

**LEGISLATION TO MODIFY THE APPLICATION OF
THE FREEDOM OF INFORMATION ACT TO THE
CENTRAL INTELLIGENCE AGENCY**

HEARING
BEFORE THE
SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT
SELECT COMMITTEE ON INTELLIGENCE
HOUSE OF REPRESENTATIVES
NINETY-EIGHTH CONGRESS
SECOND SESSION
FEBRUARY 8, 1984



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(Established by H. Res. 658, 95th Congress, 1st Session)

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PROPOSALS TO EXEMPT CERTAIN CIA OPERATIONAL FILES FROM SEARCH, REVIEW AND DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

WEDNESDAY, FEBRUARY 8, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON LEGISLATION,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:07 a.m., in room H-405, the Capitol, the Honorable Romano Mazzoli (chairman of the subcommittee) presiding.

Present: Representatives Mazzoli (presiding), Stokes, McCurdy, Boland (chairman of the committee), Robinson, Whitehurst, and Goodling.

Also present: Thomas K. Latimer, staff director; Michael J. O'Neil, chief counsel; Steven K. Berry, associate counsel, Bernard Raimo, Jr., and David S. Addington, counsel and Martin C. Faga, professional staff member.

Mr. MAZZOLI. The subcommittee will come to order.

Today the Subcommittee on Legislation meets to consider the impact of the Freedom of Information Act on the Central Intelligence Agency. The subcommittee will focus on certain proposals to exempt certain files of the CIA from search and review under FOIA.

These proposals are embodied in three measures, S. 1324, which passed the Senate last November, H.R. 4431, which is substantially similar to the Senate bill, and which has been introduced by our colleague in the committee, Congressman Bill Whitehurst; and H.R. 3460, which I introduced and which, though similar to the others, contains certain differences.

The FOIA is not a subject new to this committee. We have held hearings on it twice before, in 1979 and again in 1980. We have considered proposals to exempt the CIA entirely from the FOIA. We have considered proposals to exempt all the intelligence agencies from the FOIA, and we have considered proposals to narrow the scope of judicial review when classified information is at issue. Witnesses from the intelligence community argue vigorously that their activities should be exempt. Witnesses from the press, academia, and civil liberties groups argue just as vigorously that the Agency should remain covered and that the FOIA should be tightened as to it.

(1)

Since neither side finds itself able to win its way fully, they have come together, and I think in a correct way, to see what realistically can be done to make the law work better without impeding vital intelligence functions.

The subcommittee welcomes the opportunity to play a constructive role in this process. Community supporters suggest that the CIA has been seriously hampered by the FOIA. Community detractors suggest that the community has a role which must be overseen and investigated closely. These dramatic claims do not make our job, which is the job of trying to make changes in the law without going too far one way or the other, any easier. In any event, we are here today because the principal players in this drama realize, sometimes far better than our allies do, that something is better than nothing, and that it is neither immoral nor a sellout to talk with the other guy and try to compromise differences.

The purpose of these hearings is to look carefully at all the proposals which are on the table and to determine which formulation or combination of provisions this subcommittee should adopt. The premises of all of these measures are that an amended FOIA should not result in the loss of any meaningful information now obtainable under current law, that any amended FOIA should not prevent access to files or information concerning alleged or actual improprieties or illegalities, and that an amended FOIA should result in a sharp reduction in the time and personnel costs which the Agency now sustains in responding to FOIA requests.

While I possess a certain slight pride of authorship in H.R. 3460, I also recognize that the success of this endeavor will depend upon a further display of the spirit of compromise which has brought us this far.

Therefore, I trust all of us here are prepared to work together further to effect whatever changes to the existing proposals may be necessary to get a bill which will pass.

Our witnesses this morning are Mr. John McMahon, the Deputy Director of the CIA; Ms. Mary Lawton, the Attorney General's Counsel for Intelligence Policy, and Mr. Mark Lynch, director of the ACLU's project on national security. Each of these distinguished people has appeared before the committee many times, and each brings the highest degree of competence, intelligence and professionalism to this endeavor.

Parenthetically here, John, I might say that maybe the best way to proceed is to lock all of you in a room and send you in food under the doorway, and when you knock on the door or send up a white wisp of smoke, then we will open the door and we will let you out, and we will have a bill. But failing that process, which I think probably is the most healthy way to proceed, we have to proceed in this rather arduous way.

But we do welcome you this morning, Mr. McMahon.

Let me yield to my friend from Pennsylvania for any opening statements he would like to make.

Mr. GOODLING. Thank you, Mr. Chairman.

Today's hearings mark another important step on the long legislative road to adjustment of the Freedom of Information Act to accommodate both the informational needs of the public and the operational security needs of the Central Intelligence Agency. We

do not have to choose between the two. This great Republic can have both an informed citizenry and an effective foreign intelligence agency.

Chairman Mazzoli's bill, H.R. 3460, and Congressman Whitehurst's bill, H.R. 4431, have been crafted carefully to give greater protection to America's most sensitive intelligence operations without significantly reducing the amount of CIA information releasable to the public under the Freedom of Information Act. A decade of experience has shown that certain CIA operational records systems containing the most sensitive information directly concerning intelligence sources and methods inevitably contain few items which can be disclosed to FOIA requesters. The records contained in these operational record systems almost invariably fall within the FOIA exemptions protecting classified information and information relating to intelligence sources and methods. Nevertheless, despite the fact that records retrieved from these operational record systems will, after line-by-line security review, be found to be exempt from FOIA disclosure, the CIA must search and review records from these systems in response to FOIA requests.

The legislation under consideration is intended to end the waste of time and money entailed in this search and review of records which cannot be disclosed. The legislation is also intended to reduce the possibility of accidental disclosure of sensitive CIA operational secrets and to reassure CIA intelligence sources that the FOIA poses no risk to the confidentiality of their relationship with the United States Government.

Congressman Whitehurst's bill, which is nearly identical to the Senate-passed bill, S. 1324, is basically the chairman's bill with several refinements added in the Senate at the end of a tough legislative process of give and take. The process produced an effective bill which was worked out in cooperation with the CIA and the American Civil Liberties Union and which was favorably reported unanimously by the Senate Intelligence Committee and approved by voice vote in the Senate.

As I understand it, two issues of great importance remain: the role, if any, of the courts in reviewing CIA implementation of this legislation, and the question of search and review of documents having to do with investigation of allegations of illegality or impropriety in the conduct of intelligence activities.

I look forward to learning what the witnesses have to say, especially on these two issues, to see if we can combine the best of the chairman's bill and Congressman Whitehurst's bill to produce a bill to which the members of this committee and of the House can give their full support.

Mr. Chairman, you are to be commended for your efforts to reconcile the interests of those affected by the legislation before this subcommittee and to insure its timely consideration. Enactment of this legislation will go a long way toward reassuring our allies and individuals abroad who risk their lives to cooperate with the CIA that the United States can keep secrets.

I welcome those who are going to testify here today.

Mr. MAZZOLI. I thank the gentleman for his statement.

The gentleman from Massachusetts, our distinguished chairman.

Mr. BOLAND. Mr. Chairman, only to say I would like to underscore what you have said and Mr. Goodling has said with reference to these hearings.

As those who are familiar with this House Permanent Select Committee on Intelligence know, we have been in business a little bit more than 6 years, and the legislative subcommittee that Mr. Mazzoli chairs has been the author and has been successful in passing some of the legislation that affects the intelligence community and impacts upon the public generally.

This is an important matter, as Mr. Goodling has said, as the chairman has said. S. 1324 has passed the Senate unanimously by voice vote. That gives everybody in the Senate a chance to say they voted for it or against it. [Laughter.]

Mr. BOLAND. So we are concerned about it. We are concerned about the impact of the Freedom of Information Act on the intelligence community. We are concerned about the impact of this kind of legislation upon the civil liberties of the people of America. And so this subcommittee will get a very close look at it, a close look at the product that is before us from the Senate, and also the legislation that has been filed by the chairman of the subcommittee.

I want to welcome the witnesses who are here. Obviously, this piece of legislation has more than a passing interest among an awful lot of people. So thank you for coming. I am sure that this subcommittee will be the beneficiary of the advice that comes from both sides, both those who support and those who oppose this legislation.

Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the chairman.

Mr. McMahan, if you would introduce the gentlemen with you and perhaps anybody else in the room who might help you or assist you in your testimony today.

STATEMENT OF JOHN N. McMAHON, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY, ERNEST MAYERFELD, DEPUTY DIRECTOR, OFFICE OF LEGISLATIVE LIAISON, CENTRAL INTELLIGENCE AGENCY; AND LARRY STRAWDERMAN, CHIEF, INFORMATION AND PRIVACY DIVISION, CENTRAL INTELLIGENCE AGENCY

Mr. McMAHON. Thank you, Mr. Chairman.

I have with me today Ernie Mayerfeld, who is the Deputy Director of our Office of Legislative Liaison and has been very instrumental in fashioning our interests regarding both the Senate bill as well as your bill and Mr. Whitehurst's bill. We also have Larry Strawderman, who is the Chief of the Information and Privacy Division out at CIA.

Mr. MAZZOLI. Mr. McMahan, you may proceed.

Mr. McMAHON. Thank you, sir.

Mr. Chairman and members of the Subcommittee on Legislation, it is a pleasure to appear before you today to discuss H.R. 3460, introduced by you, Mr. Chairman, and H.R. 4431, introduced by Mr. Whitehurst. As you know, both pieces of legislation seek to provide relief to the Central Intelligence Agency—

Mr. MAZZOLI. Mr. McMahon, I hate to interrupt you, but the gentleman, our ranking member, has just come in. He had traffic jams probably in northern Virginia somewhere.

Mr. McMAHON. I am glad to yield, Mr. Chairman.

Mr. MAZZOLI. Mr. Whitehurst is, of course, the author of one of the main bills and our ranking member. So with your indulgence, I would yield to him for statements.

Mr. WHITEHURST. Traffic and a very slow truck driver.

Thank you very much, and let's proceed. I am sorry.

Mr. MAZZOLI. John, you may continue.

Mr. McMAHON. Thank you, sir.

As you know, both pieces of legislation seek to provide relief to the Central Intelligence Agency from some of the most serious problems the Agency has encountered in working to comply with the Freedom of Information Act, and at the same time, both bills are designed to insure that the public's access to records of the CIA is preserved. Neither bill would totally exclude CIA from the requirements of the FOIA, but rather, each is based on a carefully crafted approach which would exclude from the FOIA process only our operational files contained in three specific components of the Agency.

Removing these operational files from the FOIA search and review process would substantially lessen the ever present risk that a human error might result in the exposure of intelligence sources and methods.

Most importantly, I believe that this legislation would go far toward alleviating the perception of our sources and potential sources that the U.S. Government cannot be trusted to protect them from exposure. At the same time, Mr. Chairman, the public should receive improved service from the Agency under the FOIA because requesters would no longer have to wait 2 to 3 years to receive whatever responsive information could be released to them.

Furthermore, it is important for everyone to understand that enactment of this legislation would not result in any meaningful loss of information now released under the act.

Mr. Chairman, last June I testified before the Senate Select Committee on Intelligence on S. 1324, a bill which at that stage was very similar to your bill. The problems we have with the FOIA are no different from the ones we faced several months ago. Therefore, my testimony before you today will basically reiterate the points that I made last summer to the Senate.

Under present law, any FOIA requester can cause a search and review to be made in all CIA files, including operational files, and the Agency must defend a denial of sensitive information to anyone who asks for it, line by line, sometimes word by word. We, of course, attempt to assure our sources who live in fear of this process that the exemptions available under the FOIA are sufficient to protect their identities. That assurance is too often seen as hollow.

They ask, with justification, in my view, that in exchange for the risks which they undertake on our behalf and in your behalf, we provide them with absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as potential-

ly public documents, we are unable to provide the ironclad guarantee which is the backbone of an effective intelligence service.

In addition, the review of operational files withdraws uniquely capable personnel from intelligence operations and compels us to violate our own working principles of good security. Let me explain these points in more detail.

For security reasons, Agency information is compartmented into numerous self-contained file systems which are designed in order to serve the operational needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific files only on a need to know basis. Operational files are more stringently compartmented because they directly reveal intelligence sources and methods. Yet a typical request under the FOIA will seek information on a generally described subject wherever it may be found in the Agency and will trigger a search which transgresses all principles of compartmentation.

A relatively simple FOIA request may require as many as 21 Agency record systems to be searched. A difficult request can involve as many as 100. In many instances the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search:



Although in the case of records gleaned from operational files, virtually none of this information is released to the requester, security risks remain which are inherent in the review process.

The documents are scrutinized line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source-revealing or other sensitive information. These reviewing officers must proceed upon the assumption that all information released will fall into the hands of hostile powers and that each bit of information will be retained and pieced together by our adversaries in a painstaking effort to expose secrets which the Agency is dedicated to protect.

At the same time, however, the reviewing officer must be prepared to defend each determination that an item of information is classified or otherwise protected under the FOIA. Furthermore, the officer must bear in mind that under the FOIA, each reasonably segregable item of unprotected information must be released. Sentences are carved into their intelligible elements, and each element is separately studied.

When this process is completed for operational records, the result is usually a composite of black markings, interspread with a few disconnected phrases which have been approved for release. Here again is a typical example:

F
G L

TABLE SECURITY AND DISSEMINATION INDEX NO INDEX RETURN TO FILE IN CS FILE NO.

CONF: FILE NO. ADD ADD G G G

G G

L G G G

6 JUN 72 20 01:01:01

CHIEF DIRECTOR

INFO E 275220

REFS: A E (IN 620504) (NOT NEEDED E)

E

E. DIRECTOR-270520

E

E

E

N

K

APPROVED FOR RELEASE
DATE 18 01 1980

COORDINATING OFFICERS E

AUTHENTICATING OFFICER E

REPRODUCTION BY OTHER THAN THE ISSUING OFFICE IS PROHIBITED. 6 June 72

(11)

TO		FROM		SUBJECT	
FILE NO.		FILE NO. OF FILE NO.		FILE NO.	
FILE NO.		FILE NO.		FILE NO.	

CREATOR

7375230

2. FOR INFO ADDRESSEES: REF A, IN RESPONSE TO REF
RAISED
POSSIBILITY THAT AK AND DAVID MIGHT BE IDENTICAL.

3. FILE: AK X-REF L

END OF MESSAGE

FG (in draft)
FG
FG

FG
FG

FG

COORDINATING OFFICERS

L L

AUTHENTICATING OFFICER

RELEASING OFFICER

APPRO. SIGN BY OTHER THAN THE ISSUING OFFICE IS DENIED.

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After the responsive records have been properly reviewed, the public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we never cease to worry about these fragments. We can never be completely certain what other pieces of the jigsaw puzzle our adversaries already have or what else they need to complete the picture.

Perhaps we missed the source-revealing significance of some item. Perhaps we misplaced one of the black markings. The reviewing officer is confronted with the dizzying task of defending each deletion without releasing any clue to the identity of our sources. He has no margin for error. Those who have trusted us may lose their reputation, their livelihood or their lives. Even the well-being of their families is at stake if one apparently innocuous item falls into hostile hands and turns out to be a crucial lead.

As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated. The harm done to the Agency's mission by such errors is, of course, unknown and uncalculable. The potential harm is, in our judgment, extreme.

Aside from this factor of human error, we recognize that under the current Freedom of Information Act, subject to judicial review, national security exemptions do exist to protect the most vital intelligence information. The key point, however, is that those sources upon whom we depend for that information have an entirely different perception. I will explain how that perception has become for us a reality that hurts the work of the Agency on a daily basis.

The gathering of information from human sources remains a central part of CIA's mission. In performance of this mission, Agency officers must in essence establish a contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the U.S. Government. This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationships is trust, and to build such a relationship, which in many cases entails an individual putting his life and the safety of his family in jeopardy to furnish information to the U.S. Government, is a delicate and time consuming task. Often it takes years to convince an individual that we can protect him. Even then, the slightest problem, particularly a breach or perceived breach of trust, can permanently disrupt the relationship. A public exposure of one compromised agent will obviously discourage others.

One must recognize also that most of those who provide us with our most valuable and therefore most sensitive information live in totalitarian countries. In such places, individuals suspected of anything less than total allegiance to the ruling party or clique can lose their lives. In societies such as these, the concepts behind the Freedom of Information Act are totally alien, frightening, and indeed, contrary to all they know. It is virtually impossible for most of our agents and sources in such societies to understand the law itself, much less why the CIA operational files in which their identities are revealed should be subject to the act.

It is difficult, therefore, to convince one who is secretly cooperating with us that someday he will not awaken to find in a U.S.

newspaper or magazine an article that identifies him as a CIA spy. Also, imagine the shackles being placed on a CIA officer trying to convince the foreign source to cooperate with the United States. The source who may be leaning toward cooperation will demand that he be protected. He wants absolute assurance that nothing will be given out which could conceivably lead his own increasingly sophisticated counterintelligence service to appear at his doorstep.

Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, the deliberate exposure of our people by Agee and his cohorts prior to your passage of the identities legislation, and espionage activities by foreign powers all contribute, but the perceived harm done by the FOIA is particularly hard for our case officers to explain because it is seen as a deliberate act of the U.S. Government.

Although we try to give assurances to these people, we have on record numerous cases where our assurances have not sufficed. Foreign agents, some very important, have either refused to accept or have terminated a relationship on the grounds that in their minds—and it is unimportant whether they are right or not—but in their minds, the CIA is no longer able to absolutely guarantee that they can be protected.

How many cases of refusal to cooperate where no reasons are given are based upon such considerations I cannot say. I submit, however, that knowing of numerous such cases, there are many more instances where sources who have discontinued relationships or reduced their information flow have done so because of their fear of disclosure. No one can quantify how much information vital to the national security of the United States has been or will be lost as a result.

The FOIA has also had a negative effect on our relationships with foreign intelligence services. Our stations overseas continue to report consternation over what is seen as a potential legal requirement to disclose information entrusted to us.

Again, the unanswerable question is how many other services are now more careful as to what information they pass to the United States. This legislation will go a long way toward relieving the problems that I have outlined. The exclusion from the FOIA process of operational files will send a clear signal to our sources and to those that we hope to recruit that the information which puts them at risk will no longer be subject to the process. They will know that their identities are not likely to be exposed as a result of a clerical error, and they will know that the same information will be handled in a secure and compartmented manner and not be looked at by people who have no need to know that information.

In his decision in the lawsuit brought by Philip Agee against the CIA, FBI, NSA, Department of State and Department of Justice, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia summarized the problem this way: "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."

At the same time, as I have explained before, by removing these sensitive operational files from the FOIA process, the public is deprived of no meaningful information whatsoever.

The paltry results from FOIA review of operational files are inevitable. These records discuss and describe the nuts and bolts of sensitive intelligence operations. Consequently, they are properly classified and are not releasable under the FOIA. The reviewing officers who produce these masterpieces of black markings are doing their job, and doing it properly. The simple fact is that information in operational records is by and large exempt from release under the FOIA, and the few bits and pieces which are releasable have little or no informational value.

When I speak of reviewing officers absorbed in this process, it is important to stress that these individuals are not and cannot be simply clerical staff or even FOIA professionals. In order to do their job, they must be capable of making difficult and vitally important operational judgments. And consequently, most of them must come from the heart of the Agency's intelligence cadre. Moreover, before any item of information is released under the FOIA, the release must be checked with a desk officer with current knowledge of the operational activity involved.

Hence, we must not only call intelligence officers on a full-time basis away from their primary duties, we must also continually divert the attentions of the officers of our operating components. That is so because we have a practice in the Operations Directorate which requires that every piece of paper which is released, even including those covered with black marks like the one I showed you before, must be reviewed by an officer from the particular desk that wrote the documents or received it from the field. And we cannot alter this practice because the risk of compromise is so great.

You can imagine the disruption, for example, on the Soviet desk when the people there must take time off from the work they are supposed to do to review a document prepared for release under the FOIA, and it is obvious, of course, that when a CIA operation makes the front pages of newspapers, the FOIA requests on that subject escalate.

This loss of manpower cannot be cured by an augmentation of funding. We cannot hire individuals to replace those lost. We must train them. After the requisite years of training, they are a scarce resource needed in the performance of the Agency's operational mission.

Let me make clear that this legislation exempts from the FOIA only operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports disseminated from the field. Files which are not exempted from search and review will remain accessible under the FOIA, even if documents taken from an operational file are placed in them. This will insure that all disseminated intelligence and all matters of policy formulated at Agency executive levels, even operational policy, will remain accessible under FOIA. Requests concerning those covert actions the existence of which is no longer classified would be searched as before. And of particular importance, a request by a U.S. citizen or permanent resident alien for personal information about the requester would trigger all appropriate searches throughout all pertinent record systems in the Agency.

I would also like to address the benefit to the public from this legislation. As I mentioned earlier in my testimony, FOIA requesters now wait 2 to 3 years to receive a final response to their requests for information when they involve the search and review of operational files within the Directorate of Operations. We estimate that with enactment of appropriate legislation, the CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, I can assure you that following enactment, every effort will be made to pare down the queue as quickly as possible. This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and efficient manner. The public would continue to have access to disseminated intelligence product, and all other intelligence and files which would not be exempted under the terms of these bills.

I would also like to address the issue of how it would be possible for the American public to have access to information concerning any Agency intelligence activity that was improper or illegal. My firm belief is that given the specific guidance which we now have in Executive orders and Presidential directives, along with the effective oversight provided by this committee and its counterpart in the Senate, there will not ever again be a repeat of the improprieties of the past. And let me assure you, as I did the members of the Senate Intelligence Committee, that Director Casey and I consider it our paramount responsibility that the rules and regulations not be violated.

However, should there be an investigation by the Inspector General's Office, the Office of General Counsel or my own office of any alleged impropriety or illegality and it is found that these allegations are not frivolous, the records of such an investigation would be found in the files of the office conducting the investigation, and these files cannot be exempted under the terms of the legislation before this subcommittee.

In addition, 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. The same would be true, for similar reasons, Mr. Chairman, whenever a senior intelligence community official reports an illegal intelligence activity to this committee or to the Senate Intelligence Committee pursuant to the requirements of Section 501 of the National Security Act.

As I mentioned earlier, I testified last June before the Senate Intelligence Committee on S. 1324 which, as introduced, was very similar to your bill, Mr. Chairman, H.R. 3460. After 2 days of testimony on that bill, it was clear that there were differences of opinion and issues that had to be addressed. For the next 5 months, a great deal of effort was spent by committee staff, Agency personnel, and the interested nongovernment organizations to work out solutions to the remaining issues. Several Senators personally participated in this process as well. Committee staff were given detailed briefings on our records systems and inspected our files. Just last week the staff of your committee were given briefings on our file systems. In addition, we responded to numerous pages of detailed questions from the SSCI as a whole, as well as from individual members. The result of this lengthy process was unanimous

committee, SSCI, approval of a substitute bill containing several amendments. These amendments were achieved through good faith negotiations and compromise on the part of all parties involved. S. 1324, as amended and reported out of the Intelligence Committee, then passed the Senate by unanimous consent. It has now been referred to your committee. One of the two bills you are considering today is Representative Whitehurst's bill, H.R. 4431, which is virtually identical to S. 1324 as passed by the Senate.

This concludes my testimony, Mr. Chairman. I have with me the Deputy Director of the Office of Legislative Liaison, Ernest Mayerfeld, who is prepared to answer any questions you may have regarding the differences between the two bills. Also with me is Larry Strawderman, Chief of the Information and Privacy Division.

We will be pleased to answer any specific questions you or the other members may have.

Mr. MAZZOLI. Thank you, Mr. McMahan.

I might advise our subcommittee, because we have such a large turnout this morning, that we will limit at least our first round of questions to 5 minutes.

So, I yield myself 5 minutes now.

Let me just ask a couple of questions, Mr. McMahan.

First of all, when you talk about operational files, is there, for example—if I am asking questions which are classified, I can certainly understand your deciding not to answer them—but are there file cabinets marked operational and file cabinets marked nonoperational?

Would that be a simple way to be able to decide which files are then under a bill like ours or which are not?

Mr. McMAHON. Well, the answer to that is yes, in the generic term, but a great many of the files which we consider are machine language, so they have an identification as well. But yes, indeed, we isolate and segregate operational files, and when we speak of operational files, that is a specific terminology for specific kinds of files.

Mr. MAZZOLI. OK. Let me ask you this, then.

If, for example, a law is passed which exempts operational files, would it be possible in a sense to expand the number of file cabinets which are marked operational, and contract the number of file cabinets marked nonoperational, and in a sense finesse the problem that way?

Mr. McMAHON. Yes, sir, if we were prepared to do something that violated the spirit and the legality of the law, that would be possible.

Mr. MAZZOLI. But I guess the implicit statement then, in the response is that that is not likely because not only do you as a person follow the law, but that there would be opportunities for oversight by this committee and by our counterpart in the Senate to get into that, is that correct?

Mr. McMAHON. That is correct, Mr. Chairman, but I think the greatest oversight is the people within CIA themselves. They would not tolerate that. We went through a considerable amount of anxiety in the past, and I need not remind this committee nor the American public, but what came to pass in the past was exposed by CIA

itself, and I think that same spirit persists in springloaded fashion today.

Mr. MAZZOLI. Mr. McMahon, let me ask you this. One of the main reasons that there would be some looking at this FOIA bill is because of problems that might occur, in connection with service to the public.

With respect to the Agency, you said essentially it is hard to quantify the perception problem. It is hard to quantify the number of foreign agents or assets who have decided not to further cooperate with us. It is hard to quantify the danger, perhaps, which might have occurred to some of the people.

Let us suppose, then, say I am going downstairs to the floor and try to encourage my colleagues to pass a bill like this. And I have to say to them I cannot tell you how many agents have been compromised; I cannot really tell you how many files have been let out which contained those little fragments of information which can be reassembled by the enemy, to our detriment; I cannot really tell you, for example, the loss of confidence which has in effect lessened the number of assets we could ever obtain, but I want you to pass the bill because I like John McMahon and he likes me. Tell me something else I could say except for the fact that you are a good man, and Mr. Casey is, and good people run CIA.

Mr. McMAHON. It is difficult to give specific examples without exposing the people that we have used.

Mr. MAZZOLI. Right.

Mr. McMAHON. But there are a number, a great number of instances where agents, working agents, agents in the Soviet Union have told us not to touch them anymore and not to deal with them anymore. There are a number of agents in other parts of the world that refuse to have further dealings with us. We have had even intelligence services of friendly nations tell us that there is certain information which they will not share with us because of the impact of the FOIA.

It is indeed a very real problem. It goes to the heart and the very fiber of running an intelligence service because the relationship which you develop with agents or other intelligence services is one of trust. It is a lawyer-client relationship. It is a patient-doctor relationship. It is a priest and confessor relationship, and to have that exposed in the situation where through error or oversight that person might be compromised, just runs anathema to how intelligence organizations must work.

Mr. MAZZOLI. If it is impossible to quantify any of this data on the record, or even off the record, may I ask you—and we are depending on this thing, that it just is not the way the operation runs, it is not the way the Agency can function, or the whole industry of intelligence—is there any other nation in the world that has an FOIA that permits its citizens to examine any kind of intelligence records? Are you aware of anything like that?

Mr. McMAHON. None that I know of. I know that the Australians at one point were considering a similar type arrangement, but I think they were clever enough to exclude operational files.

I would ask my colleague.

Mr. **MAYERFELD**. I think that is correct. I have seen a draft of their bill. I do not know what the present status is, but the exemption was so vast that in effect they included all intelligence files.

Mr. **MAZZOLI**. One of the things we could perhaps use to convince a Doubting Thomas downstairs is that no other nation in the world does it, which perhaps is some kind of a lead.

Lastly, and then my 5 minutes will be up, you used at different times in here "absolute guarantees," "total guarantees," and "guarantees."

If I understand correctly, Mr. **McMahon**, even if this bill passes, or the Senate counterpart to it were passed, it would be hard for the Agency to give an absolute guarantee because a certain amount of your material would be looked into, and it would be expunged or bowdlerized, but at least it would be gone into.

And even under the very best of circumstances, you cannot provide an absolute guarantee. So is the lack of an absolute guarantee going to be a constant problem?

Mr. **McMAHON**. I think, Mr. Chairman, if you can say that you are not going after the operational files, that a lot of people will breathe easier, because it is operational files where the person is identified. If you go to our disseminated intelligence, while you can often get unique intelligence that can only come from a certain person, the bulk of the intelligence is such that you cannot go back to the original source and expose a person. You expose a capability someplace, but not the individual.

Mr. **MAZZOLI**. So even though you would have something less than an absolute guarantee, you still think you could convey a new perception and convince new potential assets that there is a new day in the CIA?

Mr. **McMAHON**. By all means, and it would be a great burden off our individual case officers.

Mr. **MAZZOLI**. Well, thank you.

My time has expired.

I yield 5 minutes to the gentleman from Virginia, Mr. **Whitehurst**.

Mr. **WHITEHURST**. Thank you, Mr. Chairman.

Just several questions, though, for the record because I think it is important to establish this, Mr. **McMahon**.

At the Senate Intelligence Committee hearings on S. 1324, you testified that a court review of CIA designation of operational files as exempt would defeat what you hope to accomplish with this legislation.

Mr. **Mayerfeld** testified that if the DCI designations of files as exempt were subject to challenge in court, then "we would be right where we started."

Does that testimony still remain your position on what would best serve the national interest on the subject of judicial review of CIA implementation of the legislation?

Mr. **MAYERFELD**. Mr. **Whitehurst**, yes. We would indeed prefer legislation in which the file designation were legislated by the Congress or left to the absolute discretion of the Director of Central Intelligence. On the other hand, as this bill proceeded through the legislative process in the Senate, it became clear that it would not be accepted and would have no chance of passage unless some pro-

vision for judicial review were made. The provision that is now in your bill, which is close to the one that was passed by the Senate, is one that we can live with. It has very limited judicial review. It provides how a case gets into court, and that would not defeat the purpose of the bill.

Mr. WHITEHURST. This is kind of a follow-on to that. You also testified in the Senate that the concern for possible CIA overzealousness in designation of files as exempt would best be resolved not by judicial review but by vigorous oversight of CIA file designation by the Intelligence Committees of the Congress.

Is that still your view of what best serves the national interest?

Mr. MAYERFELD. Indeed it is.

Mr. WHITEHURST. Mr. McMahan, H.R. 4431 contains the Senate judicial review provision of S. 1324, as you have noted.

Now, the Senate bill does not directly state the standard for judicial review. The Senate report on the provision refers to a "rational basis" standard of review.

Is this acceptable also to the Agency?

Mr. MAYERFELD. Indeed, it is.

Mr. McMAHON. Yes, sir.

Mr. WHITEHURST. Finally, I understand that once judicial review is properly triggered under the provision, the court will uphold a CIA action implementing the bill if there is a rational basis in the bill for the action, but if CIA has instead acted arbitrarily, then the Court will order CIA to search and review operational files for the requested records.

Is this degree of judicial involvement in review of the propriety of file designation and placement of records in designated files acceptable to you?

Mr. MAYERFELD. Yes, it is, Mr. Whitehurst.

Mr. WHITEHURST. I think this is very, very important. We have inserted this aspect of it in the bill that I submitted, and I want this on the record. I want my colleagues, indeed, all of the people who are here this morning, to understand precisely what we are driving at with the judicial review provision.

Mr. Chairman, I yield back my time.

Mr. MAZZOLI. Thank you very much. The gentleman's time has expired.

The gentleman from Ohio is recognized for 5 minutes.

Mr. STOKES. Thank you, Mr. Chairman.

Mr. McMahan, I am a little concerned about the Senate bill in this respect. In the absence, let's say, of a person having personal knowledge of the existence of a particular document, how can that person requesting the document make the *prima facie* showing that is necessary in order to get a court to review the designation process contained in the Senate bill?

Mr. MAYERFELD. Mr. Stokes, the language on the face of the bill specifically states it is either an affidavit based on personal knowledge or otherwise admissible evidence. In other words—well, perhaps a hypothetical example that would best illustrate it would be the following. A person has received a document under a previous FOIA request which makes it crystal clear that there are further documents on the same subject which should be contained in non-designated files. I would think that the court would accept such an

affidavit as admissible evidence and get into court under those circumstances.

Mr. STOKES. Another one of my concerns would be a concern some of the historians have, and that is that these operational files will be kept permanently away from them. We are encountering some of the same thing here, for instance. I chaired the Select Committee on Assassinations here, and under the House rules, any documents not released had to be kept under file for 50 years. Some members of the same committee that served with me and some historians are saying that it is unfair to keep this type of material away from historians.

So, I guess my question is, do you have any plan to review these operational files periodically in order to ascertain whether or not some of them should be declassified for that purpose?

Mr. MAYERFELD. Mr. Stokes, indeed we do. We view this process of file designation as a dynamic one. It permits the Director to de-designate files whenever he feels it is appropriate. This was examined in the course of the Senate process, and in fact, the bill was amended to specifically provide that the Director must review the designations no less than once every 10 years. He does not have to wait 10 years. He can, if a case is made, if you will, or if he determines that a certain file that is only 2 years old is of such interest to historians or to other groups, and the risk of compromise of sources or a compromise of other classified information is really minimal, he can de-designate a category of files or a portion of a category of files or a part of a file to permit access under the FOIA.

Mr. STOKES. Now, as I understand it, if we enact this legislation, it is going to affect pending FOIA requests and pending court cases since the law would be applied retrospectively rather than prospectively.

Can you give us some idea of how many court cases are going to be affected?

Mr. MAYERFELD. We will be submitting the answer formally for the record, but I do have some preliminary figures. I believe Mr. Moffett is here. He can correct me if I read his information wrong.

There are some 24 cases that would not at all be affected, now currently pending that would not at all be affected, because they are first-person requests either under the Privacy Act or the FOIA. There are an additional 23 cases that will not be affected at all because the subject in dispute and the documents involved in the case, were not found in files which could be designated. They would be in nondesignated files.

And that leaves us with 12 cases, is that correct?

Mr. MOFFETT. Yes, sir.

Mr. MAYERFELD. Twelve cases that may be affected if this bill were enacted, may be affected.

We cannot be certain because it is in litigation, the litigation is ongoing, and to what extent these cases are affected is also uncertain. But at least our present view is that those 12 cases contain documents that will—some documents that will have come solely from designated files.

Mr. STOKES. We are talking about approximately 12 pending court cases?

Mr. MAYERFELD. Twelve pending court cases.

Mr. STOKES. You are not certain exactly how this would affect those cases?

Mr. MAYERFELD. They are likely to be affected. That means—I do not know. Do you know whether any would be likely to be dismissed outright?

Mr. Moffett. It is very unlikely that they would.

Mr. MAYERFELD. Very unlikely. We may move for dismissal of a portion of a case.

Mr. STOKES. I would have concern there in terms of dismissal of plaintiffs, let's say, who have contracted a large amount of legal expense and so forth, and who would be cut off in the middle of that type of situation.

I have one further question.

H.R. 3460 includes in the definition of operational files those files that document "investigations conducted to determine the suitability of potential foreign intelligence sources, counterintelligence sources, or counterterrorism sources."

Now, does this definition include CIA employees and contractors?

Mr. MAYERFELD. Not CIA employees. It may include contractors, yes.

Mr. MAZZOLI. The gentleman's time has expired.

The gentleman from Oklahoma is recognized for 5 minutes.

Mr. McCURDY. Mr. Chairman, since I am not a member of the subcommittee, I am probably not up on this as closely as you are, but I want to ask, from the readings of the statements and some of the statements of succeeding witnesses, it appears that H.R. 4431, which is similar to the Senate version, is the one that the Agency would support of the two.

Can you explain the principal differences, as you see it, between the two bills? Is it judicial review and the amount of specificity within the legislation, or is there any other noticeable difference?

Mr. MAYERFELD. Well, aside from some differences in format, and the chairman's bill leaves out the statement of findings and purposes, substantive differences are primarily those which you have outlined, Mr. McCurdy. The judicial review provision is in there. There is a somewhat clearer definition of the files, perhaps, in the Senate bill, and it also identifies the operational files with a specific component which holds them.

There is one additional difference. The Senate bill specifically states in the area of improprieties or investigations on improprieties, that operational files would be searched for documents that were reviewed and relied upon by investigative bodies. That is in my mind a bit clearer than Mr. Mazzoli's bill which talks about information that was the subject of an investigation, which is capable of being interpreted a bit too broadly.

Mr. McCURDY. Have you read the statements of Mr. Lynch of the ACLU, or Mr. Gammon of the American Historical Association, and Mr. Rowe, who speaks on behalf of the publishers? Those three appear to be the most critical, I am not so sure it is critical, but the most concerned about the legislation before us today.

And how would you respond? I think Mr. Stokes raised a very good question about the historical implications of closing files for such an extended period of time.

Mr. **MAYERFELD**. I'm sorry, Mr. McCurdy, I have not had an opportunity to read any of these.

Mr. **MCCURDY**. Well, I think the other statements were fairly supportive. Perhaps as the others testify, you will be prepared at some later time to respond to their concerns because that is one of the reasons, I am sure, that they were called today, to get opposing views so we can have a good debate.

I yield back my time.

Mr. **MAZZOLI**. I thank the gentleman.

Maybe using part of the gentleman's time, if the gentleman will yield to me, would you tell me, Mr. Mayerfeld or Mr. McMahan, with respect to the historians that want to get back into the records later on, you say that at least every 10 years the Director of the Agency would have to make a review for purposes of potential declassification. Is that the idea?

Mr. **MAYERFELD**. Under the Senate bill, yes.

Mr. **MAZZOLI**. And in our bill, what do we have in our version, Mr. Whitehurst and I, on that?

Mr. **MAYERFELD**. Mr. Whitehurst has that same provision.

Mr. **MAZZOLI**. And what do I have in mine on that subject?

Mr. **MAYERFELD**. It does not specifically address that.

Mr. **MAZZOLI**. And what would you take from that?

Mr. **MAYERFELD**. Well, the way—I think after we have studied it, I think we have all come to the conclusion, I think even my friend Mr. Lynch would agree, that the bill ought to permit the Director, ought to grant the Director the authority to designate these files because that builds into the process some flexibility.

Mr. **MAZZOLI**. Is there any kind—maybe I think Mr. Stokes asked it. Is there any sort of an ongoing, routine, regular check for the purpose of declassification going on now?

Mr. **MAYERFELD**. Yes, there is.

Mr. **STRAWDERMAN**. There is no ongoing systematic declassification. We review material based on a mandatory review criteria as spelled out in Executive Order 12356 where we receive material from Presidential libraries, from people seeking documents that were originated by CIA. They are sent to us, we review them and release them under that procedure. So that is a form of mandatory review or systematic review, but we do not have an ongoing program under the new Executive order. It leaves that up to the discretion of each agency.

We also participate in activities dealing with other agencies such as the State Department and their foreign relations of the U.S. series. We will participate in the review of that material to the extent that our equities are involved.

Mr. **MAZZOLI**. Thank you.

The gentleman from Oklahoma's time has expired.

The gentleman from Pennsylvania is recognized for 5 minutes.

Mr. **GOODLING**. Did you indicate that the Mazzoli bill does not then give you that flexibility that you are just talking about?

Mr. **MAYERFELD**. Well, I think in effect it probably would because even if the bill is silent on how we go about designating files, there has to be a means of doing that, and regulations will have to be written, and we could simply write those into the regulations. But it is less clear on the face of the Mazzoli bill.

Mr. GOODLING. And therefore it would be better to clarify it now?

Mr. MAYERFELD. I would say so, yes.

Mr. GOODLING. Mr. Chairman, we might, after Mr. Lynch testifies, perhaps Mr. McCurdy could ask or others could ask those questions that they may want to ask at that particular time.

Mr. MAZZOLI. I would agree.

Mr. GOODLING. I will continue for the record the questioning that Mr. Whitehurst began.

H.R. 4431 requires the DCI to promulgate regulations to implement the legislation. Since CIA's functions are all foreign affairs functions, these regulations fall within the Administrative Procedures Act public rulemaking exemption for matters involving foreign affairs functions, do they not?

Mr. MAYERFELD. No, I do not think so, because I believe the CIA would come under the national security exemption of the APA.

Mr. GOODLING. And the second question, the term "sources" is used in H.R. 3460, H.R. 4431, and S. 1324, when defining as exempt Office of Security files documenting suitability investigations of potential sources.

I understand the term "sources" in this legislation to refer to providers or potential providers of information or operational assistance and employees of contractors. The use of the term "sources" in this bill is not intended to be tied to the definition of intelligence sources created out of thin air in the recent *Sims* FOIA case.

Do you share the same basic understanding that I do of the meaning of the term "sources" as used in the legislation we are considering today?

Mr. MAYERFELD. Absolutely.

Mr. GOODLING. Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you.

The gentleman's time has expired.

Let me yield myself just a few more minutes to follow up.

Mr. Mayerfeld, let me ask you, in response to the gentleman from Ohio, you said that there are something like 12 cases which would be affected by the retroactive provision in the bill. And there would be 24 unaffected first-person cases and 23 unaffected non-designatable file cases.

Mr. MAYERFELD. That is correct.

Mr. MAZZOLI. And I realize that you would be carrying a certain burden into the future because I gather from Mr. McMahon's testimony these things can roll on for years and years, and it does get some people, but would there not be something to arguing on behalf of symmetry and appropriateness here?

Typically we pass bills prospectively, for prospective application. Is there any way to quantify or to give us anything that would not be a detail, because I am sure you do not want to tell us how many people you have working in this function, but is there any way to quantify the problem of a prospective application?

Mr. MAYERFELD. Of a prospective application?

The problem is, this bill is not going to be passed in secrecy, and everybody out there is going to find out that operational files are going to be excluded.

Mr. MAZZOLI. Let's say as of yesterday afternoon, close of business.

Mr. MAYERFELD. As of yesterday afternoon, if we were to even then not affect the pending requests in the administrative stage, the only result would be a longer wait until the queue is shortened.

Mr. MAZZOLI. Let me shift. Mr. McMahon, you had talked about benefits to the public from this prospective change in FOIA because currently the public waits for long, long periods of time. It gets back extremely edited versions which may or may not be useful to them.

You suggested that you were pretty sure the time would pick up.

Have you any idea now how long it takes as an average to get documentation and how long it might take if this bill were passed?

Mr. STRAWDERMAN. It takes about 2 or 2½ years today to process a request if it involves Directorate of Operations records. If it does not involve the Directorate of Operations, it can take less, say up to 6 months to clear a case. We are hopeful that with the passage of this bill we will be able to respond in terms of weeks, or at most, months, to get a request back to the public.

The DDO queue is by and large the holdup at the moment. They have the bulk of our workload, and with some of the cases dropping out with passage of this bill, we believe that the flow of materials throughout the Agency would be enhanced.

Mr. MAZZOLI. Will you need more people, more money to do this?

Mr. STRAWDERMAN. I do not believe it would take more people.

Mr. MAZZOLI. Will you reduce the number of people on those jobs then?

Mr. McMAHON. I think what we will do, Mr. Chairman, is be able to put operationally experienced people back into involvement with operations. Therefore, they will not go over and help out on the other files, but I think that it is an obligation of the Agency, if this committee passes this bill, to live within the spirit of that, which is to enhance the response time of the Agency to the American citizenry.

Mr. MAZZOLI. Thank you.

A couple of fairly quick questions, I hope, maybe to flesh it out.

Mr. Mayerfeld, do you have any problem dealing with my version of the bill which suggests specifically the definition of operational files? It takes away from the Director that discretion which under the Senate version is basically tied to the same definitions. Would our stance on that be acceptable?

Mr. MAYERFELD. I have no problem with that.

Mr. MAZZOLI. Now, how about something that several have gotten into, and that is judicial review. Mr. Whitehurst, of course, began the line of questions this morning.

How do you see the bill that I have introduced in comparison to the two other bills, the Senate and Mr. Whitehurst's bill on judicial review?

Mr. MAYERFELD. Well, in your bill, I think it can reasonably be argued, and in fact, my interpretation might be that the judicial review would not be appropriate, that the Congress specifically legislated these issues, legislated that operational files be excluded from the FOIA access provisions, and then that would be it.

Mr. MAZZOLI. In other words, it could be inferred from my bill that silence on the point of judicial review means that there is no judicial review?

Mr. MAYERFELD. It could so be inferred.

Mr. MAZZOLI. It could also be inferred that we would just institute today's system of judicial review, the one that is currently employed?

Mr. MAYERFELD. I guess we would battle that in court.

Mr. MAZZOLI. Just for the record, it was my intention in putting it together that we would, for the purposes of argument, retain the existing system of review and then compare it or contrast it to the Senate review provision.

Could you compare and contrast today's system of judicial review with what Mr. Whitehurst has proposed and what is in the Senate bill?

Mr. MAYERFELD. Today's judicial review under FOIA?

Mr. MAZZOLI. Yes.

Mr. MAYERFELD. It is very hard to do because with today's judicial review under the FOIA, the courts have pretty broad power to look at the exemptions under the act. In other words, if we withhold a certain document or these black markings, a piece of a document, what the court can review is, is that proper under the law. Is that information properly withheld?

The exemption that we most use is (b)(1), is it properly classified? We are required to submit affidavits to justify the classification, to justify the source.

Mr. MAZZOLI. Mr. Mayerfeld, tell me if I am wrong. Staff has done some markup for me on this because this is extremely complicated material which I really do not fully understand. One of the differences they suggest is that in the view of Mr. Whitehurst, the shoe is on the foot of the petitioner to make a prima facie case, and only then does the court really get into it.

If I am correct and advice to me is correct, today's situation puts the burden on the Government to show that their classification is correct.

Is that essentially the difference?

Mr. MAYERFELD. That is correct, but the difference is what do the courts look at? If the courts challenge our—

Mr. MAZZOLI. Let me just kind of simplify it because if we go with the Senate-Whitehurst version, we are saying that the burden, then, of making at least a prima facie case that there has been some wrongful designation or that there is some misfiled material, is on the petitioner or requester. If we were to retain today's situation either explicitly, in a revised version of this bill, or somehow, then that says that the Government has the responsibility of carrying the evidence, is that not correct?

Mr. MAYERFELD. I am not certain that it is, Mr. Chairman, because the FOIA law does not address that particular problem. What the FOIA addresses is the propriety of withholding information. This bill goes to the question of what files are designated. There is no case law that instructs us on this. The problem arises when the same kind of a thorough process that the courts get into now in looking at the propriety of withholding information, they would get into when looking at how we file our records.

Frankly, Mr. Mazzoli, we would be worse off than we are now because if we would have to demonstrate that our files were all properly designated and that every piece of paper in there is properly filed, that kind of judicial review puts us in a situation where we are worse off than today.

Mr. MAZZOLI. Well, unfortunately, my 5 minutes has expired.

The gentleman from Virginia?

Mr. WHITEHURST. I have no more questions.

Mr. MAZZOLI. The gentleman from Ohio?

Mr. STOKES. Thank you, Mr. Chairman.

Gentlemen, how is the FOIA requester going to know that either Congress or the Intelligence Oversight Board has conducted this investigation so that he can then, he or she can then avail themselves of the exemption?

Mr. MAYERFELD. Well, he does not have to know, Mr. Stokes. If a request comes in, we will search all nondesignated files, and if there has been such an investigation, he will learn of it.

Mr. STOKES. When you use the term "investigation," tell us what you mean.

Mr. MAYERFELD. If there is an allegation that is made by—let me take an example, an in-house allegation by an employee that there was some impropriety or some violation of an executive order provision, that employee has the option of going up to the management and seeing Mr. McMahan or Director Casey on this or going to the Inspector General. No such allegation is ignored. Every such allegation will be investigated if they are not on their face frivolous, and there will be a record of whatever the Inspector General did or whatever the Director's office did to investigate such an allegation. There will be a record, and that will be kept in a nondesignated file.

Mr. STOKES. When you receive either an FOIA request or a Privacy Act request, do you just search the headquarters files, or do you search the field office files, both here and abroad?

Mr. MAYERFELD. Am I right about that, Mr. Strawderman, all the files are at Langley?

Mr. STRAWDERMAN. That is right. We receive them in a central office, and like the hub of a wheel, we fan those requests out to the components most likely to have records, and all records would be maintained at headquarters. We would not deal with installations outside of the Washington, D. C. area. So they are all resident here or indexed here and searchable here in the Washington area.

Mr. STOKES. So when you use the term operational files, how many distinct file systems are we talking about, one or more?

Mr. McMAHON. Files on tens of thousands of individual people.

Mr. STOKES. Thank you.

Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you very much.

The gentleman from Pennsylvania is recognized.

Mr. GOODLING. Just a few more for the record questions.

One I think might include the conversation that you were just having.

Mr. McMahan, it has been suggested that the committee provide for a full blown de novo judicial review of all CIA action to imple-

ment the legislation we are considering instead of more limited judicial review or no judicial review at all.

If the legislation is modified to provide for the de novo judicial review of CIA implementation of the legislation, would CIA continue to support it?

Mr. MAYERFELD. What is de novo review? That is a term of art.

Let me say that if the review meant that a plaintiff by means of discovery could examine our entire file systems and make us prove, the way we have to today, that a piece of information is classified, make us prove that we filed properly or that every piece of paper in that file ought to be in there, if the judicial review is that unfettered, then we could no longer live with it.

Mr. GOODLING. Second question. I am not only interested in the role of the courts in FOIA cases involving the CIA under the new legislation, but also under current law. As I understand it, de novo review under the current FOIA lets judges substitute their judgment for that of the Director of the CIA on matters involving protection of sensitive national security information.

Can you tell us what kind of dangers this role for judges in national security matters causes, and also address specifically the recent *Fitzgibbon* case?

Mr. MAYERFELD. Well, Mr. Goodling, your statement I suppose I would challenge. The Supreme Court has not yet spoken on that.

Mr. MOFFETT. The *Fitzgibbon* case—

Mr. MAZZOLI. Would you identify yourself for the record?

Mr. MOFFETT. Yes. My name is Page Moffett, Assistant General Counsel, Central Intelligence Agency.

Sir, my personal view would be to agree certainly with that statement under the current FOIA law. Besides the *Fitzgibbon* case, there is also the *Sims* case where the courts have substituted their judgment as to what a source is or is not under the National Security Act. Indeed, in the *Fitzgibbon* case, the district court overruled many of our determinations as to classified information and to whether certain individuals were sources. And I would certainly agree with your statement, sir.

Mr. GOODLING. What inherent dangers are there in such rulings by judges?

Mr. MOFFETT. Well, sir, obviously, that a court will decide in its opinion that this piece of source-revealing information is no longer sensitive. In the *Fitzgibbon* case the judge decided that these people lived 20 years ago, and there was a new regime, and he speculated they would be popular with the new regime, and therefore he did not see any reason why not to disclose them.

Mr. MAYERFELD. I should emphasize, Mr. Goodling, however, that this legislation in no way attempts to alter the Freedom of Information Act. So whereas the *Fitzgibbon* case, as Mr. Moffett pointed out, is disturbing to us, this legislation will not affect that at all.

Mr. GOODLING. And the last, as just one example of the difficulty of allowing Federal judges to override the Director of the CIA on the matter of withholding sources, the judge in the *Fitzgibbon* case ruled that CIA cannot withhold information to protect the identity of an intelligence source if the source is not witting that he is providing the information to the CIA.

Can you explain why that judge's ruling that you could not protect unwitting CIA sources from FOIA disclosure would, if it were upheld by appeals courts and became the general rule, harm national security?

Mr. McMAHON. It is conceivable that we are working the individual through another source, another agent who elicits the information from the person providing the information, and to expose that would identify that intermediate source. It may also expose our own case officer as being involved in intelligence as opposed to whatever his cover may be.

Mr. GOODLING. Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman.

I think maybe just one very last question, and then we will move on to another panel.

Excuse me, I am sorry.

The gentleman from Virginia.

Mr. WHITEHURST. I yield, Mr. Chairman.

Mr. MAZZOLI. I apologize.

Mr. WHITEHURST. Well, I thought I would just sit and bide my time. I want to come to a bottom line, if I can, on this with respect to human intelligence.

You have just been involved in an operation in Grenada, an ongoing one in Lebanon, and a complaint that has run through both of these episodes has been, well, we did not have any human intelligence, and why did we not have it? And of course, there are various reasons for that. I understand that.

I think it is very important to raise that here for this reason. Either we will adopt the Senate bill or mine, whatever—I have no pride of authorship—or the Mazzoli bill, or some combination thereof, and I think what needs to be answered so far as you can is this:

First of all, which of the two bills provides the maximum security for the protection of foreign agents?

Mr. MAYERFELD. Mr. Whitehurst, I think they are equal.

Mr. WHITEHURST. Do you think they are equal in that regard? It makes no difference then.

Mr. MAYERFELD. [Nods in the negative.]

Mr. WHITEHURST. Fine. That seems to be an answer.

Mr. McMAHON. I would like to make one point, Mr. Whitehurst. I would be pleased to ride the alleged failure of intelligence in Grenada and Lebanon as a good reason why we need one of these bills.

I cannot do that. There was no intelligence failure in Grenada and there was no intelligence failure in Beirut.

Mr. WHITEHURST. OK. So we have that on the record. That puts to rest a lot of the comments that we heard.

Thank you very much, Mr. Chairman.

While I have got the floor, and in the absence of the chairman, the aspects that we have been talking about with respect to judicial review do not really touch on that at all, on the question of security of foreign agents. It really comes back to the issue of your ability to oversee your files more effectively, et cetera, et cetera.

OK, that is fine.

Mr. MAZZOLI. Thank you very much, Mr. Whitehurst.

I will just continue on the gentleman's time for the other couple questions I have.

Perhaps Mr. Strawderman might answer. We started talking about benefits to the public and the amount of time it takes and what steps might be taken.

May I ask you, have any steps been taken, any concrete steps to improve the way these cases are handled?

Mr. STRAWDERMAN. I believe the biggest value, once the bill is passed, will be the cases that will drop out by virtue of the retroactivity of the bill, and we need to measure, then, what the effect of that is on the entire process. It is hard to hypothetically look at it and say it is going to move in 6 months or 8 months or 2 weeks or 10 weeks.

So I think we need to see what happens with that and measure accordingly how rapidly we can get material to the public.

So I cannot really give you a more finite answer on that today.

Mr. MAZZOLI. All of the proposals have an exemption for first person requests. This has been discussed on the Senate side, and there was some thought of extending that to groups and organizations.

Can you give me some pros and cons on that, how you see that?

Mr. MAYERFELD. Well, first of all, the basis behind the first person is founded on what we believe is a very proper principle, that people ought to have the right to know what the Government has on them. That I think is less justifiable on behalf of organizations. Whether this kind of a first amendment, if you will, right is possessed by IBM is perhaps questionable.

The other consideration is if we extend that first person exemption to include organizations, it would so drastically cut back the relief that this bill provides; it would cut it back to almost meaningless because we mention—organizations appear constantly now in correspondence and all manner of contacts, and it would have to be searched whenever it is requested.

Mr. STRAWDERMAN. Mr. Chairman, I might add we are continually reviewing our processes and procedures to see if we can use form letters more efficiently or word processors more efficiently. So it is a concern that we have as to how we can move material through the system more efficiently.

Mr. MAZZOLI. The reason I asked the question was to flesh out the record because someone argued that one of the real problems here is self-created: The longer it takes you to churn out the papers and the longer it takes you to examine, the more impact on the system there is, and the more the requesters perhaps will turn to things as drastic as trying to find a law that might speed things up a little bit.

So I mean, you are satisfied that you are doing everything reasonably within your budget and power to move these requests along while maintaining security of vital information?

Mr. STRAWDERMAN. That is correct, Mr. Chairman.

Mr. MAZZOLI. Thank you very much.

I thank all of you gentlemen for your testimony today, and I am sure it will help us. And as Mr. Whitehurst has said, it is our intention to try to do something, and your statements certainly have helped.

Mr. McMahan. We appreciate that, Mr. Chairman.

I cannot emphasize enough the impact of the present FOIA on our sources. It is detrimental to the well-being of our country, and we have to seek the relief. And I do not think that there is any American that would want to see one of our sources exposed.

We will, under the provisions of your bill and Mr. Whitehurst's bill, guarantee the American citizenry, the historians, academia, the kind of information that they need, that they feel is useful and meaningful, but we will be able to protect those people that are providing us that information.

Mr. MAZZOLI. That is certainly our goal.

Thank you very much, Mr. McMahan, Mr. Strawderman, and Mr. Mayerfeld.

We will now welcome Ms. Mary Lawton, Counsel for Intelligence Policy of the U.S. Department of Justice.

Ms. Lawton, welcome. You have been before us many times, and we welcome you again.

You may proceed.

**STATEMENT OF MARY C. LAWTON, COUNSEL FOR INTELLIGENCE
POLICY, UNITED STATES DEPARTMENT OF JUSTICE**

Ms. LAWTON. Thank you, Mr. Chairman.

We welcome the opportunity to appear before the subcommittee to support legislation granting significant relief to the Central Intelligence Agency from burdens currently imposed by the Freedom of Information Act. The subcommittee has before it two proposals to achieve this end, H.R. 3460 and H.R. 4431. For reasons I will outline later, the Department of Justice prefers the approach taken by H.R. 3460.

This committee is already aware of the enormous burden FOIA imposes on the CIA, and certainly, Mr. McMahan pointed that out. The compartmented nature of its files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. Moreover, the subtlety of intelligence information necessitates review by skilled intelligence analysts rather than FOIA specialists, thus diverting the intelligence analysts from their primary mission.

The committee may not be as familiar with the burden litigation over CIA files imposes on the Department of Justice. To begin with, the Department can assign to CIA FOIA cases only those attorneys who have the necessary clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in *Phillippi v. CIA* and *Ray v. Turner*, without at the same time disclosing the very information they are requested to protect. Often, in order for the courts to appreciate the national security implications of requested records, extensive classified affidavits explaining their sensitivity must be filed. The courts, in turn, must struggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts. Yet this enormous expenditure in intelligence, legal, and judicial time and energy invariably results in the classification being upheld and the requester denied the information.

If there were any public benefit served by FOIA requests of this type, it would be appropriate for the committee to weigh that benefit against security concerns. But there is no such benefit with regard to the operational files of the CIA. From the security standpoint, a FOIA request diverts intelligence personnel from their mission, diminishes compartmentalization, ties up attorneys for CIA and Justice, and clogs already crowded court dockets. All that the public receives is the not inconsiderable bill.

H.R. 3460 and H.R. 4431 recognize that the time has come to eliminate this vast waste of resources. They focus on the most sensitive records of the CIA, those dealing with operations, intelligence sources and methods, and the exchange of information with foreign liaison services. The bills provide FOIA relief only to files maintained in the Directorates of Operations, Science and Technology and the Office of Security. At the same time, they provide the possibility of FOIA access to files concerning special activities, the existence of which are unclassified, matters which have been investigated for possible violations of law, and information concerning U.S. persons requested by those persons.

Where the bills differ is in the means proposed to achieve the goal of FOIA relief. Under H.R. 3460 the Congress would describe the categories of files which should be exempt and exempt them. The mechanisms under H.R. 4431 are more elaborate. The DCI would be required to issue regulations for the identification of exempt records within the statutory categories. Deputy Directors or office heads would then propose the designation of certain files within the category of records for which they have responsibility, and such designations would be reviewed at least every 10 years. All designations and redesignations would require DCI approval. The courts would be authorized to review the regulations, the designations, and even the placement of documents in the particular files.

Both bills would ease the initial FOIA search burden on the CIA. In our judgment, however, H.R. 4431 does nothing to ease the litigation burden on CIA, Justice and the courts but may even serve to increase it. Litigants would be invited to challenge the DCI's regulations and his subordinates' compliance with them and the filing practices of the CIA. This would create a new field of litigation in which there are no existing precedents to guide the attorneys or the courts. It takes little imagination to conclude that at least from the Justice Department perspective—and I emphasize that—the cure offered by H.R. 4431 may well prove worse than the disease.

Accordingly, Mr. Chairman, we urge the committee to adopt the straightforward approach of H.R. 3460 which provides the CIA with relief from the unwarranted burden of searching and analyzing files which by their very nature are protected from release. We urge the committee to question seriously whether the price of such relief should be additional burdens on the courts and the department of the type inherent in H.R. 4431.

We have no other comments, Mr. Chairman. We will be happy to answer questions.

Mr. MAZZOLI. Thank you very much, Ms. Lawton. I appreciate your being here, and thank you for the very succinct testimony.

Let me ask a couple of questions to get started.

H.R. 3460 contains a proviso designed to insure the fact that files which contain evidence of past abuses will be not exempt, and it is suggested that those files would be characterized as those on which there has been an investigation by our two committees, the Intelligence Committees of the Senate or House, the Intelligence Oversight Board and Office of General Counsel of the CIA, the Office of Inspector General of the CIA, or the Office of the Director of Central Intelligence, but it does not mention the Department of Justice specifically.

Do you see that there is any reason or logic in our extending that to include the Office of the Attorney General or whatever agency or group in your shop makes investigations?

Ms. LAWTON. Certainly it seems an anomaly. I do not think the practical effect is much different because normally CIA would investigate internally before referring it to us for further investigation. So the same cases are going to show up either way, but on the surface, it does look rather odd that the law enforcement branch is excluded.

Mr. MAZZOLI. Let me ask you, there are some differences between the two bills. You outlined one. I am sure that Mr. Whitehurst will be talking about the other in a moment.

Let me talk about the other one, and that is on the issue of judicial review. You do not in your statement, I believe, talk about it, but you were in the room and you heard us talk earlier about the question of the very detailed kind of judicial review which is present in the Senate-Whitehurst version and the absence of any reference to judicial review in H.R. 3460.

Now first, as one of the leading lawyers, and I notice from your vitae, No. 1 in your law school class, maybe you might remember back to it—what do you take from an absence of any reference in our bill to judicial review?

Ms. LAWTON. If we were writing on a clean slate, Mr. Chairman, you could argue either way. Certainly we would be inclined to argue no judicial review available under your bill, particularly since it is—the bill itself, is the Congress of the United States designating the files, and acts of Congress are reviewable customarily when you are challenging them on constitutional grounds.

But FOIA access is not a constitutional right; it is a statutory right. So I seriously question whether designation by the Congress would be judicially reviewable, although somebody is going to try, I will guarantee you that.

Mr. MAZZOLI. Sure. A few people in this room today, maybe.

Ms. LAWTON. Particularly since in the course of developing these bills the subject has come up and been discussed at great length. If the bill were ultimately passed without mention of judicial review, then I think it would be very clear that the Congress did not intend any, and I would certainly argue that.

Mr. MAZZOLI. All right.

So let's say that the lack of artfulness of the author has left us with a big open hole in here which is supposed to be filled by current judicial review.

Could you give me, if you are familiar with it, a comparison of current judicial review of these FOIA questions and what appears

in the Senate/Whitehurst version? Is there any succinct way to describe the differences?

Ms. LAWTON. Well, I think so because you have several determinations. In the current FOIA you have implicitly some determinations of who is not covered, yourselves and the courts. You have the determination through legislative history that the Executive Office of the President, elements which advise the White House Office, and particular elements based on the *Soucie v. David* line of cases are not covered. They are not obliged to search, as CIA would not be obliged to search the operational files.

Those have all been challenged—not all, some of those determinations of who is not covered have been initially challenged, settled, and that is it, and they are no longer relitigated. The Executive Office exemption is litigated agency by agency but only once per agency. The claim of an exemption which an agency may make to any given record is continually litigated, and on a de novo basis, with the court deciding not as a matter of law but basically as a matter of fact whether a particular document fits a legal definition. And the court is free to substitute its own judgment. Most have been deferential in matters of classification, but not all, and those are a constant litigation matter.

What I would see as between the two bills is if the bill as you introduced it where Congress makes the designation and there is no mention of judicial review was passed, there will be a one-shot test of whether that is reviewable. My best guess is it would be found not reviewable, and that would be the end of it.

What I am concerned about in the bill Mr. Whitehurst introduced is that there will be a one-shot attack first on the DCI's regulations which, while they do not have to go through the APA, will immediately be requested under the Freedom of Information Act. And then, even if we win that one, there will be a challenge whether the Deputy Director of Operations and the Deputy Director for Science and Technology, and the head of the Office of Security each complied with those regulations. So that is at least three challenges.

Then we come down to whether any given document belongs in those files to begin with, and that last is what really worries me. The first four cases we can handle, but that last one is what worries me.

Mr. MAZZOLI. My time has expired.

The gentleman from Virginia is recognized for 5 minutes.

Mr. WHITEHURST. I would like to have you around when we go to conference with the Senate, I really would.

Ms. LAWTON. I would love to be there.

Mr. WHITEHURST. Let me ask you this. I am not an attorney, but you have been a very impressive witness this morning.

Is it possible to write into the Mazzoli bill or the House bill a specific prohibition against judicial review?

Ms. LAWTON. Yes, but somebody will challenge the constitutionality of it anyway. There is no way to keep a lawyer out of court on the first shot. [General laughter.]

Certainly it would probably more likely appear in legislative history than a line in a bill saying the courts are not to look at this, but it has been done.

Mr. WHITEHURST. What about in the report language as the intent of the Congress, putting it in there, the intent of the framers of this legislation?

Ms. LAWTON. If the court does not like it, it will not look at the report.

Well, you may not remember the original Freedom of Information Act in 1966, there was a House report and a Senate report both describing the same bill but in words nobody would recognize as similar. We argued always in the executive branch that the House report was controlling, but the courts decided the Senate report was controlling. So you just do not know, Congressman.

Certainly language could go in either the bill or the report that would have an effect, and particularly having had major discussions in the Congress and then not saying anything in the bill is an important item of legislative history.

Mr. WHITEHURST. That is why I am pursuing this this morning for the record here because I think it is important to establish this.

Just for the sake of absolutely clarifying now, it is your judgment that if we went with the Mazzoli bill, the government would take the position that judicial review does not prevail because of the absence of our including such a provision in the legislation?

Ms. LAWTON. For that reason and because it is the Congress designating the files. It is not delegating that to an executive officer. It is doing it itself.

Mr. WHITEHURST. Do you think a subsequent administration with different players would read it differently?

Ms. LAWTON. No, I do not, Congressman.

Mr. WHITEHURST. Thank you very much.
Thank you, Mr. Chairman.

Mr. MAZZOLI. The gentleman from Ohio is recognized for 5 minutes.

Mr. STOKES. Thank you, Mr. Chairman.

Ms. Lawton, some of us are concerned about the revelation of certain improper action that took place on the part of the agencies back in the 1950's and 1960's and even the 1970's. I am just wondering how would this legislation affect, say, activities that were conducted by the DDO or the Office of Security back in the 1950's and the 1960's which may have involved improper activity or improprieties which were not at that time investigated but which are revealed or come to light here in the 1980's?

Ms. LAWTON. Well, whether still classified or not, they were covered in the investigations conducted by the Church and Pike Committees. They would under either bill be available.

If there has been any other investigation by the Inspector General, the Director's office, the Intelligence Oversight Board, or subsequent oversight by this committee after the Church and Pike Committees disbanded, it would be under the bill, available. If there is something in there that was not uncovered in the last decade—and I have great difficulty visualizing what that could be—it probably would not turn up under this bill because there would be no search of the Directorate of Operations files, and unless there is a cross-reference someplace else in a file that is searchable, it is probably buried forever.

Mr. STOKES. So from the viewpoint of this legislation, the bottom line would be that if it has not either been investigated by the two committees or any one of the other agencies, that this would stop any further investigation.

Ms. LAWTON. Well, it could, of course, be come across accidentally by operations people using operations files for operational purposes. All I am saying is that the FOIA would not uncover it because there would be no search made for that purpose.

Mr. STOKES. Thank you very much.

Mr. MAZZOLI. Thank you very much.

Let me yield myself 5 minutes.

Ms. Lawton, let me come back to the question which is one of the fairly profound differences between these two versions of the bill, and that is on judicial review.

To kind of go back again, to set the groundwork here, we have a bill sponsored by yours truly that says nothing whatsoever about judicial review, which can be, by legal analysis, judged to say, by reason of the way the files were designated, that judicial review does not obtain on the question of whether or not operational files are properly designated, and in effect, there would be no judicial review.

We can take the other position, which is the Senate/Whitehurst, which is a fairly long and detailed description of what the courts can do.

Is that your understanding, one is silent and one has a new structure for judicial review different than current judicial review?

Ms. LAWTON. Yes, because it has both a structure of reviewing new things, but also a different standard through the report which is the arbitrary, capricious standard.

Mr. MAZZOLI. Let me start at that point, then. If because of my lack of legislative artfulness I put a big hole in my bill where I really meant to put current practice, current judicial review, let's then accept that what I meant to put in there was current judicial review, and we are talking about that versus the new practice which would be set up by the Senate/Whitehurst bill.

Now, would you tell us a little bit about those two, today's practice, today's review, and their proposal on how you see that to work from your standpoint, how you see it working from the public standpoint, what rights and prerogatives the jurists would have?

Could they examine the individual documents? Could they see this material which is said to be operational and therefore exempt? Can you give me a little background on that?

Ms. LAWTON. It is hard to visualize how they would go at it, Mr. Chairman, because there is no exactly comparable situation today. However, that was my point in discussing who is inside the FOIA and who is outside, and essentially, the courts have not reviewed whether requesters can file requests with the Congress of the United States, because the statute does not cover them, and that is clear, and that is the end of it.

And there has been, as I say, one-shot litigation on who in the executive office is or is not covered, but once they are determined not to be covered, then there is no case-by-case review. And that is the analogy, I think, under your bill.

Mr. MAZZOLI. Let me ask you this question because I may be in over my head with this stuff.

Ms. LAWTON. It is a wonderful act.

Mr. MAZZOLI. If the material prepared by staff is reasonably accurate, it is to the effect that current practice or current judicial review with respect to FOIA matters requires the Government to bear the burden of justifying any withholding of information by reason of the fact that it would be sensitive, and includes judicial access to the material in question. Those are two things in current practice, if I am correct. The Government has the burden of proof to justify any withheld information, and also, the judges have access to the information in question.

Is that your understanding?

Ms. LAWTON. The judges have a right of access. They do not always exercise it. They will sometimes be content with an elaborate affidavit.

Mr. MAZZOLI. That is the *Vaughn*, whatever they call it?

Ms. LAWTON. The *Vaughn* affidavit is a public thing, but there are often *in camera*, *ex parte* affidavits which are classified, as you lay out for the judge chapter and verse of why every word of every page of every document cannot be released. They are sometimes longer than the document.

Mr. MAZZOLI. I am sure they would be.

So the judge may or may not go further. The judge may accept that long, elaborate, classified affidavit *in camera* satisfying himself or herself that this material was properly sequestered, properly designated, or that judge could, is that correct?

Ms. LAWTON. Insist on seeing it.

Mr. MAZZOLI. Insist on seeing the document. So the CIA has to go wheeling out to Langley and bring that piece of paper in.

Ms. LAWTON. What more often happens, Mr. Chairman, is the judge says no, I do not need to see it. I am satisfied without the document. It goes to the Court of Appeals. The Court of Appeals says you should have looked at it. It comes back to the district court, and then they look at it.

Mr. MAZZOLI. Let me shift focus to Senate/Whitehurst.

Would under that version of judicial review the judge have an opportunity to be satisfied with this long, elaborate, classified affidavit submitted *in camera*? Would, under the other version here, would that be possible?

Ms. LAWTON. Yes.

Mr. MAZZOLI. Then taking it one step further, could the judge under the Senate/Whitehurst version demand to see the document?

Ms. LAWTON. Yes, he could.

Mr. MAZZOLI. Thank you.

I understand that there is a footnote in the Senate report, I have not read it, but somewhere it deals with the question of what judges have access to in extraordinary circumstances. I am not quite sure I fully understand it. We may have to take that up in answers that you might send us later.

But it seems to me that if I read this thing correctly and am correctly advised, the Senate version is apparently silent on the point of whether or not the judge can actually demand to see the docu-

ment, but the footnote suggests that it is available in the presence of extraordinary circumstances.

Does that ring any bells with you, Mary? I am not sure I fully—

Ms. LAWTON. Not to be flippant, but the judge is a 500 pound gorilla once you are in his court. He can see what he wants to see.

Mr. MAZZOLI. I guess we are in sort of an informal setting.

Ernie, why do you not come up? It would help. What we are trying to do is get information here.

Mr. MAYERFELD. The Senate report does indeed say—

Mr. MAZZOLI. Could you help us on the question again?

Let me start from ground zero.

Under current judicial review, the judge may in his or her opinion demand to see a document.

Mr. MAYERFELD. Yes, if the document is in the dispute under current FOIA, sir.

Mr. MAZZOLI. It may go up to the court of appeals, but the judge has that power.

Under the Senate/Whitehurst, can the judge demand to see a document?

Mr. MAYERFELD. I would say yes, and the Senate report does address that.

Mr. MAZZOLI. But that is only in a footnote, if I am not mistaken.

Mr. MAYERFELD. It is in the body of the report. It says the bill does not deprive the court of its authority to order the Agency to attach to its affidavits as part of its response requested Agency records in extraordinary circumstances.

Mr. MAZZOLI. Let me just ask your opinion and Mary's.

What would the view be if that were put in statutory language, not in a committee report, but in language dropping, say, the word "extraordinary," but in effect return to current practice where the judge, if the judge is not satisfied with this long and detailed and classified affidavit, the judge may demand to see the document.

The current practice says that. How about something like those exact words put into a Whitehurst formulation? How would you see that?

Mr. MAYERFELD. Well, if we write that into the statute, it gives a plaintiff the right to do this, and that is really what concerns us. We are not worried about judges looking at our files and judges satisfying themselves, but if it gives rise to a litigating right and permits the plaintiff an unfettered kind of discovery, to walk through our files, that is what we would find intolerable.

Mr. MAZZOLI. I am not sure I follow that, to tell you the truth. It seems to me that if we return this wording to current practice or current status of judicial review, we are simply saying it is not so much the plaintiff's determination because the judge may be very well satisfied by the in camera examination of the affidavit which describes the material which might have sources and methods, but if for some reason that judge who, as we say, are 500 pound gorillas with plenary power, decide that he or she wants to see that thing, current practice says you cannot say no. That judge—for security reasons. I mean, they cannot flap it around, but if something like that could be put in the bill so that we could say that if the judge is not satisfied, not the plaintiff satisfied, but if the judge is not sat-

ified and in that judge's opinion an examination of the original document is required to decide whether or not it is properly classified, properly designated, whether it has this sensitive material in it.

Mr. WHITEHURST. Would you yield?

My bill provides that already. He can see anything he wants.

Mr. MAYERFELD. That is exactly correct.

Mr. MAZZOLI. It is in the Whitehurst version?

Well, then it does not parallel the Senate version entirely.

Mr. MAYERFELD. Yes, it does. The Senate report language, together with the Senate/Whitehurst bill, makes that clear. The judge has that right.

Mr. MAZZOLI. Well, my time has long since expired. You have been very indulgent.

I yield to my friend from Virginia or Pennsylvania for followups on this or anything.

Mr. WHITEHURST. I have a very curious feeling I am going to become a champion of the chairman's bill and he is going to become a champion of mine.

Mr. MAZZOLI. You sit here and I will sit there. No one is going to kill his bill.

Mr. WHITEHURST. I yield to my friend from Pennsylvania.

Mr. GOODLING. Well, I can approach this three different ways. I could say that I have no legal background, I am intimidated by the witness, and therefore I will call her if I need a lawyer, but I am not going to be stupid enough to ask any questions. Or since I am sitting up here half asleep with a lawbook in my hand, I could act like a judge. [Laughter.]

But I think the approach I will take is since the questions I am asking you are questions of the staff, if they are stupid, we can blame them and not me. So I will use that approach. [Laughter.]

Is not a possible third alternative the courts should review the Mazzoli bill under the normal Administrative Procedures Act review of action by all Federal agencies?

Ms. LAWTON. Well, Congressman, by and large the Mazzoli bill does not require an action by the Federal agencies. That is the difference between that bill and the Whitehurst bill, in that the Mazzoli bill says these files, Congress says these files are not covered. Under the other formulation, Congress says to the Director, you decide what files are not covered. Under that formulation, the Director is taking an action which is probably reviewable, but under the Mazzoli bill, it is Congress that is saying these files are not covered, and the Director does not have to do a thing.

Mr. MAZZOLI. Would the gentleman yield for a second?

Just assume, Mary, that we say fine, under the Mazzoli formulation, this is a congressional determination of which files are exempt, and also say the kind of judicial review of the question of whether or not a proper designation has been made or whether or not material is in the right file is current administrative practice review, even though we might suggest that we do not need to do it this way, but we do it voluntarily. Is that possible? Would that be discordant? Would that be mutually exclusive in one bill?

Ms. LAWTON. I suppose not because there is, of course, the Agency, when it searches or not a particular system, has in effect

taken an action interpreting the bill, if you will, but again, the question would be—and this is all in the wording—whether it is the selection of this system as outside the bill, the view of which we could live with, versus whether any given item belongs in that system or in some other system. The latter is what Justice would have great difficulty with. The former is this. One of the systems covered by the bill would not be a terribly difficult case. As I have said, we have litigation. As the Deputy Director said, there are 22 major systems. We would have 22 cases and then it would be done, we would be finished with it.

Mr. MAZZOLI. I am sorry. I did not mean to take too much time. Thank you for yielding.

Mr. GOODLING. A few other questions.

As I understand it, the FOIA standard for judicial review is somewhat of an anomaly when referring to the legal standard of judicial review.

Do you think we should have a standard of judicial review which gives more credence to a decision made by a local zoning board and a lesser standard to a decision made by the DCI on only those issues concerning sensitive national security?

Ms. LAWTON. No. I do not think that.

Mr. MAZZOLI. That is a high hard ball right in there, and bang, right out of the park. It is a 450-foot homer right to dead center field.

Ms. LAWTON. With a short right field.

Mr. MAZZOLI. Hit that one right out of the park.

Mr. GOODLING. I will quit while I am ahead.

Mr. MAZZOLI. The gentleman from Ohio is recognized.

Mr. STOKES. I have no further questions, Mr. Chairman.

Mr. MAZZOLI. Mary, thank you very much. We may, because this is obviously an interesting area, we may ask for further help from you, but for now we thank you and appreciate your attendance.

Ms. LAWTON. Thank you, Mr. Chairman.

Mr. MAZZOLI. Now I would like to call the last of the morning witnesses in, Mr. Mark H. Lynch, counsel for the American Civil Liberties Union.

Mr. Lynch, we welcome you, of course. Like our previous witnesses, you are not only a person who is very familiar with Hill procedures, but you have been in this room many, many times.

I just wonder, does the Sergeant at Arms think you may be earning a congressional pension up here? When he sees you around long enough, he may think you are one of the members.

Mr. LYNCH. Not under the new security system, Mr. Chairman. I had a hard time getting in here this morning.

Mr. MAZZOLI. Well, you and Howard Baker are in the same boat.

Again, your statement will be made part of the record, and we welcome your statement.

[The prepared statement of Mark H. Lynch follows:]

STATEMENT OF MARK H. LYNCH ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman: Thank you for your invitation to the American Civil Liberties Union to testify on H.R. 3460, introduced by Mr. Mazzoli, and H.R. 4431, introduced by Mr. Whitehurst. The latter bill is substantially similar to S. 1324, which passed the Senate on November 17, 1983. These bills amend the National Security Act of

1947 so as to remove certain files of the Central Intelligence Agency from the coverage of the Freedom of Information Act.

The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the FOIA as one of the most important pieces of legislation ever enacted by Congress because the Act positively implements the principle, protected by the First Amendment, that this nation is committed to informed robust debate on matters of public importance. Accordingly, the ACLU is extremely wary of all proposals to limit the FOIA.

However, the CIA's position on these bills and on S. 1324 marks a significant shift in the debate of the last several years over the applicability of the FOIA to the CIA which we welcome and commend. The Agency is no longer seeking a total exemption from the Act; it is no longer arguing that the Act is inherently incompatible with the operation of an intelligence service; and it is no longer arguing that no information of any value has ever been released by the CIA under the Act. Most significant of all, the Deputy Director of Central Intelligence, Mr. John N. McMahon, stated before the Senate Intelligence Committee that if S. 1324 was enacted, "the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act."

If in fact no meaningful information now available under the FOIA will be withheld under this bill, and if the bill will result in more expeditious processing of requests, it will not be a set-back for the FOIA. However, there are many questions which must be answered before we can be confident that Mr. McMahon's assurance will be borne out. The Senate Intelligence Committee made a great deal of progress in answering these questions, and many of the answers are contained in that Committee's report on S. 1324, S. Rep. No. 98-305, 98th Cong., 1st Sess. (1983) (hereinafter "Senate Report"). Furthermore, the amendments adopted by the Senate Intelligence Committee improved the bill considerably.

Nevertheless, there is still important work for this Committee to do to assure the public that this legislation (1) will not result in the loss of any meaningful information now released under the Act, and (2) will improve the CIA's service to the public under the FOIA. We set forth below a number of steps which the Committee should take in this regard. Moreover, since some aspects of the CIA's filing systems and other internal operations are classified, the public must depend on the Committee to verify the assumptions on which these bills are based. Furthermore, as detailed below, there are a number of amendments which we urge this Committee to adopt to refine and improve this legislation further.

WHAT THE BILL WOULD DO

At this point, I would like to set forth our understanding of what this legislation would do, based on the CIA's testimony before the Senate Intelligence Committee and the Senate Report. If this understanding is mistaken or incomplete in any respect, we request clarification so there will be no misunderstanding over the legislation.

1. Certain operational files, the contents of which are now invariably exempt from disclosure, will be exempt from search and review. However, all gathered intelligence will be accessible, subject to the Act's exemptions, as it is now. This is possible because most items of gathered intelligence are routinely disseminated outside the components identified in the bill and are stored in non-operational files. In exceptional circumstances where gathered intelligence is stored in an operational component, it will be indexed in a non-operational file and will be subject to search and review. By making all gathered intelligence accessible, this bill is a significant improvement over past proposals which would have made only finished intelligence reports, such as national intelligence estimates, accessible. This is important, because finished intelligence may omit raw information that is important to understanding events.

2. Only the operational files of the CIA's Directorate of Operations, Directorate of Science and Technology, and Office of Security will be exempt from search and review. Thus, operational information located elsewhere in the Agency will be subject to search and review.

3. Information concerning investigations of illegality or impropriety in the conduct of intelligence activities will continue to be subject to search and review, even if the information is found only in operational files.

4. Operational files will be subject to search and review in response to requests for information concerning "special activities"—i.e., covert operations for purposes other than the collection of intelligence—if disclosure of the existence of such activi-

ties is not otherwise exempt under the FOIA. This provision codifies the current procedures under the Act. See e.g., *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

5. All CIA files, including operational files, will continue to be subject to search and review in response to requests from United States citizens and permanent resident aliens for information concerning themselves.

STEPS TO ASSURE THAT THERE WILL BE NO LOSS OF INFORMATION NOW AVAILABLE

In order to be sure that Mr. McMahon was correct when he said that the bill will not result in the loss of any meaningful information now released under the bill, we asked that the CIA analyze a number of documents of significance to the public which have been released by the Agency under the FOIA to determine whether these documents would be accessible under the proposed legislation. Our understanding from the published deliberations of the Senate Intelligence Committee is that the CIA did this and that the results of the analysis were favorable. However, the analysis itself was never made part of the public record. Accordingly, we ask this Committee to make similar inquiries and to make the answers available to the public so that we can determine that this legislation will not diminish the quality of information currently available from the CIA under the FOIA. Furthermore, since the Senate deliberations, various people have brought to our attention other significant documents released by the CIA, and we request that these also be included in the CIA's analysis.

We also asked that the CIA prepare an analysis of how the bill would affect pending litigation so that there would be an ample public record against which to measure Mr. McMahon's assurances. This analysis too apparently was prepared but was not included in the published record. Accordingly, we request this Committee to take the step of requesting and publishing the analysis of the bill's effect on pending litigation.

STEPS TO IMPROVE PROCESSING

I would like to focus for a moment on the CIA's promise that it will provide improved service to FOIA requesters under this bill. There is a very great need for improvement on this score. The two to three year wait which the public must now endure has greatly diminished the Act's utility. As Mr. McMahon acknowledged in testimony before the Senate Intelligence Committee, some people have given up making requests to the CIA because of the backlog. By removing from the FOIA's search and review requirement files which invariably are exempt from disclosure under the current provisions of the FOIA because of their sensitive operational nature, this legislation will eliminate the requests which are primarily responsible for the backlog. But how will the continued processing of documents still subject to the Act be improved?

The Senate Intelligence Committee has addressed this question largely in budgetary and personnel terms, which of course are the foundation for improved service to the public. Accordingly, the Senate Committee has received assurances that the CIA will not reduce the resources now allocated to FOIA processing so that resources currently devoted to processing operational files will be diverted to processing requests for non-operational files which will continue to be subject to the FOIA.

While this commitment of resources is crucial and fundamental to improved processing, we believe that the processing problem has another dimension as well. There needs to be a change in the CIA's attitude toward responding to FOIA requests. For a number of reasons, some of which may be excusable and some of which may not, the CIA has developed a siege mentality toward the public and the FOIA. Consequently, the Agency has also developed a number of techniques to stymie the processing of requests and to put off requesters. Here are some recent examples:

1. On September 24, 1982, a member of the staff of the Center for National Security Studies requested CIA studies produced since October 15, 1979 on the subject of where the insurgents in El Salvador receive their weapons and other support. The request specifically disclaimed any interest in raw intelligence reports and limited itself to analytic studies. The CIA made the following response:

Your request, as submitted, cannot be processed under the FOIA. Under the provisions of the FOIA, we are neither authorized nor required to perform research or create records on behalf of a requester. Almost without exception, our FOIA searches, because of the structure of our records systems, must be limited to those that can be conducted for records that are indexed or maintained under the name of an individual, organization, title, or other specific entity. Further, if our searches surface information, we are not permitted to analyze that information on behalf of a

requester to determine if it is in some way related to an event, activity, incident, or other occurrence.

The foregoing paragraph is apparently a piece of boilerplate on a word-processor, for it appears in many Agency responses. By making this response, the Agency avoids its obligation to process the request. While there may be some requests that are so vague that such a response is appropriate, it is used in many cases where it is plainly inappropriate. In this instance, it was astonishing for the CIA to suggest that it cannot identify any studies on the source of weapons to the insurgents in El Salvador, for this is one of the key issues in the debate over U.S. policy toward that country. Indeed, this request asks for the same sort of information the President, the Secretary of State, the Secretary of Defense, or this Committee might request from the CIA. In fact, after further discussions between the requester and CIA personnel, the Information and Privacy Coordinator wrote on February 17, 1983 that he had arranged for a search of Agency files for responsive records. However, there should have been no need for this five month run-around—a process which would deter less experienced requesters or those without ready access to legal counsel.

2. On February 3, 1983, CNSS requested information on the issue of whether former CIA employees William F. Buckley and E. Howard Hunt had complied with their obligation to submit their writings concerning intelligence matters for prepublication review. The request was prompted by Mr. Buckley's discussion of this topic in the January 31, 1983 issue of *The New Yorker*. The Agency replied with another piece of computerized boilerplate:

So that we can be sure there are no privacy considerations, we need to have a signed and notarized statement from these individuals authorizing us to release personal information that otherwise would have to be withheld in the interest of protecting these person's privacy rights. These rights are addressed in the Privacy Act (5 U.S.C. 552a) and the FOIA (5 U.S.C. (b)(6)). If we should locate relevant records and did not have such an authorization, we probably would be unable to release substantially more than already appears in the public domain, such as that contained in newspapers and the like.

After a letter from counsel pointing out that compliance by public figures with their prepublication review obligations does not involve privacy concerns protected by the FOIA or the Privacy Act, the Agency agreed to process the request. It should have begun processing immediately upon receipt of the request without the intervention of lawyers and the threat of litigation.

3. In response to a subpoena from CBS News, the CIA produced a large number of CIA documents relevant to the libel litigation between CBS and General Westmoreland over the CBS News' report that the military falsified enemy troops strengths in Vietnam. All classified information was removed from these documents, and they were released to CBS without any restriction on the use to which they might be put. Indeed, both CBS and General Westmoreland have released some of these documents in well-publicized press conferences. On August 25, 1983, one of my clients requested a set of these documents from the CIA. Since the CIA already had processed the documents for release to CBS, no further processing should have been required other than to copy them. Notwithstanding the seeming simplicity of this request, my client has not yet received a single page. This type of bureaucratic delay is inexcusable.

Mr. Chairman, I offer these examples of the CIA's techniques to resist compliance with the FOIA not to refight old battles but to demonstrate that Congress must take steps to insist that the CIA improve its compliance with the FOIA. The Agency says that this bill will alleviate its most pressing problems with the FOIA. In return for that relief the Agency must be required to make prompt, efficient, cooperative responses to the public. While this bill may eliminate the backlog, it will not by itself change the Agency's attitude toward the Act. Business as usual even with the relief provided by this bill will not be enough to insure compliance with the spirit of the FOIA. Accordingly, this Committee must go beyond the budgetary and personnel commitments which the Senate Committee received and require a firm commitment from the Agency's leadership to improve service under the Act and a detailed plan for accomplishing this objective. Furthermore, this Committee must make it clear that it intends to make CIA's compliance with the FOIA one of its oversight priorities.

COMMENTS ON SPECIFIC PROVISIONS OF H.R. 3460 AND H.R. 4431

I now would like to turn to our comments on the specific provisions of H.R. 3460 and H.R. 4431. Some of these comments concern drafting issues where we believe the bills can be made clearer and others concern important matters of substance.

OVERALL ORGANIZATION

In general we prefer the overall organization of H.R. 3460 to that of H.R. 4431 because the former is more straightforward and more simply stated. In particular, H.R. 3460 collects in one section, 701(b), all three circumstances in which operational files will remain subject to search and review. As a matter of drafting, we believe that this approach is preferable to H.R. 4431, which disperses those three circumstances between the second proviso to section 701(a) and section 701(c).

Also as a matter of drafting, we favor the way in which H.R. 3460 states in section 701(a) that operational files shall be exempt and then defines operational files in section 701(c). However, H.R. 4431 contains a very significant improvement over H.R. 3460 in that it links the different kinds of operational files with the specific components of the CIA where those files are found. We also favor the consolidation of the four types of operational files in H.R. 3460 to three in H.R. 4431. Also with respect to the definitions of operational files, we favor H.R. 4431's deletion of the word "counterterrorism," which as the Senate Report makes clear, is included in other terms employed by H.R. 4431. Accordingly, we recommend that the final bill be organized along the lines of H.R. 3460 but with the definitional section drawn from section 701(a) of H.R. 4431.

REQUESTS BY INDIVIDUALS FOR INFORMATION ABOUT THEMSELVES

H.R. 4431 provides that all files shall be subject to search and review whenever United States citizens or lawfully admitted permanent resident aliens request information about themselves pursuant to the Privacy Act or the FOIA. H.R. 3460 omits any reference to the Privacy Act. We believe that both Acts should be included because there are circumstances where it is advisable for individuals to invoke both the FOIA and the Privacy Act when requesting information about themselves.

REQUESTS BY ORGANIZATIONS FOR INFORMATION ABOUT THEMSELVES

We also urge this Committee to explore the possibility of expanding the concept of first-party requests to include requests by political, religious, academic, and media organizations which have been operationally targeted or utilized by the CIA. Such an amendment would do a great deal to assure the public that information about CIA activities which affect the exercise of First Amendment rights will not be lost as a result of this bill.

The Senate Intelligence Committee rejected the concept of requiring search and review in response to first party requests by organizations for the following reasons:

Such search could run the gamut of operational files because U.S. organizations are frequently referred to incidentally in Agency operational documents. Reference to a U.S. organization in an operational document does not necessarily indicate that the organization was targeted by or involved in a CIA operation. Because of the volume of incidentally acquired information, granting domestic organizations the same access as individuals would resurface the problems this bill is designed to alleviate—risks to sources and methods by breaking down compartmentation of operational files and commitment of operations officers to nonproductive FOIA review. Senate Report at 28.

Mr. Chairman, we do not advocate an amendment which will require so much processing that it defeats the bill's objective to reduce the CIA's backlog. However, we believe that the objections expressed in the Senate Report suggest that there are ways to limit the circumstances in which first-party organizational requests trigger search and review so that the CIA's task is manageable. This can be done by limiting the type of organization to those whose activities inherently involve the exercise of First Amendment rights—political, religious, academic, and media organizations. Furthermore, the search required by requests from such organizations could be limited to files concerning the CIA's operational targeting or use of such an organization. Thus, it would not be necessary to search for all incidental references to a requesting organization—a problem which the Senate Report suggests is the main objection. We urge this Committee to explore whether such a middle-ground approach to requests by organizations is feasible. If it is, incorporation of such an approach will certainly make this bill more acceptable to the public.

REQUESTS FOR INFORMATION CONCERNING SPECIAL ACTIVITIES

Both H.R. 3460 and H.R. 4431 provide that operational files will continue to be searched for information concerning "any special activity the existence of which is not exempt from disclosure under the Freedom of Information Act." As noted above, the purpose of this provision is to codify current law and to insure that information

concerning covert actions will be available to the same extent it now is. We have no problem with the language in these bills on this issue, but we are concerned that the Senate Report may be construed to give a "tilt" to current law.

The discussion at pages 24-25 of the Senate Report seems to suggest that covert actions will be exempt from disclosure unless an authorized Executive Branch official has officially and publicly acknowledged the existence of the covert action. Indeed, this is the position which the CIA takes in litigation. However, we believe that there are additional circumstances under which a covert action may no longer be exempt from disclosure. For example, a requester might argue that actions by a House of Congress or one of its Committees disclose enough information about a covert action so that a court should conclude that its existence is no longer exempt from disclosure; or a requester might argue that a covert action has become so widely known to the public that a court should conclude that its existence is no longer exempt from disclosure. The validity of these arguments is presently an open question in the courts.

We do not ask the Congress in this bill to take any position on the validity of these various arguments over when the existence of a covert action can no longer be exempt under the FOIA. Indeed, one of the reasons that this bill is not highly controversial is that it does not address the substantive scope of the FOIA's exemptions from disclosure. We do not believe that the Senate Report meant to take any position on the issue of when the existence of covert operations is exempt from disclosure, but we are afraid that such an implication might be drawn from the Report. On the other hand, the separate views of Senators Durenberger, Huddleston, Inouye, and Leahy expressly disclaim any such implication (Senate Report at 42), as does a colloquy between Senators Goldwater and Huddleston on the Senate floor during the debate on the bill. 129 Cong. Rec. S 16745 (daily ed., Nov. 17, 1983). For the sake of absolute clarity, we urge this Committee to include in its Report a statement along the lines of the separate views of these four Senators.

REQUESTS FOR INFORMATION CONCERNING INVESTIGATIONS OF ILLEGALITY OR IMPROPRIETY

There is a major difference between H.R. 3460 and H.R. 4431 on the issue of search and review of operational files for information concerning matters which have been investigated for illegality or impropriety in the conduct of a intelligence activity. H.R. 4431 provides that operational files will continue to be searched "for information reviewed and relied upon" in the course of such an investigation. H.R. 3460 provides that operational files will continue to be searched "for information concerning . . . the subject" of such an investigation. We feel very strongly that the approach taken by H.R. 3460 must be adopted. In our view, the issue determining search and review in these circumstances should not be whether documents were reviewed or relied on, but whether they concern the subject which is important enough to have been the subject of the investigation. Even if investigators overlook relevant documents in the course of an investigation, those overlooked documents should be subject to search and review.

With respect to the proviso on investigations, we also suggest that the list of bodies whose investigations require search and review be modified slightly. Both H.R. 3460 and H.R. 4431 now list "the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the CIA, the Office of the Inspector General of the CIA, or the Office of the Director of Central Intelligence." To these we would add any special Presidential Commission or Select Committee of Congress established to investigate intelligence activities.

DISSEMINATED INFORMATION STORED IN OPERATIONAL FILES

Both H.R. 3460 and H.R. 4431 provide that information derived or disseminated from operational files and found in non-operational files shall be subject to search and review. The CIA's testimony before the Senate Intelligence Committee and the Senate Report make clear that most items of gathered intelligence are routinely disseminated beyond operational files and therefore will be subject to search and review because they are stored in non-operational files. However, the CIA's testimony and the Senate Report also make clear that some items of gathered intelligence are disseminated outside the Operations Directorate on an "eyes only" basis and they are returned to the Operations Directorate for storage. The Senate Report clearly states that such documents will be subject to search and review because they have been disseminated outside operational components. However, this concept is not spelled out as clearly in any of the statutory language as it is in the Senate Report. Indeed, both H.R. 3460 and H.R. 4431 only provide that documents from

operational files *contained* in non-operational files will be subject to search and review. Accordingly, we urge this Committee to include statutory language to indicate clearly that documents which are disseminated outside operational components but stored in operational files are subject to search and review.

JUDICIAL REVIEW

One of the most important issues in this legislation is the question of the scope and standard of judicial review. One of the most important and unique features of the FOIA, as it was passed in 1966, is that members of the public can obtain *de novo* judicial review of agency decisions to withhold information. Almost all judicial review of actions by government agencies is conducted under a deferential standard, such as whether the agency action is arbitrary or capricious, is an abuse of discretion, or has a rational basis. The FOIA provision for *de novo* review, however, requires courts to take a harder look at agency decisions to withhold information than courts take at other agency actions. This searching standard of review is codified in section 552(a)(4)(B) of the FOIA, and it is in many ways the engine which makes the Act work. Because agencies know that they face *de novo* review, they must be very careful when they decide to withhold information. Because of *de novo* review courts have the authority to examine closely agency decisions to withhold information. With this authority, courts can vindicate the rights which Congress conferred on the public when it enacted the FOIA. Because of the vital importance of *de novo* review, the ACLU must oppose any legislation which threatens to erode this standard of judicial review.

When S. 1324 was introduced, it, like H.R. 3460, made no mention of judicial review. Thus, we assumed that any disputes arising under this legislation would be judicially reviewable under section 552(a)(4)(B) of the FOIA. Such disputes might arise over the following issues: (1) whether files are in fact operational files as defined in the bill; (2) whether documents have been improperly placed solely in operational files; and (3) whether any of the provisos requiring search of operational files are applicable, that is, (a) whether the requester is a person entitled to make a first-person request for information, (b) whether the request concerns a special activity the existence of which is not exempt from disclosure under the FOIA, or (c) whether the requested information concerns an investigation for illegality or impropriety. Let me also stress that we do not anticipate that such disputes will arise very often under this legislation. Indeed, the difficulty which has been encountered is devising procedures to handle these disputes is far out of proportion to the frequency with which they will occur.

Since we assumed that disputes arising under this legislation would be judicially reviewable, we were startled when the CIA announced at the hearings before the Senate Intelligence Committee that in the Agency's view there would be no judicial review of CIA determinations under S. 1324. We responded that this view was wholly unacceptable and that we would oppose any bill that would restrict the level of judicial review now available under the FOIA.

The Senate Committee decided that judicial review was important and should be maintained. In response to that stand, the CIA refined its position and pointed out specific burdens which it has encountered in litigation over its decisions to withhold specific documents under the FOIA exemptions. These burdens arise primarily from the requirement that the Agency file detailed affidavits justifying its withholding decisions on a page-by-page, document-by-document, and paragraph-by-paragraph basis. Since we do not believe that disputes under this legislation will involve the same kind of issues that arise when the CIA withholds documents as exempt under the Act, we did not object to report language or statutory language which would make clear that courts should handle disputes under this legislation with different procedures that those used in disputes over whether documents fall within the Act's exemptions, provided that both types of dispute are subject to *de novo* review.

The language which now appears in section 701(e)(1) of H.R. 4431 represents an attempt to accommodate all of these interests. However, that language was hastily drafted on the eve of the Senate Committee's mark-up and could be considerably clearer. Accordingly, we think that this Committee can substantially improve the way judicial review is addressed and that in doing so it can meet both the concerns of the CIA that it not be subjected to unduly burdensome litigation demands under this legislation and the concerns of the public that *de novo* review be maintained. Such an accommodation should include the following principles, which we believe are consistent with the intent, if not the actual result, of section 701(e)(1) of H.R. 4431.

First, review should be available for all types of disputes which may arise under this legislation. See p. 17, supra. As H.R. 4431 is now drafted, it is not clear that judicial review is available when there is a dispute over the applicability of the provisions requiring search of operational files.

Second, review should focus not on whether the CIA's regulations comply with the statute but on whether in any specific case the CIA's action has complied with the statute. As section 701(e)(1) of H.R. 4431 is now drafted, it requires that in the first instance the court shall determine whether the Agency's regulations comply with the statute. However, if the requester makes a prima facie showing that the Agency has not complied with the statute, the court must make a further inquiry. We believe that the intent of the section is that on this second inquiry the court shall determine whether the Agency has complied with the statute. However, because of ambiguity in the drafting, the section is susceptible to the interpretation that even after the requester has made a showing of non-compliance with the statute, the court's determination is limited to whether the regulations, rather than the actual Agency action in question, comply with the statute. This interpretation would undermine the principle of de novo review, and therefore the statute and legislative history need to be clarified to insure the rejection of this interpretation.

Third, to avoid any ambiguity, the following procedures should be spelled out clearly. Whenever a complaint alleges that the CIA has not complied with the statute, the Agency should be permitted to rebut the allegation with an affidavit from an appropriate Agency official averring that the Agency has complied with the statute. At that point, the burden of proof should shift to the plaintiff to show a genuine dispute that the Agency's affidavit is incorrect. We have no objection to requiring the plaintiff to do this by an affidavit based on personal knowledge or otherwise admissible evidence, for the Federal Rules of Civil Procedure require no less. If the court finds that the plaintiff has raised a genuine issue that the Agency has not complied with the legislation, it can require further submissions from the CIA, which can be filed in camera ex parte if they are classified. This procedure of in camera ex parte filings, when necessary, is consistent with current practice. Although we agree that the plaintiff would not be able to direct discovery to the CIA on his own initiative, it is important that the court have the authority to require the CIA to make whatever submission which the court determines is necessary to resolve the controversy before it. Any implication in the Senate Report that this authority is circumscribed should be rejected. However, we stress that (1) ordinarily a CIA affidavit demonstrating compliance with the statute will be sufficient, and (2) these affidavits would not be the same as the detailed affidavits which the Agency is required to file in support of its decisions to withhold documents under the exemptions to the FOIA.

Fourth, the standard of review which the court applies to the question of whether the Agency has complied with the statute must be de novo, as is the standard of review for all other determinations under the FOIA. Unfortunately, the Senate Report (p. 31) states that the court should apply a "rational basis" standard of review. That deferential standard of review is unacceptable.

Finally, Mr. Chairman, there is the question of how these principles should be expressed in the legislation. Our view is that it would be best for the statute to state simply that disputes arising under section 701 are reviewable under section 552(a)(4)(B) of the FOIA and for the procedures outlined above to be set forth in the legislative history. The reason for this preference is that it is easier to write out the procedures in ordinary language than in statutory language. Furthermore, reference to section 552(a)(4)(B) would emphasize that review is to be de novo. However, if others believe it imperative for the procedures to be spelled out in the statute, that task can be accomplished, although it will require great care.

REQUESTS FOR FILES OF HISTORICAL SIGNIFICANCE

Testimony before the Senate Intelligence Committee demonstrated that S. 1324, as originally introduced, was deficient with respect to the needs and interests of historians. That testimony showed that operational information can be important to the writing of history and that after the passage of time it is often possible to declassify much operational information. However, as introduced, S. 1324 would have sealed operational files in perpetuity.

The CIA and the Senate Committee responded to this problem in a positive and commendable fashion. As an example of how operational files can be considered for declassification after the passage of time, the Agency informed the Committee that the files of the OSS now held by the Operations Directorate would not be exempt from search and review. Furthermore, the CIA agreed to the provision which now

appears as section 701(d)(2) of H.R. 4431. This amendment provides that not less than every ten years the CIA will review operational files or portions thereof to determine whether they can be made subject to search and review. The criteria for this determination "shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein."

We believe that this provision is a very significant improvement in the legislation and we recommend that it be included in H.R. 3460. However, we also believe that one further step should be taken to protect the public's interest in historical research. As now incorporated in H.R. 4431, the decennial review is limited to the files which the CIA believes are of historical or other public interest and which the CIA believes can be declassified in significant part. Moreover, these determinations are not subject to any meaningful judicial review. For the purposes of decennial review, we do not object to leaving the Agency with the discretion to decide which files will be reviewed. However, with respect to older files, we think that members of the public should be able to petition for review of specific operational files which the CIA may not have removed from the exempt category through its discretionary decennial reviews. We do not at this time have a firm view on the precise age at which files should become eligible for such citizen petition. Whether it should be 25, 30, or 40 years is a question which the Committee should explore with historians and with the CIA.

In order to make this citizen petition for removal of old files from the operational category effective, there should be a right of judicial review when the Agency denies a petition. The standard for such judicial review could be whether a senior official has determined that there is no likelihood that a significant portion of the specified file or specified portion of a file can be released to the public. Thus, the nature of this judicial review could be different from the nature of review of disputes over the release of specific documents, and it would not require page-by-page analysis of the documents in the file which the requester seeks to have removed from exempt status. Such a provision would, we believe, strike a balance between the interests of the public, and particularly historians, in being able to trigger review of specific files for removal from exempt status after the passage of an appropriate amount of time and the CIA's interest in avoiding the burden of page-by-page review in response to such petitions.

In summary, Mr. Chairman, the introduction and consideration of these bills represent an important step forward in balancing the interests of the CIA and the interests of the public in appropriately applying the principles of the FOIA to the Agency. Our position continues to be that if this legislation will not result in the loss of information now available under the FOIA, and if it will result in the improved processing of requests, the ACLU will support it. The Senate deliberations resulted in several significant improvements in the legislation to meet this standard, but there is still important work for this Committee to do in establishing a convincing public record which shows that the bill will meet this standard and in drafting language that will precisely achieve its aims. We look forward to working with the Committee to complete this work.

Thank you, Mr. Chairman. I would be happy to answer any questions the Committee might have.

STATEMENT OF MARK H. LYNCH, COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. LYNCH. Thank you, Mr. Chairman.

We appreciate the opportunity to testify on these pieces of legislation. I have a fairly lengthy prepared statement which deals with a great many issues which have been raised this morning. I would ask that that be submitted for the record, and perhaps I could attempt to summarize that statement and focus particularly on the things that seem to have most interested the committee already this morning.

Mr. MAZZOLI. Certainly.

It would be very helpful, if you could, because you have seen the general area of questions, and you could help us on some of those issues.

Mr. LYNCH. Mr. Chairman, just to give a little background, I have been litigating cases against the CIA under the Freedom of Information Act for about 8 years now, and a couple of things have been clear to me.

First of all, a great deal of useful information is released to the public as a result of the Freedom of Information Act, but at the same time, there is a great deal of information which the CIA invariably and properly withholds under the exemptions which exist in the act because that information is either classified or involves intelligence sources and methods. And it has also become clear to me that, as the testimony from the Agency has indicated, a great deal of time is spent processing and justifying the withholding of information which in the end is exempt and which the courts are going to accept as exempt.

It has been my feeling for a long time that this is not a sensible way to proceed. The burdens of processing this information have resulted in this enormous backlog, 2 to 3 years, which vastly diminishes the utility of the act to the public, and it has contributed to a siege mentality at the Agency which has resulted in all sorts of strategies and ploys to try to put requesters off. Generally things have been mired down. There ought to be a way out of this morass.

As long as the Agency insisted on total exemption from the act, we were obliged to take very strong exception to that position because, as I have said, and as the Senate committee has documented, a great deal of useful information has been released.

So it was a big breakthrough when the Agency came up with the idea of focusing narrowly on operational files, the contents of which are almost always withheld anyway, as the key to defining what should be removed from the coverage of the act.

At the same time, we all recognize that there has been some information of significance released from operational files, and it then became a problem of how to craft certain provisos to provide for the search of operational files in certain exceptional circumstances. The provisos in the bill cover that.

And we now, I think, are at probably the most difficult issue, that being judicial review.

Now, our position on this bill is that if, in fact, it will not result in the loss of any meaningful information to the public, and if it will result in expedited processing, it will be a plus for the public, and it is something that we would support. But those promises from the CIA have to be substantiated on the public record through the process of legislative development, and there are a great many questions and specifics that have to be dealt with.

The Senate Intelligence Committee report answers a lot of those questions, but there still is more work for this committee to do in establishing the public record. There is also more work for this committee to do in fine tuning the bill.

There are a couple of things that we would like to see on the public record. First of all, an analysis of documents which have been released in the past so that we can be assured that these kinds of documents will be subject to search and review in the future. It is my understanding that the CIA has prepared such an analysis, but that it did not get included in the published record of

the Senate Intelligence Committee. We would like to see that on the public record here. [See Appendix D.]

Second, Mr. Mayerfeld earlier this morning referred to an analysis that the Agency has done of pending litigation. Again, we have heard about this analysis, but it has not been put on the public record, and we think that is very important because that lets us see precisely what this bill will do in the real world. It gives us a real world bottom line against which to evaluate the effect of this bill. So we would like to see that on the public record as well.

With respect to improving the processing of Agency requests, the Senate Intelligence Committee has obtained commitments from the CIA to maintain certain budgetary and personnel commitments to freedom of information processing. That is an excellent development and something that we are very pleased to see. In effect, the CIA has promised that, although it may divert individual people that are involved in the process, the Agency is not going to reduce the number of people or the amount of money that it spends on processing, and that the resources that will no longer be devoted to processing operational files will be used to process other files.

But on this processing point there is another problem as well. That is the attitudinal problem, and I do not think the Senate committee got very far into that. Perhaps they assumed it would fall into place. Because of the backlog and the problems which the Agency has perceived itself to be beset with, an uncooperative spirit with the public has developed. We hope that this bill will alleviate that, but we would like to see this committee go a little further with the Agency in developing some concrete plans to improve the efficiency, the cooperativeness, the civility, with which people are treated by the Agency. It is possible to do this. I point to the freedom of information program at the Department of Defense where there are a great many sensitive files, and people are treated efficiently and cooperatively.

If we get this operational file problem out of the way, we would like to see the CIA make some improvements in that regard as well.

Now, turning to the specific provisions of the bills, in terms of overall organization, we prefer the Mazzoli bill to the Senate/Whitehurst bill for a number of detailed reasons which I have pointed out in my written testimony. In particular, I think the Mazzoli bill is a little clearer in the way it sets out in one place the provisos under which operational files will be searched. However, I think the definitions in the Whitehurst bill are more highly refined than those in the Mazzoli bill. So we would like to see the definitional sections—particularly the way they tie the definitions of operational files to particular components of the Agency—included in the framework of the Mazzoli bill.

The issue has arisen as to whether the concept of first party requests can be expanded to include certain kinds of organizations. The bill now provides that, individuals who are U.S. citizens or permanent resident aliens can request information about themselves and that the search in response to those requests will cover all files of the Agency.

The Senate Intelligence Committee's report suggests that the reason the CIA cannot do this with respect to U.S. organizations is

that there are too many incidental references to organizations and that requests by organizations would require a wide-ranging file search. We would like to explore the possibility of meeting the specific objections or the specific problems that the Senate committee focused on, and we think it might be possible to resolve them. We do not have a firm view, but we are offering this proposal as a suggestion. We think it might be possible to resolve the problems identified by the Senate committee if you enabled U.S. organizations whose activities inherently involve the exercise of first amendment rights to request records about themselves—that is to say, political organizations, religious organizations, academic organizations, and media organizations. If you restrict search and review to those kinds of organizations, and further restricted the search only to subject files concerning those organizations where they have been operationally targeted or utilized by the Agency, this would respond to the concern that these organizations may be getting improperly enmeshed in intelligence activities. We think that this approach could avoid the problem of searching for a vast number of incidental references to these organizations.

On the other hand, if it is impossible to do this without aggravating the backlog, then it probably is not feasible, because the backlog is a very important consideration. We do not advocate amendments that are going to exacerbate the backlog problem. But it seems to me that if you limit the requests by U.S. organizations in the way I have suggested, or perhaps in other ways the committee might find appropriate, we can avoid that problem.

One way in which we think the Mazzoli bill is quite superior to the Senate bill is in the proviso dealing with when operational files will be searched for information concerning investigations into illegality or impropriety. The Senate bill provides that this search will be for documents which have been reviewed or relied upon by the investigators. The Mazzoli bill provides that this proviso reaches documents which concern the subject of an investigation into illegality and impropriety.

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.

To give an example of how this might make a difference, there clearly have been a number of investigations by the CIA and by committees of Congress into operation CHAOS. Operation CHAOS was quite a large and wideranging affair. It is conceivable that there could be some files concerning operation CHAOS that were not actually eyeballed by any of the investigators, but nonetheless relate to the subject of operation CHAOS. Under the Mazzoli bill, as we read it, those documents would be included, whereas under the Senate bill, only the documents on operation CHAOS which actually had been reviewed or relied upon by investigators would be subject to search and review. So for that reason we favor the approach taken in the Mazzoli bill.

The Senate Intelligence Committee report provides that documents which may have been disseminated outside of operational

files but then returned for storage in operational files will be subject to search and review. The underlying principle is that anything that is disseminated out of the operational files is subject to search and review. However, there are extraordinary circumstances where some disseminations are on an eyes only basis, and the information is then returned to the Operations Directorate for storage.

As I say, the Senate committee report makes it very clear that such information will be subject to search and review, but that concept is not spelled out in the statute. 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 dealt with in statutory language, which should not be too difficult to draft.

Let me turn next to the issue of historians.

Testimony before the Senate Intelligence Committee made it clear that S. 1324 as introduced was not sufficiently responsive to the interests of historians, because after the passage of time, some operational files can be declassified and these types of operational files can be important to the writing of history. The CIA and the Senate committee responded in a very positive fashion to these concerns. For example, the Operations Directorate informed the Senate committee that the files of OSS, although they are operational, will not be regarded as exempt because they are sufficiently old and of sufficient historic interest that they can be reviewed.

Furthermore, the Agency agreed to undertake not less than every 10-year review of operational files to determine if particular files are of historic or other public interest and if a significant portion of them can be declassified. If so, then they would be removed from the exempt operational status. But this review, this every 10-year review, is solely in the Agency's discretion. It is up to the Agency to decide whether there is historical interest, and it is up to the Agency to decide whether a significant portion of the file can be declassified.

I do not think that that standard is inappropriate for the purposes of the decennial review. However, to accommodate the interests of historians and the interests of the public in historical research, I think it would be useful to establish a mechanism whereby a member of the public can trigger a review of older files, and whereby the standard of review would be whether a significant portion can be declassified.

Now, I do not know what the appropriate age here is, whether it is 25 years, 30 years, 40 years. I think the committee can determine that in consultation with historians and the Agency. But while we heartily commend the discretionary decennial reviews, we think that there ought to be a mechanism at some point after the passage of a sufficient amount of time whereby a member of the public can trigger a review of a file which may not have been taken out of the exempt status in the course of the decennial reviews.

Now, turning to the issue of judicial review which properly has occupied the committee in substantial part this morning, one of the most important and unique features of the Freedom of Information Act as it was passed in 1966 is that it provided for de novo review of decisions by agencies that documents fell within the act's exemption. This is different than almost any other kind of judicial review

of agency action, because usually judicial review of agency action proceeds on the standard of whether the agency was arbitrary or capricious, whether it abused its discretion, whether what it did had a rational basis in fact or law. Those are all highly deferential standards of review, but Congress felt the Freedom of Information Act was sufficiently important that courts should be authorized to conduct de novo review. And in many ways, this feature of de novo review is the engine which makes the act run.

Because of de novo review, agencies have to be very careful in their decisions to withhold information, and the courts have full authority to vindicate the rights which Congress conferred on the public.

Now, when this bill was introduced, we assumed that the provision of the Freedom of Information Act that provides for judicial review would apply to this act. There has been a lot of debate today about whether or not there is judicial review when the statute is silent. As a general rule, in my view, when statutes are silent, there is judicial review. There is judicial review unless a statute affirmatively precludes judicial review. Ms. Lawton, however, has identified a plausible argument—and it is one that has to be taken very seriously because I am sure the Justice Department will make it—that the way the Mazzoli bill is drafted, the Government could argue that Congress intended to preclude judicial review.

As a result of all this debate and all this confusion, Congress is going to have to speak clearly on what judicial review is appropriate, irrespective of what might have been the situation if we were writing on a clean slate. There has been enough debate and enough controversy over this so that Congress is going to have to speak clearly.

I might say that it would be very easy to fix the Mazzoli bill to respond to the point that Ms. Lawton made if at the beginning of section 701(a) the bill said something like the Director of Central Intelligence "is authorized to exempt" operational files located in the various directorates from the provisions of the Freedom of Information Act which require publication or disclosure, search and review in connection therewith. It would be a very easy thing to take away the preclusive effect Ms. Lawton finds in the language in your bill.

I think it is important to focus on what kinds of disputes might arise under this legislation, and I think the discussion up to now has not done that very clearly. We have got to remember that the Agency's experience heretofore on judicial review has been with the question of whether particular documents are exempt under the statute. In order for a court to undertake de novo review of those issues, the affidavit requirement has been developed by the courts, the *Vaughn v. Rosen* affidavit, and it is true that *Vaughn v. Rosen* affidavits sometimes are very long, very extensive. They require the Agency to justify on a paragraph-by-paragraph basis why they take the position that particular documents are exempt.

Now, I do not think that when we have disputes under this legislation we are going to be dealing with the same kind of issue. We are not going to be dealing with lots and lots of documents. We are

going to be dealing with larger questions that are not going to have to be dealt with in that paragraph-by-paragraph fashion.

Ms. Lawton said there is no precedent to guide the courts in the way disputes under this statute might be handled. I have to disagree with her about that. In fact, there is a substantial body of law under the Freedom of Information Act dealing with what courts do when a plaintiff alleges that the Agency has not conducted a sufficiently thorough search for requested documents. That body of law over the adequacy of the search—while it does not fit precisely, will and will not govern precisely the issues which arise under this statute—it nonetheless is a relevant body of precedent. And the kinds of showings that courts require agencies to make when there is an issue over the adequacy of the search simply do not involve the voluminous, detailed *Vaughn* affidavits.

Now, the disputes which might arise under this statute I think are as follows: First, Whether the files are in fact operational files as defined in the bill. Second: Whether documents have been improperly placed solely in operational files. Third: Whether any of the provisos requiring search of operational files are applicable; and that breaks down into three parts, (a) whether the requester is a person entitled to make a first person request for information; (b) whether the request concerns a special activity the existence of which is not exempt from disclosure under the FOIA; or (c) whether the requested information concerns investigation for illegality or impropriety.

We think it is very, very important to maintain the principle of de novo review, but let me stress that de novo review in this context will not require the same kind of litigation demands that the Agency has experienced when the issue has been whether a particular document is exempt under the act. So the kinds of problems that Mr. Mayerfeld was concerned about—and I think I have got him fairly well quoted here in my notes—where the Agency has to examine the entire file system and all pieces of paper, he said he could not live with that. I do not think that is going to be required if we have de novo review of the kinds of disputes that will arise under this statute.

We do think it is essential to have de novo review. Any implication in the Senate bill or the Senate report or the Whitehurst bill that the standard of review is arbitrary or capricious or whether the Agency position has a rational basis would be inadequate in our view. But again, I do not think that resolution of these issues under the de novo standard is going to require the same kind of litigation burdens that questions of exemption under the FOIA involve.

A provision providing for de novo review of the disputes that might arise here would result in the following procedures being followed in court. If a plaintiff alleges in a complaint that in some way the CIA has not complied with section 701, the Agency would be permitted to rebut that allegation with an affidavit from an appropriate Agency official averring that the Agency had in fact complied with the statute. At that point, assuming the sufficiency of the affidavit, the burden of proof would shift to the plaintiff, and he would be required to show that there is a genuine dispute, that the Agency's affidavit is incorrect.

We do not have any objection to this showing being made through an affidavit based on personal knowledge or otherwise admissible evidence because the Federal Rules of Civil Procedure require that now.

Now, if the court finds the plaintiff has raised a genuine issue as to whether the Agency has complied with the statute, the court can then require whatever information the court feels is essential to resolve that controversy, and if the submissions that the court feels are necessary involve classified information, that information will be filed *ex parte*, in camera, as the current practice now proceeds.

One of the things that Mr. Mayerfeld said he was concerned about was giving the plaintiffs an unfettered right of discovery into the Agency's file system. I do not think that would happen under this bill. It would be perfectly permissible to let the court control the questions the Agency must answer, and the court should be guided in that regard by what kind of information it needs to resolve the dispute that has been presented to the court.

Any implication in the Senate bill or in the Senate report that the court's authority in this regard is circumscribed should be rejected by this committee.

Let me also stress that ordinarily the CIA's first affidavit demonstrating compliance with the statute—assuming that it is a sufficient affidavit—is going to resolve the issue because unless the plaintiff can come up with an affidavit controverting the CIA's affidavit, there is no need for the judge to go further.

And as I said several times already, these affidavits would not have to be as detailed as the *Vaughn v. Rosen* affidavits.

For these reasons, Mr. Chairman, we think that you can accommodate the interests of the Agency in avoiding undue litigation demands, and at the same time, our very strong interest in maintaining the vital principle of *de novo* review under this statute.

I would be happy to answer any questions you have now.

Mr. MAZZOLI. Well, thank you very much, Mr. Lynch, and I will yield myself 5 minutes to get started.

Let me get to a few little things before we get to judicial review. You said that you thought the CIA should go on the record with this review of cases which might be affected by the effective date of this bill.

How much more do you need than what Mr. Mayerfeld told us this morning? He gave us the number of cases and suggested that the bulk of them, 46 or 48 of them, would not be affected, and 12 would be.

Mr. LYNCH. We would like to see which cases fall in which categories.

Mr. MAZZOLI. Would you not find that out very soon? Would the court not determine at what point?

Mr. LYNCH. That is my point, Mr. Chairman. I think the public is entitled to know what effect this statute will have on pending litigation before the statute is enacted. Basically, I think we should not be asked to buy a "pig in a poke" here.

Mr. MAZZOLI. Well, you know, the whole thing might be mooted if the committee decides to make it prospective, totally prospective, and then all cases which are inside would be there.

Do you share Mr. Mayerfeld's concern that there will be a whole rush to the courthouse if we do not limit this to some time yesterday?

Mr. LYNCH. Well, my view on the question of retrospective versus prospective application in the last analysis hinges on the backlog. I had understood that it was necessary to have retrospective application in order to clear out the backlog. If that is the case, I think we are prepared to live with retrospective application. On the other hand, if prospective application would not have a horrendous impact on clearing out the backlog, then there would be no reason for this committee not to consider it.

Mr. MAZZOLI. What proof do you need? What sort of things can Mr. Mayerfeld give you that would assure you of how much speeding up and getting into the backlog would develop from a retrospective application of this bill?

Well, maybe you all can talk about that at some point, but if there is something that can be done to assure you, then we might curtail these cases.

If I understand correctly around here, typically we have made laws prospective, and anyone inside——

Mr. LYNCH. I may be wrong about this, but I do not think that the pending cases are the big problem. The big problem is the pending requests which have not yet been processed. If the case is pending in court, I think that the processing has probably been done in almost every case. There may be a couple of cases where they are still processing.

Mr. MAZZOLI. Well, I would not anticipate that if we made the bill prospective that we would allow anyone who has made an application at this point to come in under the old act, I would not think that to be the case. It would seem to me that if they decide to go into court, they do so under the new basis.

Mr. LYNCH. It may be that the way to cut it is between requests that have been processed and requests that have not been processed as of whatever date the committee thinks is appropriate, but the guiding principle here is taking care of the backlog.

Mr. MAZZOLI. Well, if that is the case, and because you mentioned that before, you were thinking in terms of four categories under the first amendment, the clergy, the media, press, and political, and you were a little bit hesitant to extend this first-person exemption, to curtail the first-person exemption for these four areas because it might further build up the backlog, and yet with respect to the historians, it would seem to me that you are adding to the backlog almost inevitably by requiring at the trigger of some member of the public the CIA to examine all these past cases to decide.

It does strike me as being reasonable. If you have a mandatory every 10 years, this decennial review, nothing is going to be too very old at the end of a 10-year period.

Now, the question of whether or not the DCI's determination of what is historical and what is not is maybe at another point, but I worry, frankly, about a trigger just on the basis that that just is going to cause, it seems to me, an incredible amount of paperwork.

Now, tell me a little bit about——

Mr. LYNCH. Well, the key to that, I think, is the standard that you apply for whether a file should be reviewed for exemption from the operational category, and I think it would be appropriate to have that standard be whether a senior Agency official has determined that no significant amount of information can be declassified from that file. That would not require going through the file in great detail. It could be done on a less intensive basis.

The reason why I think that at some point, whether it is 25, 30, or 40 years, that there ought to be an opportunity for citizens to petition for this kind of review is to take care of the possibility that in the course of the decennial reviews the Agency has never made the determination that a particular file can be dedesignated or removed from the exempt category. It is sort of a court of last resort for very old documents to insure that the interests of historians are protected.

Mr. MAZZOLI. Well, you know, I think the committee will discuss it, but it does strike me on whatever basis that you do it that this opens up a whole new area, and if it seems through our oversight—and I guess we could get into the two committees, that the Agency has been derelict about ever opening up anything, I mean, they have this 10-year review and they just simply do it pro forma and say nothing is available, then I think our committee would be in a position then to say that something ought to be done. Maybe the act could then be rewritten to say that public people could trigger it or something. I think I would like to see this play out just a little bit just to see what kind of cooperation you get, because if you start something that is going to require sort of an ongoing review of these files, depending on whatever standard, it seems to me you are going to build up the very backlogs that you might be trying to diminish.

But let me mention one thing just in passing. You hope, and I do, too, that at some point we can develop concrete plans for assisting the public, and I think you used the term "civility." Well, my 51 years of living life has shown me that civility is a two-way street, and I am sure that some of the people that go into the CIA are going in there with blood in their eye and with a chip on their shoulder, and with the belief that this Agency should not exist, and they have done this and done that. And in some cases maybe they have. I think it works both ways.

I have always, in talking to my Federal employees at home, suggested that if they make a good first contact with the public, it makes the whole operation of the Federal Government so much more pleasant that it tends to destroy the image that people have about Federal civil servants.

Again, I think here the teaching process can lean both ways.

Mr. LYNCH. That is where, Mr. Chairman, I think the experience with the Department of Defense is very instructive in this regard. They found that when they dealt more cooperatively with people, people dealt cooperatively with them. They would get a request like a subpoena, intended to cover like a tent, made by people who were very wary that they were going to be cheated out of information. But then the Department would call them up and engage the requesters in a discussion about what it is that they really want, and the requester is so flattered and surprised to get this level of

cooperation that in many cases—obviously some people are prickly—they are able to refine the requests.

Mr. MAZZOLI. Well, I hope so. I do not know what the amount of business is with respect to DOD, but DOD probably has about the same number of requests as the CIA; but, in any event, I think the idea of having some consciousness raising about dealing with the public is important.

My time has long since expired.

The gentleman from Ohio?

Mr. STOKES. Thank you very much, Mr. Chairman.

Mr. Lynch, CIA has expressed some concern relative to discovery in the judicial review process.

What type of materials would be available under discovery? Currently what type of materials are available under discovery?

Mr. LYNCH. Not very much because the courts have placed the burden on the Agency to produce a sufficient amount of information for a judge to make a determination through the *Vaughn v. Rosen* affidavit process. Because the burden is on the Agency, they have to put forth the relevant information. Then if the requester feels that the *Vaughn* affidavit is inadequate, he can either direct his own discovery, which the judges are reluctant to permit, or the requester can protest that the *Vaughn* affidavit is insufficient. If the judge agrees with that, then the judge tells the Agency to be more specific, and sometimes the judge gives the Agency some guidelines on how to be more specific. Sometimes the guidelines are so specific that the Agency's response must be classified and the judge has to review it in camera.

Mr. STOKES. Well, then, how do you think that this legislation would affect the whole question?

Mr. LYNCH. Well, again, if the requester is able to raise a genuine issue that in some way the Agency has not complied with section 701, then the court would direct the Agency to provide however much information the court felt it needed to resolve the dispute that had been raised by the requester. Courts are very reluctant to let people propound numerous and burdensome interrogatories to agencies like the CIA. You do not get that kind of freewheeling discovery that arises in other contexts.

Mr. STOKES. There has been some discussion here, you have mentioned it, the chairman has mentioned it, in terms of the attitudinal problem as it relates to CIA, and I think you have hit upon certainly an area that we ought to be concerned with. However, I do not know how you can effectuate change in attitudinal problems because generally that is a policy problem, sort of like the phone company that says it will be our policy here to speak civilly to people, that you be very cooperative and that type of thing.

I guess one of my questions would be in dealing with other agencies, you have told us how DOD is very responsive, very sensitive to the concerns of people. How are some of the agencies, FBI or NSA, some of the other agencies?

Mr. LYNCH. They are not great. They all have different problems and different attitudes, and very many of them could improve on this score, and it really is—I think you are right—it is a policy matter. It depends a lot on the signals that come from the top, and assuming a good signal comes from the top, then following it up,

getting the right people into the line positions. I am not casting any aspersions on anyone at this point, but there are some people who are talented at this and others who are not talented at it. One of the problems with the CIA is that if you are out there working on FOIA requests, all you have heard for the past several years is that we are going to get total exemption. We have got to get rid of this act altogether. We cannot live with it at all. And if that is what you hear constantly, it is not very encouraging. It does not encourage people at the line level to be open and responsive and so on. They think that maybe the whole thing will go away at some point.

The CIA's support of these different pieces of legislation marks a big watershed. In effect, the Agency is saying that if you give us relief on the operational files, we can live with the Freedom of Information Act, and we think that it is important, that it is not incompatible with our work as an intelligence agency. And that is a beginning.

If the people on the line hear this new viewpoint repeatedly and there is good leadership from the top level management to live with the Freedom of Information Act, then hopefully the processing will improve. But I think that the committee can explore with the Agency some concrete management steps that could be taken. And as I say, some other agencies perform well.

DOD is a good example because they do have some pretty sensitive files over there. They may not be absolutely as sensitive as CIA's, but they are not dealing with inconsequential material by any mean. There may be some lessons to be learned out there.

Mr. STOKES. If I have some more time left, I will ask one other question.

You perhaps heard my questions this morning with reference to concern over whether or not this particular act would foreclose any further investigation with reference to any type of improprieties by the agencies that perhaps occurred during the 1950's and 1960's and even the 1970's, and whether this act would then shut off such investigation once these matters are revealed.

We do know that from time to time there is such a revelation.

Do you have any concerns in that respect?

Mr. LYNCH. Well, the Mazzoli bill would only shut them off if the CIA took no action whatsoever on the allegation of impropriety. If there was an investigation, then the documents relevant to the subject of the investigation would be accessible. So if you were dealing with something recent, it would require stonewalling by the Agency, and then I assume the committees of Congress would get into the act and have an investigation.

Now, I can foresee some new revelation coming out about something that happened in the 1950's or the 1960's, and maybe the oversight committees and the CIA itself would decide that there was too much water over the dam and they did not want to get into it. But then you begin to get into these records through the historical access provision. If the records are old, then they will be coming up for decennial review, and if some kind of citizen petition mechanism were adopted, people could ask that the records be examined.

So I think that the problem you raise is covered through different angles of the bill.

Mr. STOKES. My time has expired. Thank you, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman.

Let me proceed with a couple more things, and then we will adjourn for the morning.

Earlier today, Mr. Lynch, you pointed out the difference between H.R. 3460 and the Senate/Whitehurst bill on the issue of insuring that records concerning improprieties remain subject to search. H.R. 3460 refers to information concerning the subject of an investigation, while H.R. 4431 refers to information reviewed and relied upon during an investigation.

Would you talk to that point for just a few minutes. "Information reviewed and relied upon," where did that wording come from? Is that wording that the Senate staff developed? Is that from some other law? Is there some historical background or precedent for that language?

Mr. LYNCH. I think it is language that the Agency felt was appropriate to deal with this problem.

Mr. MAZZOLI. All right, tell me where I got my language then, just out of curiosity.

Mr. LYNCH. I may have suggested it.

Mr. MAZZOLI. In this situation, what are we really dealing with? How much different information? Is it worth fighting over? The reason I asked you for the precedent for that language is because "relied upon" may be too narrow. There might be some other word for "relied upon" which is different than concerning the subject, because "concerning the subject" is as broad as the universe.

Mr. LYNCH. I understand that criticism of the language in your bill, but the subject is not as broad as the universe. The subject is whatever it is that has been alleged to be improper or illegal. Let me take an example. In some overall intelligence operation there is an allegation that an American citizen has been improperly surveilled contrary to the executive order and the CIA's regulations, and there is an investigation of that. In my view, what this means is that the subject of the investigation is the alleged improper surveillance of the American citizen. It is not the overall intelligence operation in which that impropriety took place, so it would not result in having to search all of the surrounding files but only the files dealing with the alleged impropriety.

Mr. MAZZOLI. What would happen if it were limited to information reviewed?

Mr. LYNCH. What I would like to guard against is the possibility that the investigators overlook relevant records, for whatever reason—inadvertence, possible withholding by the people they are investigating. Whatever the reason, I am trying to deal with the possibility that investigators might overlook particular documents.

Mr. MAZZOLI. Well, I appreciate that. I have to say that my own language, it seems to be just a little bit murky and amorphous, and it may lead to more problems.

Let me ask you a few questions which would have been asked by Mr. Whitehurst or Mr. Goodling were they here, and I would also ask staff to help me if I am improperly asking the question: If you were the judge in a de novo review and the plaintiff challenged the

court's determination, what would be the detailed steps that you would take to resolve the issue?

Do you understand what the question is essentially? In a de novo review, apparently a de novo review of the question of whether or not material has been improperly put in files or been wrongfully designated, if you were the judge in a de novo review of those questions and the plaintiff challenged your determination, I assume that you would say—

Mr. LYNCH. You mean, I think they mean the Agency's determination. If the plaintiff challenged the judge's determination, it would be the court of appeals.

Mr. MAZZOLI. Challenged the Agency's determination, what would be the detailed steps you, the judge, would take to resolve this issue?

Mr. LYNCH. That is a good question. I would say, all right, CIA, I want an affidavit from a senior official responding to this allegation. That person would write an affidavit which I do not anticipate would be terribly long. It would not have to involve the review of lots and lots of documents—explaining that in fact the Agency had complied with the statute. It is the sort of affidavit that agencies are required to file when there is a challenge to the adequacy of search under current FOIA litigation.

All right, if the affidavit rebutted the allegation, then I would ask the plaintiff, do you have any evidence to controvert what this official has said under oath. And if the plaintiff did not have any evidence, that would be the end of the matter. If the plaintiff did present admissible evidence controverting the CIA's affidavit, then I would go back to the CIA and I would say I need more information. I need a more detailed submission. Perhaps in some circumstances, which I do not think would arise very often, I might say, all right, I want to look at a particular document. That is the way I would see these cases develop, with the court having the authority to require whatever information is necessary to resolve the dispute. But vague allegations of noncompliance are not going to trigger this process. It has got to be something specific and admissible for the plaintiff to get the court into this.

Mr. MAZZOLI. I may be asking a question sort of out of synch here because the next one I have is, Mr. Lynch, on judicial review, you indicated that once the plaintiff has the burden, he satisfies that burden by showing a genuine issue of fact.

Do you know if that is the way CIA understands prima facie showing?

I am not sure I fully appreciate the question, but essentially speaking, one of the differences between the Senate/Whitehurst bill and this bill before us, the Mazzoli bill, is that in the Senate bill, in the review procedure, the plaintiff has to show a prima facie case of improper designation, wrongful handling or whatever before the Agency has to answer, before the court comes in.

If I understand correctly, current review procedures allow or require the government to show that it has properly handled the task of designating the place of the papers.

Is that correct, or am I wrong in this, because Ms. Lawton did not quite understand it that way either, yet that seems to be the kind of information I have gotten.

Mr. LYNCH. Yes. Well, the problem with the Senate/Whitehurst bill is that in the first instance when there is an allegation that in some way section 701 has not been complied with, the issue is whether the Agency has complied with its regulations.

Well, I find that to be rather irrelevant, frankly. The question is not whether the Agency has complied with its regulations. The question is in any specific case, has the Agency complied with the statute. Knowing whether the Agency complied with its regulations may be a useful bit of information for the judge in making that inquiry, but I do not think that the inquiry should focus on compliance with regulations. It should focus on compliance with the statute.

All right. Then the way the Whitehurst and Senate bill goes is that after the Agency has come in to show that it has complied with its regulations, then the plaintiff has the burden of coming up with an affidavit making a prima facie showing that the Agency has not complied with statute at that point, if I am reading the Whitehurst bill fairly. It is a little confusing.

Now, the difference here is that I think if there is an allegation that the statute has not been complied with, the Agency ought to file an affidavit saying that it has, and then we get into this procedure where the plaintiff has to come forward with an affidavit controverting the Agency. That seems to me to be a cleaner and more focused way to go than dealing with the compliance with regulations, which is not really relevant, in my view.

Mr. MAZZOLI. Let me ask you another question, Mr. Lynch, to be sure——

Mr. LYNCH. May I add one thing more, please?

Mr. MAZZOLI. Certainly.

Mr. LYNCH. I think that what I am saying really is not in any substantial way different from prima facie showing. It is just that that is not a very commonly used term in this context, and controverting the Agency's affidavit is a more——

Mr. MAZZOLI. More understandable.

Mr. LYNCH. Yes.

Mr. MAZZOLI. Mr. Lynch, on page 20 of your prepared statement, you state that ACLU agrees that the plaintiff will not be able to direct discovery to the CIA on his own initiative.

Is it your position as it is CIA's position that whatever judicial review is provided for in this legislation, this judicial review will not include plaintiff's discovery of the CIA through depositions?

Mr. LYNCH. What I mean to say here is that in the vast majority of cases dealing with the CIA, the courts are very restrictive about letting the plaintiffs initiate their own discovery, and what they are more inclined to do is let the plaintiffs suggest questions that ought to be asked by the court, which is in effect a way of the plaintiff making sure the right questions are asked. But the control is ultimately with the court because judges take control of cases involving CIA documents to a greater extent than they do in ordinary litigation.

So, I do not anticipate in cases arising under this bill that the plaintiff would be able to notice a deposition of a CIA official and bring him down to the plaintiff's office and ask him questions under oath there. I would not preclude, however, the possibility

that the judge in some extraordinary circumstances might decide that he wants to hear live testimony from somebody from the CIA, and if he does that, the plaintiff might say Judge, these are some questions I think you ought to ask. But in the end, the discretion is with the judge.

Mr. MAZZOLI. Do you have any idea of what the Central Intelligence Agency understands this whole range to be as far as depositions and discovery? Does that cover—

Mr. LYNCH. One of the things that bothers me the most about the Whitehurst language and the Senate language is it leaves so much to chance and to litigators' ingenuity. It is just not clear enough.

And that is another point, Mr. Chairman, that applies particularly to this section, but with everything else in this bill. I plead with the Congress to nail everything down. Do not turn the plaintiffs' bar and the Justice Department litigators loose on each other to argue that the bill meant this or that, where one side has a little bit of legislative history here, and the other side has a little bit of legislative history there. We have wasted a lot of time in the last 8 years doing that sort of thing. I would like to get it all straightened out and agreed upon and have the bill and the legislative history crystal clear.

Mr. MAZZOLI. How in the world could I have ever written a bill that was totally sound on judicial review, if I am to believe—how could I have ever written such a bill?

Mr. LYNCH. Well, it is clearly something that has got to be addressed, and it should have been addressed earlier.

Mr. MAZZOLI. One last question, Mr. Lynch from my colleagues here.

Under the Senate bill, to get judicial review of issues of improper designation or improper placement, does not the plaintiff have to file the affidavit with his complaint, and in fact, the mere allegations in a complaint are not enough under the bill?

Is that your understanding under the Senate bill, the Senate and Whitehurst, that allegations alone would not be enough, that you have to have an affidavit with the complaint?

Mr. LYNCH. Yes, I think it does contemplate a verified complaint. That is not totally unacceptable. It is just an extraordinary thing to do. Verified complaints are not generally required in Federal practice, and it seems to me to be a bit of overkill perhaps.

Mr. MAZZOLI. Well, I certainly appreciate your help. Obviously this whole issue of judicial review is very complex, and for people like ourselves who do not practice the law, and are trying to remember what the old practice was and trying to understand the terminology, it is very difficult, but I think today's testimony has at least sharpened the focus on a couple of issues that are really prime.

I do not know, are you and Ernie going out to lunch today or something? Maybe you guys—or maybe I ought to find a room and just slide your food in under the door, and maybe the two of you can sit down and talk it over.

Mr. LYNCH. He has got to read my testimony which he said he has not done yet.

Mr. MAZZOLI. Well, thank you all very much.

The committee stands adjourned until 1:30 this afternoon, when we will continue.

[Whereupon, at 12:04 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION (1:48 P.M.)

Mr. MAZZOLI. The subcommittee will come to order.

Our witnesses for the afternoon session are Mr. John Shenefield, representing the American Bar Association; Mr. Charles Rowe, representing the American Newspaper Publishers Association, and Mr. Sam Gammon representing the National Coordinating Committee for the Promotion of History.

Mr. Shenefield, as we all know, is a former Associate Attorney General of the United States and a partner in the lawfirm of Milbank, Tweed, Hadley & McCloy. Mr. Rowe is the editor and publisher of the Fredericksburg, Virginia Free Lance Star. Dr. Gammon is currently the executive director of the American Historical Association. Prior to assuming this position he was in the Foreign Service for some 27 years and, among other positions, was Counselor for Political Affairs in Rome, Deputy Chief of Mission in Paris, and Ambassador to Mauritius.

Gentlemen, if you care to come forward, we could perhaps hear from each of you sequentially, and then we could maybe get together and talk over a little where we are.

Thank you very much. Maybe, Mr. Shenefield, you are in the center, maybe not philosophically but geographically, and I say that lovingly since we have been together many a time in the past. But it is good to see you again, and you may proceed, and then we can get to the other statements and then maybe have some questions.

[The prepared statement of John H. Shenefield follows:]

STATEMENT OF JOHN H. SHENEFIELD

Mr. Chairman and Members of the Committee: It is an honor to appear here today on behalf of the American Bar Association to address H.R. 3460 and H.R. 4431, bills to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

These bills address a problem caused by the intersection—some would say the collision—of two powerful postulates on which our system of government is based. First, in our democratic society, the most fundamental decisions are made by our citizenry at the ballot box. Those voters must be endowed with the wisdom of educated choice that can come only from the availability of information. But second, and cutting across the need for freely available information, is the fact of life that secrecy is essential to our national security in those narrow areas in which the dangers caused by disclosure outweigh the benefits. The application of the Freedom of Information Act to our intelligence community is the best possible example of one fundamental goal in uneasy tension with another. The task of these bills is to address the problems that have been caused by that tension, and to adjust the competing values.

An informed citizenry is one of our society's highest ideals. The First Amendment to the Constitution is eloquent testimony to the importance we as a Nation place on freedom of expression as a prerequisite to the emergence of the truth. Our founding fathers were confident that truth, if given a chance, would prevail in the marketplace of ideas. Much of our public policy is dedicated to ensuring that the competition in the marketplace of ideas is fair and unfettered. Education policy, communications policy, political campaign and contribution laws, the law of libel, and patent policy are only a few examples of decisions by our society to emphasize the importance of making information available, in contrast to other competing values. To

these ends, we have always valued a free press, unruly as at times it may be; a diverse academic community, as searching and persistent as it should be; and an inquiring citizenry, as awkward as that can be—all dedicated to ferreting out and publishing facts, even when they embarrass or are uncomfortable or may cause inconvenience, even injury. We have insisted on erring on the side of disclosure.

An important component of our effort as a Nation to be sure that our citizens have access to the facts is the Freedom of Information Act. As enacted originally and then as amended, the Act was designed to improve the access of the public to information about our government. No longer was it sufficient for government, in resisting requests for information, simply to rely on vague expressions of reluctance or privileges of uncertain scope. The Congress on behalf of the people had laid out the contours of those narrow categories in which, at least for a time and in the service of some supervening justification, the public could be denied information. Even in those areas, Congress established independent judicial review to ensure that the government lived up to its obligations.

The area of national security should not be a generalized exception to our predisposition in favor of public disclosure of information. Indeed, one essential component of true national security is an informed citizenry and the support that, as a result of education, it gives more confidently to its government. Surely no area of our national life is more important, and in no other area of government activity are the concerns of the public to understand and help make decisions more commendable. In a world in which war, terrorism and intrigue are commonplace, we as Americans not only have a right to know, but the duty to find out, to analyze in a hard-headed fashion and to come to sound conclusions, especially when the implications of those conclusions are grave and the actions called for are difficult and momentous. When our sons may be called upon to give their lives to protect the national security, when our cities are held in a strategic balance of terror, when our resources are so completely committed to establish and maintain our defense, there can be no thought that the area of national security is immune from public inspection.

Because we do not live in a benign world, we confront adversaries who do not share our goals nor play by our rules. Information that might be of some relevance in public debate may be the same information that confers a decisive strategic advantage on those who are antagonistic to our ideals, to our interests, indeed to our very existence. It is a matter of common sense, then, that there are areas of our national security that cannot be open to public view and that chief among these are the operational decisions of an effective intelligence service. Moreover, it follows equally that certain essential files of information at the core of the operation of our intelligence service contain information so sensitive that every step must be taken to safeguard it against discovery or release.

Extraordinary steps are in fact taken to protect such information. Classification standards, while recognizing the importance of an informed public, nevertheless permit withholding of information in those areas where disclosure could reasonably be expected to cause damage to the national security (E.O. 12356). The organization of the sensitive files in the intelligence community is compartmented so that only those persons with a need to know have access.

It does not follow, however, that there is no legitimate room for public inquiry in the intelligence community. Where intelligence information has been furnished to policy-makers and has formed the basis for important national policy decisions, inquiry—if not always disclosure—is appropriate. Where there are non-trivial allegations of illegality or impropriety, the public has a right to ask questions. Unfortunately, the Freedom of Information Act, as presently structured, does not in the accommodation of these important predicates for public inquiry give sufficient weight to the enormous sensitivity of the central operational files. In an effort to strike a balance appropriate to government across-the-board, the FOIA properly subjects important aspects of the intelligence community to the healthy scrutiny of the American people. But to the extent it requires the search and review of files that can in the end never be made public, FOIA in this instance is futile, and possibly even disastrous.

The problem arises in this stark form because the Freedom of Information Act applies fully to the Central Intelligence Agency. A request requires the search and review of literally all files likely to contain responsive information. This can involve the search of over 100 files where a complicated request is made. Information can be refused on the grounds that it is properly classified (Section 552(b)(1)) or that it is specifically exempted from disclosure by statute (Section 552(b)(3)). In the case of the Central Intelligence Agency, a (b)(3) exemption may be triggered by Section 102(d)(3) of the National Security Act of 1947, providing that the Director of Central Intelli-

gence shall be responsible for protecting the intelligence sources and methods from unauthorized disclosure.

The result of this process is the release on occasion of minute, frequently incomprehensible, disconnected fragments of documents, which are islands of unprotectable material in the vast exempt ocean of classified and sensitive information. What emerges is of marginal value to informed discourse and on occasion, because it is out of context, is highly misleading and indeed distorting to scholarly analysis and public debate.

And yet this dubious result is achieved at the price of expenditure of enormously scarce resources. The systems of search, review and confirmatory review necessarily in place in the CIA to avoid release of information that might compromise extremely sensitive operations takes the time not of government clerks, but of intelligence professionals. Furthermore, even with a system of review redundancy, the potential for human error is present. Indeed, there are examples of sensitive material mistakenly released. Moreover, we are told that allied intelligence services and overseas contacts that are the sources of much of the intelligence in our possession are so concerned about the applicability of the Freedom of Information Act to the CIA, from initial request to judicial review, that they are increasingly reluctant to put their own lives on the line in the service of our government. In sum, the applicability of the Freedom of Information Act to these sensitive files yields very little information, if any, on the one hand, but it holds the potential for mistaken disclosure, tends to constrict the flow of information, on the other.

As this problem has become evident in recent years, there has been a series of efforts to deal with it. Differences that exist now concern only the mode of solution. What is clear is that there is a broad consensus that some solution is very much in order. The House of Delegates of the American Bar Association gave voice to that consensus at its 1983 Annual Meeting by passing a resolution in favor of significant relief for the intelligence community from the applicability of the Freedom of Information Act.

Commentators now generally agree that exemption from the Freedom of Information Act should cover only information the release of which is virtually never appropriate. The complete removal of a category of information from the Act should be as narrowly defined as is possible.

In support in principle of both H.R. 3460 and H.R. 4431 as effective solutions that meet this standard, we can say several things. First, they will result in virtually no lessening of the amount of information that has hitherto been available from the intelligence community. Second, they avoid the risk of human error that may result in the fatal compromise of highly sensitive intelligence operations. Third, they avoid the dedication of elaborate resources to the essentially futile task of reviewing documents that can in the end never be released in any event, and thus free up intelligence professionals to do the task for which they are best suited. Fourth, they inevitably will reduce the backlog and the litigation over the backlog, so that requests that can be responded to will be addressed in a more timely fashion. And finally, they will reduce the reluctance to cooperate of those abroad who do not fully understand our general system of disclosure of information, and thus they will enhance the effectiveness of our intelligence capability.

While both bills are significant improvements over the status quo, I personally admit to a preference for H.R. 4431. That bill is somewhat more precise in laying out the mechanics by which certain operational files are exempted. Moreover, the scope of judicial review is defined.

Nevertheless, both bills are modest compromises that safeguard the essential central operational files of our intelligence capability at the CIA. They are carefully crafted to avoid an unnecessarily broad exemption from the Act and its underlying policy. They preserve access to finished intelligence, information concerning authoritatively acknowledged special activities, studies of intelligence prepared for training purposes, and even raw intelligence supplied to policy-makers in its original form to assist in policy decisions. They avoid closing off access to information concerning illegal or improper intelligence activities. They are astute blends of practical effectiveness that avoid violating an important policy preference in favor of informed public debate.

In short, on behalf of the American Bar Association, I support in principle both bills, although with a slight preference for H.R. 4431. I do so because I believe that in this narrow instance, an exception to our general rule of access to information about our government is thoroughly justifiable. I do so because here the balance in favor of secrecy overwhelms the theoretical benefit of access to sensitive information that can never in the end be released. I do so in the firm belief that in this small area, secrecy must be preserved, so that we do not unnecessarily jeopardize

the security of our domestic institutions that make this entire issue of such importance. This Nation, which gains so much strength from the debate of an informed citizenry, can in this instance protect that strength most effectively by imposing the discipline of secrecy on the operational files of the Central Intelligence Agency. Both bills under consideration here successfully mediate that policy tension and either deserves speedy enactment.

STATEMENT OF JOHN H. SHENEFIELD, FORMER ASSOCIATE ATTORNEY GENERAL, CURRENT PARTNER, MILBANK, TWEED, HADLEY & McCLOY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. SHENEFIELD. Mr. Chairman, members of the committee, I am delighted to appear here this afternoon on behalf of the American Bar Association, which is the nationwide professional association that has as its members, I believe, most of the practicing lawyers in this country.

The American Bar Association has addressed this issue by resolution of its house of delegates last summer, and they have authorized me to appear here to address H.R. 3460 and H.R. 4431, to convey to the committee their views on public disclosure of intelligence information.

I assume that the written statement will be printed in the record.

Mr. MAZZOLI. Thank you for reminding me.

Without objection, all the written statements submitted will be made a part of the record, and you may read them or speak from them, however you wish.

Mr. SHENEFIELD. I will say only that the chairman of the standing committee, John Norton Moore, would have been here this afternoon but for the fact that he has a class scheduled in Charlottesville. I am happy therefore to convey his views and the view of the standing committee and the views of the ABA in endorsing both of these pieces of legislation, although stating a slight personal preference for H.R. 4431 simply because it deals more precisely with the mechanics of judicial review, which is obviously a central controversy.

Both bills would result in my view in virtually no lessening of the amount of information of a national security kind available to the public from the intelligence community. Both statutes avoid the risk of human error which is always possible any time documents of this sort are being reviewed and processed for production. Both statutes avoid the involvement of enormous resources in the review of documents at Langley, virtually all of which are always exempt in any event, and both would, if enacted, substantially reduce the backlog of requests so that requests that are legitimate can be responded to more expeditiously. And, finally, both bills would encourage, in my view, the kind of cooperation from those abroad on whom our intelligence system relies but who do not now feel that they are guaranteed the kind of anonymity that their performance in this context requires.

One brief word on judicial review before I conclude, Mr. Chairman. The Carter administration, as a matter of historical record, had developed recommendations in this area, as you undoubtedly recall, that would have precluded judicial review. The thought was that judicial review inevitably is so crude and susceptible of mis-

take that it is unwise to subject these kind of documents to that sort of risk.

On the other hand, the American Bar Association, in its actions of last summer, espoused a standard of judicial review that was exceedingly deferential to the intelligence community. They would have been willing to accept judicial review standards that in effect honored any nonfrivolous—and that is a very low standard—any nonfrivolous action by the Director of Central Intelligence.

Whatever the standard of judicial review chosen by this committee and by the Congress, it seems to me that the essential concept must be that in the absence of absolutely clear abuse, the action of the Director of Central Intelligence stands, and that the procedures for reaching that conclusion do not involve exposure of the documents themselves to the adversary parties, certainly, and only in the very rarest cases to the court itself.

With that, Mr. Chairman, I will subside and allow my colleagues on either side of me, physically, at least, if not in position, to speak further, and then perhaps we can have a debate.

Mr. MAZZOLI. Thank you very much, Mr. Shenefield. You were, I remember vividly—it seems like yesterday, but it was what, 4 years ago, 3 years ago, you were here?

Mr. SHENEFIELD. Yes.

Mr. MAZZOLI. But I remember when you used to appear before our Judiciary Committee quite a bit, you were always a person who respected our time constraints, and you continue to do so today. So I appreciate that very much.

I would like to now recognize Mr. Rowe and to invite his—again recognizing your statement as part of the record, and hear from you in any way you wish.

[The prepared statement of Charles S. Rowe follows:]

STATEMENT OF CHARLES S. ROWE

Mr. Chairman and members of the Committee, my name is Charles Rowe and I am the editor and co-publisher of the Free Lance-Star in Fredericksburg, Virginia. I am testifying today on behalf of the American Newspaper Publishers Association and the American Society of Newspaper Editors.

The American Newspaper Publishers Association is a nonprofit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of nearly 1400 newspapers accounting for more than 90 percent of U.S. daily and Sunday circulation. Many non-daily newspapers also are members.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 men and women who hold positions as directing editors of daily newspapers throughout the United States.

Mr. Chairman, at the outset, I want to thank you for affording me the opportunity to provide our views on legislative proposals to exempt certain CIA operational files from the search and review provisions of the Freedom of Information Act (FoIA).

First let me say that ANPA and ASNE support the existing FoIA. The act serves as tangible proof in our society that the spirit of open government which pervaded the founding of this great nation still lives; that this representative government still cherishes the concepts of a free society made up of free people who are entitled to information about how their government operates and how its decisions are made. When editors and publishers defend the FoIA, we do so not solely in our personal interest, but in the interests of the individual citizens of this free society. Naturally, it concerns us when any proposal is made to weaken the FoI Act.

Over the past few years there has been considerable debate about the problems faced by the CIA in complying with FoIA. In an October 1, 1982 letter to the Editor of the New York Times, CIA Director William Casey stated that "there is an inher-

ent incompatibility in applying an openness in government law to intelligence agencies whose mission must be carried out in secrecy."

There are two points which must be remembered in looking at the CIA and its problems with the FoIA. First, the existing statute recognized exceptions required to strike the delicate balance between openness in government and the need for a degree of secrecy in our intelligence operations. Exemptions 1 and 3 of the FoIA, in conjunction with Section 102(d)(3) of the National Security Act of 1947, protect classified national security information and intelligence sources and methods from disclosure. Courts have given great deference to the CIA in accordance with the aforementioned exceptions.

The CIA has not been forced to release information when it believed that such release would harm national security.

Secondly, the CIA has stated repeatedly that the existence of FOIA deters foreign intelligence sources from cooperating with the CIA. The CIA might well devote more effort to educating the foreign intelligence world and its sources on the statutory protections provided by FoIA and the National Security Act.

For example, it could reiterate abroad Admiral Stansfield Turner's statement, made to the 1980 ASNE convention in Washington, D.C., in which he stated:

" . . . we have not lost a case in the court when we have claimed that something was classified and therefore could not be released."

Mr. Chairman, we are pleased that the CIA no longer seeks a full exception from the FoIA. At the same time, representatives of the newspaper business have not rejected out of hand the CIA's pleas for relief from the FoIA search and review requirements. Over the past few years, we have met with the CIA several times to develop a dialogue on this issue.

The two press associations which I represent here today carefully monitored Senate consideration of S. 1324 from its introduction. We were concerned then that the legislation could deny information to the public which is now available. A degree of concern remains with us.

The version of S. 1324, passed by the Senate, which is similar to H.R. 4431, is much improved over the original bill. These improvements include: a judicial review provision, a requirement that the file designation be reviewed at least every 10 years, and continued search and review requirements for information in designated files that was reviewed and relied upon in an official investigation. Additionally, under S. 1324 and H.R. 4431, the CIA director is required to promulgate regulations concerning the designation of CIA operational files.

However, even with the provisions for judicial review and implementing regulations contained in the Senate bill, this legislation vests the CIA with a great deal of power to subvert the spirit of public access to information. At this stage, we do not know the percentage of CIA files which will be designated by the Director as "operational". The public's primary defense against overzealous secrecy lies with this committee's oversight responsibilities, together with the House Government Operations Committee and those of your Senate colleagues. Misfiled information, which currently would be subject to search and review, may never see the light of day under this legislation.

As a representative of the newspaper business, I do not pretend to be an expert on the intricate workings of the CIA. However, I urge the committee, in its deliberations on H.R. 3460 and H.R. 4431, to take a fresh and careful look at the question of whether in fact this legislation even inadvertently may result in denial of information currently available under FoIA. I hope that anything passed by Congress to relieve processing burdens won't also result in putting additional information under wraps.

Following Senate hearings on S. 1324, in response to a request by Senator Leahy, the CIA submitted a list which indicated the impact of S. 1324 on pending cases. According to this list, approximately 16 cases may involve information in operational files, which under S. 1324 would be exempt from search and review. It is not immediately apparent why certain cases fall within or without the new exemption. These cases should be carefully reviewed by this committee to fully understand the definition of "operational files" that will be employed by the CIA. We ask that you also give some careful thought as to whether this definition might easily be further broadened by some future CIA director.

Mr. Chairman, I would like to call the committee's attention to three specific provisions of H.R. 4431 that need improvement.

JUDICIAL REVIEW

S. 1324, as introduced, did not contain a judicial review provision. Neither does H.R. 3460. In testimony before the Senate Intelligence Committee, we joined other witnesses in calling for the inclusion of such a provision. At that time, we stated, and I reiterate here today, that a major and vital principle of FoIA is the right to judicial review. The Senate-passed version of S. 1324 does include a judicial review provision, but we believe it needs to be strengthened.

Under S. 1324, in order to secure court review, an individual would have to have personal knowledge or otherwise admissible evidence of an improper designation of specific files or improper placement of records in designated files. The committee should carefully examine the difficulty which a requestor will have in getting into court under this provision.

Even where a prima facie showing is made, under the provisions of the bill court review is limited to review of the CIA's sworn response. In order to be effective, the judicial review provision should empower the court to independently to review the file, in camera if necessary, to determine whether a proper designation was made. This is in accordance with the judicial review provision contained in FoIA, which requires de novo review of the withholding of classified material.

COVERT ACTION/SPECIAL ACTIVITY FILES

Mr. Chairman, probably the most controversial of CIA activities has been covert action operations (or special activities) which involve influencing events rather than just gathering information. H.R. 3460, H.R. 4431 and S. 1324 all provide that the CIA will continue to search and review operational files about CIA covert action operations (or special activities), if the fact of the existence of the activity is not exempt from the FoIA. The net effect of this provision would appear to deny search and review of special activity files. Presumably, all covert action operations are classified, and thus fall under Exemption 1 of the FoIA. Only in those rare cases, where an official of the Executive Branch has officially acknowledged the existence of the operation, would the search and review provision still be applicable.

OPERATIONAL FILES SUBJECT TO OFFICIAL INVESTIGATION

All three legislative proposals (HR 3460, HR 4431 and S 1324 as passed) also provide for continued search and review of information in designated files which were reviewed and relied upon in an official investigation for illegality or impropriety in the conduct of an intelligence activity. The provision does not address cases where the investigators merely sample a relevant file, overlook a file through inadvertance or where the information is withheld from investigators. The provisions should be strengthened to assure that all information relevant to the subject of an investigation remains accessible. While the report accompanying the bill addresses these issues, mere report language in our opinion is inadequate. Report language is not binding, and these loopholes should be addressed in the statute itself.

BACKLOG OF REQUESTS EXPEDITED REVIEW

Journalists have experienced excessive delays in CIA processing of their FoIA requests. The average time for processing a request is about two years. Advocates of S 1324 argue that passage of the bill will result in eradication of the backlog.

The current backlog serves to deny information on a timely basis, but while elimination of the backlog is desirable, it should not be at the expense of denial of information forever. As we have previously stated, this issue should be carefully examined by the committee. Further, we do not believe that any of the legislative proposals, including S 1324 and its report language, guarantee that the goal of elimination of the backlog will be achieved. When the CIA was questioned on this point at the Senate Intelligence Committee hearing, the response was troublingly vague. The report accompanying S 1324 contains helpful language, but there is nothing to prevent the CIA from the reallocating its resources elsewhere.

If, in fact the committee goes forward with legislation to exempt certain operational files, then at a minimum, the legislation should provide the public with streamlined processing of FoIA requests which do not required extensive search, review and coordination.

CONCLUSION

Our nation's newspapers recognize the need for a degree of secrecy in our intelligence operations. However, this must be balanced against the principle of open gov-

ernment in our free society. As Justice Black stated in the Pentagon Papers case, *New York Times v. United States*, 403 U.S.C. 713,724 (1971),

"Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."

The amendments made to S 1324, which are substantially embodied in HR 4431, clearly improve the bill. However, we urge each member of the committee and your staff to carefully review again the important points raised here. The balance between secrecy and openness is for you to strike.

As the committee with oversight responsibility for the CIA, you have a special responsibility. You have access to secret information of CIA operations which is not available to the public. In the event that this legislation is enacted, the public must rely on you to oversee implementation and to safeguard the public's right to an open government.

**STATEMENT OF CHARLES S. ROWE, EDITOR AND PUBLISHER,
THE FREE LANCE STAR, FREDERICKSBURG, VA., ON BEHALF
OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS**

Mr. ROWE. Thank you, Mr. Chairman.

At the start, I might point out that in addition to representing the American Newspaper Publishers Association, I am wearing a second hat here today as a representative of the American Society of Newspaper Editors.

Mr. MAZZOLI. Thank you very much.

Mr. ROWE. I will submit parts of my written testimony and deal with some of the key points orally.

I think there are two points that we should remember when we look at the CIA and the problems it has had with FOIA. The first is that the existing statute does recognize the exceptions that are necessary to strike a balance between the need for secrecy with regard to intelligence operations and the openness that a democratic society requires.

Under FOIA you have exemption 1, which protects classified information; exemption (b)(3) is triggered by section 102(d)(3) of the National Security Act and protects intelligence sources and methods from disclosure. And in addition, courts generally have been quite deferential to the intelligence community when dealing with these exceptions.

Second, the CIA has stated repeatedly that the existence of FOIA deters its sources from cooperation. We feel that if CIA spent a little more time trying to educate their sources as to the protections that are provided under the law and the protections that the CIA can give them, they might address part of what they call the perception problem. Maybe they should repeat more often what Admiral Turner had to say back in 1980 when he reported that CIA had not lost a single case in the courts when it claimed that information was classified and should not be released.

We are very happy, Mr. Chairman, that the CIA is no longer seeking an absolute and full exemption from the act. At the same time, we have not rejected out of hand their pleas for some relief from the search and review problems that may be unique to them.

Over the past few years both ANPA and ASNE have had several meetings with CIA personnel in an effort to develop a dialog on the issue. The two associations that I represent here today followed S. 1324 quite carefully as it proceeded through the Senate. We were

concerned when that bill was introduced that the legislation would be used to deny to the public considerable information that had previously been available.

The bill as it came out of the Senate was much improved. We still have a few concerns with it that I will discuss subsequently.

The improvements that we see in S. 1324 and in H.R. 4431 are the requirement for judicial review, the requirement that file designations be reviewed every 10 years at least, and the continued search and review requirements for information in designated files that was relied on in an official investigation.

But even with the judicial review provisions and the implementing regulations that are required, the bill gives the CIA tremendous power which, if misused, can subvert the principle of public access to information.

I do not know what percentage of the CIA files are going to be designated by the DCI as operational. This morning we heard a reference to tens of thousands of files that might be so categorized. I think that we in the press and the public will have to depend very heavily on this committee, the Government Operations Committee, and their Senate counterparts with oversight responsibilities to see that the CIA conforms in spirit to the law.

As a representative of the newspaper business, I do not pretend to be an expert on the intricate workings of the CIA, but I would hope that this committee, when it considers H.R. 3460 and 4431, will take a careful look at the question of whether this legislation may even inadvertently result in the denial of any information that is currently being made available under FOIA. If we are to relieve the CIA of its processing burdens, let's not put any additional information under wraps.

Following the Senate hearings on S. 1324, the CIA submitted a list which indicated the impact of that bill on pending legal cases. According to the list, I believe there are approximately 16 cases that might involve information in operational files which under this legislation would be exempt. I am not really quite certain why certain cases fall within or without the new exemption. I do hope that this committee will be careful to carefully define the matter of operational files and make certain that the CIA will not misuse this to give blanket classification to huge quantities of information.

The matter of judicial review was the subject of considerable discussion this morning. The testimony that I gave before the Senate Intelligence Committee indicated that we strongly favor the inclusion of a judicial review provision. We think that it is a vital principle of FOIA to have the courts overseeing the act, including the search and review exemption. While S. 1324 does include a judicial review provision, we think that this could be strengthened.

In order to secure a court review, an individual has to have personal knowledge or otherwise admissible evidence of an improper designation or improper placement of records in a designated file. We hope your committee will look carefully at the question of just how difficult it might be for a requester to meet this high standard.

Even where a prima facie showing is made, under the provisions of the bill, court review is limited to the CIA's sworn response. In order to be effective, we think the judicial review provision should empower the court to independently review the file, in camera and

ex parte if necessary, to determine whether a proper designation was made.

The provision in S. 1324 concerning information in designated files reviewed and relied on in an investigation of illegality, does not address the cases where investigators might merely have sampled a file, where they may have inadvertently overlooked a file or where perhaps information was absolutely withheld from the investigators. We believe this provision should be strengthened to insure that all information relevant to the subject of an investigation remains accessible. The language in H.R. 3460 adequately addresses this problem.

And while the report accompanying the Senate bill does address these issues, we feel that mere report language is not adequate. In this respect, while I may have indicated earlier that I prefer H.R. 4431, in this particular respect, Mr. Chairman, your bill is preferable.

Concerning the backlogs, as we have heard, it takes 2 or perhaps even in some cases 3 years for the CIA to process a request. Obviously for most journalistic purposes this delay is just absolutely impossible.

The current backlog is denying information on a timely basis. While we do hope that the backlog can be drastically reduced, we do not favor eliminating the backlog by just arbitrarily denying huge quantities of information that should be released. We hope the committee will look carefully at this question. In addition, we do not believe that any of the legislative proposals, including S. 1324 and its report language, guarantee that the goal of elimination of the backlog will be achieved.

The CIA's responses at times in this regard have been somewhat vague, and we hope that perhaps your committee can get from the CIA a more exact commitment on just how they will tackle that backlog and how rapidly they can dispose of it.

In conclusion, Mr. Chairman, our Nation's newspapers recognize the need for secrecy to a considerable degree in intelligence operations. We feel, though, that this must be balanced against the principle of open Government. As Justice Black said in the Pentagon Papers case, secrecy in Government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

The amendments to S. 1324 that are embodied substantially in H.R. 4431 clearly improve the bill. However, we urge each member of this committee and your staff to carefully review the points I have raised here. The balance between secrecy and openness is yours to strike.

As the committee with oversight responsibility, you have a special responsibility to the American public. You have access to information that the general public does not have, and in the event this legislation is enacted, the public and the press will be relying on you in your oversight capacity to safeguard the right to an open Government.

Thank you.

Mr. MAZZOLI. Thank you very much, Mr. Rowe.

Professor Gammon, welcome, and we would be happy to hear from you.

[The prepared statement of Samuel Gammon follows:]

STATEMENT OF SAMUEL R. GAMMON

My name is Samuel R. Gammon. I am a retired Ambassador and the executive director of the American Historical Association. I am presenting testimony on behalf of the National Coordinating Committee for the Promotion of History and particularly for the 20,000 members of the Organization of American Historians and the American Historical Association in opposing HR 4431 and HR 3460. These bills, together with Senate bill 1324, would amend the National Security Act of 1947 to exempt partially the Central Intelligence Agency from the Freedom of Information Act, as amended.

Mr. Chairman, historians are deeply troubled by any proposal that would automatically debar legitimate research into the past of our great nation. We perceive the two bills as doing just that. There is a broad area of agreement between even the most zealous historical researchers and the most ardent government advocates of protecting security information in the hands of the federal government. We all agree that openness, as created by our democratic traditions and by the Freedom of Information Act, promotes the general welfare; we all agree that classifying and withholding certain items of security information relating to military, diplomatic and intelligence matters provide for the common defense. We perceive no constitutional conflict here on the principles. Our differences come on matters of application. Both sides would agree absolutely that at the secret end of the scale of 1 to 100 there are matters to be protected and both sides would agree absolutely that at the other end of the scale there are matters which should legitimately be open to public scrutiny. It is the 80% in between which brings scholars swarming out of their studies and bureaucrats from their warrens at Langley in bitter disagreement.

Mr. Chairman, historians accept that documents on intelligence methods and sources need to be protected and that those documents should properly be classified and should be withheld from scrutiny, whether requested under the Freedom of Information Act or coming up for declassification under systematic review precedures. The chief argument of the Central Intelligence Agency and of proponents of the two bills is that hunting for and identifying documents which will probably be refused anyway is just too darn much work, and therefore the Agency should be permitted to designate Operations Division, Science and Technology Division and Security files as exempt from such mandatory review. In lengthy discussions with Senator Durenberger with respect to S. 1324, the progenitor of these two bills, the Agency conceded that it would review all such files at least once every ten years to see if it could dump them back into the pile eligible for FOIA consideration. That concession is incorporated in HR 4431 (page 8, lines 3-12).

I fail to see, therefore, how this labor-saving legislation, designed to exempt the CIA from finding out what is in its "operational" files in response to FOIA requests, will save it any work whatever. True, they could wait ten years from enactment before launching a crash project to review all documents in the exempt category, and perhaps the Micawber principle would let something turn up in the meantime to save them from the shirked labor, but I submit that this would be neither prudent management nor responsible stewardship.

The proposed HR 4431, therefore, would not serve its purpose.

Mr. Chairman, during my 27-year diplomatic career, I spent over five years on the seventh floor of the State Department, encountering a great deal of classified material, including much sensitive compartmented intelligence from the CIA. Indeed, the daily Top Secret Summary of the Department, seen every morning by the President, SecDef, DCI, and SecState, and which usually contains 25-30 percent codeword material or sensitive compartmented intelligence, was produced under my direct supervision during two assignments to the Executive Secretariat totalling three and one-half years. (I claim no credit, however, for the readership this interesting publication has lately enjoyed among the inmates at Lorton. That is a form of openness which even zealous historians deplore.) I also know how harried bureaucrats operate, having been one myself during 15-hour days under Secretary Kissinger.

The existence of an exemption for operational and other files as proposed under these two bills would constitute a temptation more than mortal flesh could bear. As a beneficiary of such an exemption, I know what I would have done—put wheels on my safes and trundled them across the hall to the operations division at need!

Mr. Chairman, historians are deeply concerned at any legislation that exempts entire categories of files from FOI search and review. We who have spent many years in the Archives or federal records centers or presidential libraries know that operational files of government agencies go far beyond sources and methods. Tradi-

tionally, they also include the policy guidelines and the planning processes of operational activities and are the core of the decisionmaking process of government. Although the intent of these bills is to leave "non-operational files" subject to search and review, only those bits of intelligence specifically transferred to such files from their safeguarded operational cousins would be available for the normal operation of FOIA procedures. Historians, and indeed congressional oversight committees, may be permitted some skepticism under this heading, and I note that page 6 of HR 4431 is devoted to preventing the proposed operational files' exemption from search and review from being applied against intelligence committees of the Congress and other oversight entities.

Mr. Chairman, another concern of the historical community which I represent is the total absence of any bottom line for exemption. So long as CIA every ten years reviews its exemption designation, they may last in perpetuity. Surely even the Director of Central Intelligence would concede that Secretary of State Jefferson's modest CIA-like intelligence operations with the confidential fund of the State Department (which still exists) might now be revealed? How about merely 100-year-old material relating to President Chester A. Arthur? Or even 50-year-old operations, modest indeed, against Mussolini and Hitler?

Would the exemptions proposed for Operations Division, Science and Technology Division, and Security Division of CIA also extend to other agencies, such as State, Defense, the NSC? That is not clear, but our historian colleagues specializing in Near Eastern history are not the only ones to know something about letting the camel's nose into the tent.

Mr. Chairman, in conclusion, historians believe that these two bills are bad legislation. They would not save CIA any labor in the long run. They would inevitably lead to the use of operational exemptions as a "cover," and they constitute a very bad precedent. There are enough other assaults on openness and the public's right of legitimate access—and need only cite National Security Decision Directive 84 and Executive Order 12356, as the most glaring examples—for this branch of government to enact the proposed bill.

STATEMENT OF SAMUEL R. GAMMON, EXECUTIVE DIRECTOR, NATIONAL COORDINATING COMMITTEE FOR THE PROMOTION OF HISTORY, ON BEHALF OF THE ORGANIZATION OF AMERICAN HISTORIANS AND THE AMERICAN HISTORICAL ASSOCIATION

Mr. GAMMON. Thank you very much, Mr. Chairman.

As the distinguished member from Virginia will confirm, historians are accustomed to batting cleanup in order to come in and tidy up the record. [Laughter.]

Mr. GAMMON. I do want this afternoon to express my appreciation for the opportunity to appear here for the American Historical Association and the Organization of American Historians; 20,000 historians is an awful lot of them, but that is what I represent this afternoon. I am also in a somewhat novel position; it is well and widely known that poachers make the best gamekeepers, but I am a former gamekeeper appearing in the role of poacher. As a former Government bureaucrat accustomed to trying to hide documents from the public and occasionally from the legislative branch, I am here to express the opposition of historians to the proposed legislation.

Historians, of course, accept the need for secrecy in Government in national security matters. We accept that the classification system is a legitimate means for protecting documents from premature release. We are very worried, however, about blanket exemptions, and particularly, blanket exemptions that have no time limits.

Let me just cite one particular example of what might be called historical interest. It has been widely rumored for some years that the Agency ran a successful urinalysis on Khrushchev in Vienna in

1961. Historians would not be interested in which plumber was useful in this plan or how it was done, or methods of operation; we would be interested in the fact of it, of course, and certainly interested in the results of the laboratory findings.

I would like just to sum up very briefly from my written testimony the three basic reasons for historians' opposition to the legislation which would restrict the operation of the Freedom of Information Act as far as the CIA's operational, science, technology, and security files are concerned.

Our first and most serious problem is that there is no time limit, no ultimate time limit in the use of the exempting authority. The only implied limitation is not a final one, which is the concession which Senator Durenberger negotiated with the Agency, and which is incorporated in H.R. 4431, that every 10 years the certification of exempt operational status would be reviewed. But it does not say how many times this could be done.

Is 100-year-old material to be treated as still needing protecting? CIA is not that old yet, but one day it will be. What about Mr. Jefferson, who as Secretary of State, used the confidential fund of the department, which still exists, by the way, for limited intelligence activities? Presumably that should certainly come out. Or 50-year material on the operations, limited indeed, against Hitler and Mussolini?

The fact that CIA has itself conceded that it will not treat OSS files as operational files, and hence, protected from search and review under the Freedom of Information Act, would tend to argue that the Agency itself believes that 38 years is long enough to provide for absolute protection.

We would like very much to see, if legislation is going to be enacted, some form of final limitation which would set a limit on how long material might be protected by such an exemption as that contemplated in the two bills under consideration here.

Our second objection is perhaps a technical one in the sense that the two acts, judging by the testimony this morning, might well be retitled CIA and Justice Department Relief Act. The workload is very heavy, backed up for 2 or 2½ years on the Freedom of Information Act requests for CIA. The Justice Department has an awful lot of cases on its hands and more coming in all the time. But the solution of saying do not raise the bridge, let's lower the river, seems to us to be of doubtful validity.

The 10-year pledge, which we welcome, for reviewing the designation of files as operational, which is absent in H.R. 3460, though written into H.R. 4431, would itself very obviously generate a considerable workload. What it consists of is a pledge to set up a systematic review system. Now, the review would be for the purpose of certifying that these documents contain operational material and must still be protected, and there is perhaps a subtle shade of difference between this type of analysis and an analysis which says is this still classified or can it be declassified? But that is a fairly fine shading of meaning, and it seems to me the workload would be very considerable.

So how much labor is going to be saved at CIA if it truly intends to implement the 10 year review rule?

The third objection which we have to the legislation is perhaps best expressed from a personal point of view. It seems to me that the temptation of an operational exemption is just more than bureaucratic flesh ought to be made to bear. I have been a harried bureaucrat myself. The morning top secret summary of the State Department incorporates, from $\frac{1}{4}$ to $\frac{1}{3}$ of its contents, special compartmented, sensitive compartmented intelligence of CIA. That publication was produced under my direction on two separate occasions over a period of $3\frac{1}{2}$ years but I cannot claim any credit for the readership among the inmates at Lorton most recently. Even historians deplore this kind of openness. But I do know that if I had been the beneficiary of an exemption of this type, as a harried bureaucrat, I would have been inclined to put wheels on my safe and trundle it across into the operations division at need.

Well, now, that is an oversimplification, but the other side of that is perhaps the assumption, which seems to be implicit in the legislative approach, that any file is either one or the other. It is either clean or dirty, overt or covert, operational or nonoperational. Files do not look like that. They have all sorts of stuff in them.

There will be parts, yes, that would give the name of the mythical plumber who helped with the urinalysis of Mr. Khrushchev, but parts of the same file may contain nonoperational material. Is it the intention of the Agency to break out only the most operational part of the operational file and segregate that, or will one piece of operational data purify, shelter or protect the whole file?

That is a practical problem and one which it seems to me to be one that should be addressed.

I note, of course, that a large part of both the amended Senate bill and H.R. 4431 is concerned with protecting the principle of oversight, both congressional oversight and other appropriate agencies, and insuring that they will have access in the course of legitimate operations to some of this exempt material. I would say that our concerns are very similar. We are very worried about the actual operation of a proposal such as this.

So in conclusion, I would say that the historians are opposed to the idea of legislation, and we like the Freedom of Information Act the way it is. We are worried about the absence of a final limitation on how long material might ultimately be protected. We are not persuaded that the laborsaving provisions are going to be all that laborsaving, and third, we are very worried about problems of the liability to abuse.

Thank you, sir.

Mr. MAZZOLI. Thank you very much, Doctor.

Let me yield myself 5 minutes to start out with.

Mr. Rowe, I think you mentioned something, and perhaps Dr. Gammon as well. You are worried about what might be called an open-ended exemption, and I think you mentioned the same thing.

If you were to put a time limit on it, what period of time would you select, just out of curiosity?

Mr. ROWE. Mr. Chairman, I do not believe you can put one arbitrary time limit. I think you might have to have a variety of time limits, depending on the types of information. I think we are cover-

ing such a broad area of subjects here that an arbitrary 5, 10, or 50 years would hardly apply across the board.

Mr. MAZZOLI. Dr. Gammon.

Mr. GAMMON. I think our belief would be that of course we would be delighted with 38 years, if the OSS precedent is to be followed, but it would seem 40 years would appear to be a reasonable time to protect sources and methodology.

Mr. SHENEFIELD. I would, in answer to the same question, not want to try to put any defined time into a statute. It seems to me that the regulations that are promulgated by the Agency can take care of those questions better. They have got to satisfy this committee of their propriety, and this committee will then continue to exercise oversight responsibility to see to it that the Agency is living up to those regulations.

Mr. MAZZOLI. I guess we can have the question of raising the sea or shortening the sail or something by just eliminating the whole historical 10-year examination. That would be one way for CIA to save a lot of manpower or womanpower, would it not, Doctor, if we are talking about trying to get people——

Mr. GAMMON. That would encourage, flagrantly encourage the abuse concept, however, I would think. We like the 10-year principle.

Mr. MAZZOLI. It is kind of interesting. I sense a fairly strong skepticism on your part, maybe even antagonism on the parts of the two gentlemen at the end of the table with respect to CIA.

Is that born of some personal experience that you have had, or is that a kind of institutional bias that the press has to the intelligence community? It is curious because that seems to be fundamental to what you are saying and what I think Dr. Gammon is, if they are going to welsh, they are going to try their best to do all the bad things and do all the finessing if you do not really watch them every second of the time.

I mean, how did you get that point of view?

Mr. ROWE. Certainly not from personal experience in my case, Mr. Chairman.

I think it would be only the natural tendency of somebody in any agency to take maximum advantage of a statute that provides opportunities to hide things, and I do not think, in many cases I do not think this would be done with evil intent.

Mr. MAZZOLI. Well, let me ask you the question, because if I am not mistaken, are the newspaper publishers not trying to have laws passed that practically exempt public persons from having rights of libel? Would not that then give your reporters a chance to do what you say the agencies would do, which is to be less than careful and to be unmindful of sources and checking out the data, and yet you are looking for that, are you not?

Mr. ROWE. I do not really believe the two situations are comparable, Mr. Chairman.

Mr. MAZZOLI. Why not?

Mr. ROWE. Well, I think we are dealing with two totally different things. We are dealing with a nondisclosure statute——

Mr. MAZZOLI. What we are dealing with is having no controls over certain agencies, and you say if you have no controls over certain agencies or activities, they are going to be like the old story,

when the cat is away, the mice will play, and you suggest that if you take away these controls, people will misuse that freedom.

And I assume if you take away the controls over the right of reporting accurately and fairly, is there not the same likelihood of perversion of that freedom, of misuse of that freedom as you say there is here in CIA?

Mr. ROWE. Well, I guess you could say in the case of reporters there is a possibility of misuse of that freedom. Over the years, it is one of the things that I think that this country, legislatively and judicially, has decided it is willing to put up with because it was the lesser of the evils.

Mr. MAZZOLI. Well, it is an interesting question. This is, of course, very philosophical. We are not going to solve the problem of the FOIA exemption here. But I think what that does is point up the problem we have because there is a kind of an institutional mistrust or distrust, whichever is the accurate word here, of historians, of writers, publishers, toward this agency, and frankly, if we were to go your way, you would have every kind of hobble in their way, and there would be the possibility I think of maybe having some really serious intelligence failures, intelligence difficulties because we would not have the opportunities for the Agency to recruit assets.

I mean, one of the things, Mr. Rowe, you were saying—and I think Dr. Gammon echoed it, too—quoting Stansfield Turner, they have never lost a case in court. And if I understand correctly, listening to the intelligence agency, that is not the standard that you use. You do not lose cases in court, and we all know that, but they say this perception problem is very real, it is not just a vaporous thing, it is for real, that assets jump ship and they do not get involved because they cannot be protected.

But obviously you do not believe that. You seem to think that is not really the accurate state of affairs.

Mr. ROWE. No, I would concede that they probably do have a perception problem. I think they could to some extent reduce the severity of that problem by what they tell assets or sources they are trying to recruit.

They have lots of problems——

Mr. MAZZOLI. Just a second. I have that written down. I could not read it, but I have “work hard to tell agents that protection is available.”

Now, do you really believe that an officer in some country is going to say, now, look, trust me, trust me. I promise you we are going to protect you.

Do you think that is going to make much difference to that agent? I mean, do you not think they need something much more concrete than that?

Mr. ROWE. I think they have lots of problems unrelated to FOIA, penetration of allied intelligence services, which can disclose information about our agents I think can be a tremendous problem, and yet they have to somehow reassure their sources that either the British intelligence cannot be penetrated, or if it is, there is a minimal chance their cover will be blown.

Mr. MAZZOLI. Well, my time has expired.

Dr. Gammon, you had something, and then I will move on.

Mr. GAMMON. I would just like to comment on a point.

One is with regard to my personal experience with the Agency.

I have worked closely with CIA personnel, and it is a splendid agency; it does a very vital and necessary function. I was deeply concerned at the damage done to its capabilities by the backlash from revelations about certain earlier improprieties. It became so difficult that even running a very, very tiny, minuscule and essentially harmless operation which took place under my aegis at one point became almost impossible to get cleared. It took 6 months to do a very, very simple and certainly entirely legal operation. So I think we went much too far in damage inadvertently to CIA's capability.

My concern and the concern of historians really is that there is a natural opposition between historians and Government officials. Though we all agree that on one end of the scale, at least 10 percent of the material, even CIA would concede is certainly unclassified, should come out, and on the other end of the scale, even a zealous historian would say, yes, maybe 10 percent should be protected, it is setting that difficult line about the other 80 percent in between where we bicker and argue a great deal.

And indeed, I do have concern about abuses, not in the sense that CIA officials or State Department officials are not honorable men doing their very best, but the mindset in tackling the protection of material is very different from that in saying let's get it all out.

Mr. MAZZOLI. Thank you. My time has expired. I appreciate my panelists' indulgence.

The gentleman from Virginia is recognized.

Mr. WHITEHURST. Well, I must observe, Mr. Chairman, that the appearance of these gentlemen, especially Mr. Gammon and Mr. Rowe, creates feelings of ambivalency within me.

Mr. MAZZOLI. I am sure.

Mr. WHITEHURST. For one thing, Mr. Rowe and I attended the same university. He was several years ahead of me. So I remember him very well, when I was at Washington & Lee after World War II. And Mr. Gammon and I come from the same profession, and I feel kind of like Benedict Arnold to put the bill in after listening to his testimony.

What was your specialty? I am just curious.

Mr. GAMMON. Sixteenth century English history.

Mr. WHITEHURST. Oh, how marvelous. That is very good.

Well, I am sure you had no trouble with declassification.

Mr. GAMMON. Henry VIII had no objections.

Mr. WHITEHURST. I raise this because I mentioned to staff earlier, they told me about your very generous comments, you may not feel they have got the right historian on this committee by virtue of my being an author of one of those bills, but my dissertation was on Roosevelt's quarantine speech in 1937, and I wanted in the worst kind of way to get hold of the papers of Cordell Hull who, as you know, did not have a very high opinion of Sumner Welles, and the feeling was mutual. Welles was still living, and he gave me the benefit of his thinking of Hull, but Hull was dead when I did the dissertation. But they were closed after 1933, and I think there was something like a 40-year embargo on getting them. So I just walked

around the Library of Congress salivating and not being able to do anything about it.

Let me just, I have some questions to ask here, and I am going to ask Mr. Mayerfeld if he will—is he still here?

Mr. MAYERFELD. Yes.

Mr. WHITEHURST. CIA is always with us. [Laughter.]

With respect to the problem that Dr. Gammon has raised about declassification, you do not go actually document by document, do you? You pick a period—what is the intention of the Agency in this regard?

Mr. MAYERFELD. As far as the provision in your bill is concerned?

Mr. WHITEHURST. Yes, sir.

Mr. MAYERFELD. The intention is at the appropriate times, but no less than every 10 years, we look at certain files and see if it would be appropriate to dedesignate, keeping in mind the possibility that most of the material can be declassified.

Mr. WHITEHURST. Well, that is a pretty good answer, I guess.

Let me come back to something, and I will close up.

Mr. MAZZOLI. Take your time.

Mr. WHITEHURST. I instinctively feel the concerns of Dr. Gammon, and this is maybe because it is latent within me because I spent 18 years in a classroom. You did not. You were overseas working for the enemy, for heaven's sakes, the Government. [Laughter.]

You are a fine one. You should be the Benedict Arnold today and not me. You know, I just deserted later on in life. But my mother said, son, hang on to it. It is the best paying job you ever had. And I have been here ever since.

But I look at, for example, what the British have done, and a few years ago their kind of renewed interest in the Lusitania. The British still would not open their files, which leads us to a great deal of suspicion about the role of the British Government in that tragedy.

But this legislation that has been presented either by the chairman or by myself or what has passed the Senate was not something that we all just got up one morning and said what we need is to revise the FOIA. It came about because of problems, and very real ones. It was not a question of the CIA just hammering on us so that we finally said, all right, just keep them quiet, we will make some changes.

But I think that the concerns are valid, and yet, to a person, even though it may not always strike you that way on either side of the aisle philosophically, there is a concern from the point of view of the press in America, and as legitimate, genuine, honest historical research, that we should not compromise ourselves too much.

And I guess you really put your finger on it when you said that somewhere in the middle we have got to come down on this. We have got to absolutely provide better security for people who are willing to serve the United States in another country, and how we do that is probably not going to be entirely satisfactory as far as you are concerned, and it may, as a matter of fact, not be satisfactory, I am sure it will not be entirely as far as the Agency is concerned, or even the rest of us.

I think your testimony has been very helpful. I really got over here this afternoon not having had a chance to look at the testimony ahead of time and not knowing really what to expect.

Mr. MAZZOLI. The gentleman from Massachusetts.

Mr. BOLAND. Let me ask the representative of CIA; you say you are going to look at them every 10 years to determine whether or not you dedesignate?

Mr. MAYERFELD. Mr. Whitehurst's bill provides for that at a minimum.

Mr. BOLAND. How often do you do it?

Mr. MAYERFELD. Well, we do it when—well, as in the case, the example that Professor Gammon cited, when there was sufficient interest expressed in the OSS files, for example, the decision simply was made. There was so much historical interest in these that we should not designate those as operational files.

Mr. BOLAND. Let me ask you whether or not, have you dedesignated very many of the files at all?

Mr. MAYERFELD. None of them has been designated at the moment. All files currently are subject to review, but in the course of reviewing this legislation, we have made a commitment that we would not designate the OSS files.

Mr. BOLAND. I take it, addressing the panel, I take it that both Attorney Shenefield and Mr. Rowe favor one of the bills, either the Senate bill or the bill introduced by Mr. Whitehurst.

And you do that because it does provide, as I understand it, for judicial review, and that is one of the principal differences among the three bills, and Ambassador Gammon, you oppose them all. You do not want any restriction.

Mr. GAMMON. We would prefer none.

Mr. BOLAND. You have a marvelous background. I have been looking at that background. That really is a marvelous background, and I can understand why the American Historical Association has sent you here to testify, because of the background you have and your association, I presume, with historical evidence which of course is essential to the success of your organization.

And you have about, how big did you say, 20,000 members?

Mr. GAMMON. Of the two learned societies.

Mr. BOLAND. You must have an awful lot of information in your own files, the society itself, does it not?

Mr. GAMMON. We do, which are kept in the Library of Congress.

Mr. BOLAND. And that is all available to the public.

Mr. GAMMON. That is all open.

Mr. BOLAND. But that information is quite different, of course, from what we are trying to protect here.

As Mr. Rowe has said, the CIA files, the classified files, any files that are classified are exempt, and also any files which would indicate sources and methods used by the intelligence community are also exempt.

With respect to judicial review, Attorney Shenefield, would you give me your position on that, or the ABA's position on judicial review? I think it is slightly different from what Mr. Rowe's is of the American Association of Newspaper Editors.

Mr. SHENEFIELD. The position of the ABA, however it is worded, is one in favor of substantial deference to the DCI in his designa-

tion of these files. The words they used were a nonfrivolous certification. On the sort of ladder of all possible lawyer lingo that might be applied to this judicial review concept, that is about the lowest and most deferential.

Mr. BOLAND. And as I understand it, Mr. Rowe, your preference is for full de novo judicial review with the court having access to the files to determine if it was properly designated. You are really loading the court with a burden, aren't you, here?

Mr. ROWE. I think the courts can handle it, Mr. Chairman. I do in fact.

Mr. BOLAND. Well, you know, the purpose of this legislation is to try to lift the burden that is imposed upon the CIA with reference to material that ought to be exempt, and of course, as you heard, and the CIA has testified so often, the number of inquiries under the FOIA run to several thousand. I think one of the figures I heard—and you can correct me—is it 7,000? How high is that, the number of inquiries to get a look at files in the CIA under the FOIA? How many requests do you have, does the CIA get?

Mr. GAMMON. Your recollection is correct.

Mr. BOLAND. Does anyone have any idea.

Mr. MAYERFELD. Your figure is a little low for the totality since the act has been—we get in excess of 1,000 a year.

Mr. BOLAND. And as I understand it, one of the great problems, of course, is the operational files, and it is necessary to have people who are familiar with information, requests for information. They are the ones, you could not get the ordinary clerk to look at those operational files, could you?

Mr. MAYERFELD. That is exactly right, Mr. Chairman.

Mr. BOLAND. And this, of course, places a great burden upon you. Someone has said, well it would not be much of a burden. Why do you not—why, you give the CIA money, all the money it wants anyhow. Why do you not appropriate a couple of extra dollars to them, give them some additional personnel, and it will correct the situation.

But that does not do it at all. So the matter of money and personnel is really not a consideration. It really is taking expert, personnel to look at the files to determine whether or not they can be released under the law.

Mr. SHENEFIELD. And then, because the files are compartmented, any time you have the same person looking at more than one compartmented file, you have broken down the compartmentation. In addition to that, there is a redundancy review, and so you have got to put two people in place rather than just the one.

Mr. GAMMON. Mr. Chairman, the State Department's solution to the same type of problem, absent the compartmentalization, is to make heavy use of retired Foreign Service officers who presumably have the expertise and are more than delighted to work part time.

Mr. BOLAND. I think the intelligence community, particularly the CIA, I think the concern it expresses with reference to people from whence information could flow is a justifiable one.

We have been sitting here now for almost 7 years on this committee, and time and time again we get information from the intelligence community indicating that they do have difficulty getting information from sources, particularly foreign sources, because of

the danger of leaks or the danger of exposure, and I think that is a legitimate complaint, from my experience in this committee, I think it is a legitimate complaint. This would help to solve part of that anyhow. I am not sure it is going to solve it all. But I am delighted that at least two out of three, that is not too bad, two out of three favor some action in this area.

And Ambassador Gammon, you are going to get it, you know. That bill got by the Senate unanimously, a voice vote, and we have three good bills on this side, and we will try to come out, under the leadership of Mr. Mazzoli and Mr. Whitehurst, with the kind of a bill you can all live with. You are going to get one, and we will do the best we can to get you one you can live with.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. BOLAND. I think the Ambassador had a comment.

Mr. GAMMON. I just wanted to make one point for clarification, perhaps, on the question of access to sources.

I certainly agree that recruiting, which CIA field officers must do, is made difficult by the perception of individual sources that they might be burned or exposed either accidentally or on purpose or through whatever act, or through the national openness of American society. I think that concern is certainly very legitimate.

I confess to a certain amount of skepticism about the fact that the sister organizations, liaison organizations overseas, for instance, British intelligence, French intelligence, et cetera, hold back very much with us because this type of interchange is basically horse trading, and we have more and better information than anybody else. So they cannot *not* deal with us.

Mr. MAZZOLI. I thank the gentleman.

There is one thing I believe the chairman has brought up, which is very important. What little I have learned of the activity of intelligence gathering and analysis over the years is that what appears to be very innocuous and obviously not particularly sensitive information can, in light of other things, the context in which it is revealed and other material which is public record, can be rather devastating.

So one of the problems we have here, I think, was the question of kind of review, and I want to get back, after letting Mr. Robinson proceed, I want to get back to Mr. Shenefield on the whole question of judicial review. Judges may well be able to review automobile evidence and be able to understand patent law, but understanding intelligence is a very different matter, and if you had that information before them, it could cause some problems. Their judgment may not be accurate as to what really is sensitive and is not because this is such a highly sophisticated activity.

The gentleman from Virginia is recognized.

Mr. ROBINSON. Thank you, Mr. Chairman.

I want to apologize to all of our witnesses here today for not being present earlier. This is one of the days when I have had to wear about three hats, and unfortunately I did not get here on time, but I want to in particular apologize to my friend and constituent Charles Rowe who, in addition, of course, to his great stature in the Association of Newspaper Publishers, is a pillar in one of the communities that I represent, that being Fredericksburg, and it is certainly nice to have you with us today.

I also am sorry that another constituent, John Norton Moore, who was scheduled to be on, found he could not be here, so I do not have the privilege of welcoming two constituents among those that are with us here today.

I have a very deep concern about the matters that you have had under consideration, that you have been discussing, and I can assure you that I am going to peruse the record of this hearing, the transcript of this hearing, very carefully, and that I will digest it in full.

But I understand, Mr. Shenefield, that in your comments you mentioned that a resolution in favor of relief for the intelligence community from the FOIA has been passed by the American Bar Association House of Delegates?

Mr. SHENEFIELD. Yes, sir, "significant relief" was the wording.

Mr. ROBINSON. Do you have a copy of that resolution?

Mr. SHENEFIELD. I will provide it to the committee.

Mr. ROBINSON. Mr. Chairman, I ask that this resolution be entered in the record at this point.

Mr. MAZZOLI. Without objection, so ordered.

[The information referred to follows:]

American Bar Association

On August 3, 1983, the House of Delegates of the American Bar Association, acting at the ABA's annual convention in Atlanta, Georgia, adopted the National Security and Intelligence provisions of Resolution 110B, proposed by the Section of Administrative Law. The entire text of these provisions is as follows:

"BE IT RESOLVED, that the American Bar Association favors amendments to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, consistent with these principles:

"1. National Security and Intelligence.

"a. Congress should grant significant relief from the FOIA for the intelligence agencies.

"b. Judicial review of classification decisions shall be limited to determining whether there is a non-frivolous certification by an official, appointed by the President with the advice and consent of the Senate, that the material has been properly classified.

"c. A new exemption should be added to the FOIA for information obtained through sensitive intelligence sources or methods, and for information obtained from foreign intelligence sources under a promise of confidentiality.

"d. Intelligence agencies should be encouraged to experiment with modifications in current administrative practices for handling FOIA requests."

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Mr. ROBINSON. I thank you for the opportunity.

Mr. MAZZOLI. Thank you very much for joining us.

Mr. Rowe, I think, if my memory is correct, you earlier today were saying you thought we ought to get something fairly concrete from the CIA with regard to service to the public and how quickly requests will be acted on.

Could you give me some idea? You have had much more contact with this than I have. What would you look for by way of such concrete help? I mean, statements from CIA that they are going to speed up the process probably would not be satisfactory, but what are you really looking for? What kind of help in that respect? What kind of timeframe would be the goal you would seek?

Mr. ROWE. Well, obviously, Mr. Chairman, it would depend in most cases on the type of information being requested, but certainly, 2 to 2½ years is far too long now for any journalistic use in the short term. It is more historical by the time you get it.

You know, I would think that once they can solve their backlog problems, that routine requests should be handled in 2 to 3 months, even, where they are not having to spend the time in the designated files. I would think 2 to 3 months for the simple type of request.

Mr. MAZZOLI. And you have seen newspapering and the whole profession change radically in just the last few years with new kinds of word processors and type setters and satellites.

Is it your feeling that the use of new equipment, new techniques, would be useful, or is this a painstaking, document by document, line by line, word by word process and we can't avoid it?

Mr. ROWE. You are speaking of within the CIA?

Mr. MAZZOLI. Yes.

Mr. ROWE. I would have just no basis for judging what they do or how they do it or how I might suggest they do it better.

Mr. MAZZOLI. Because I remember the days of Ben Hecht and the hat tilted back and the ticket stub in the hatband, you know, and clicking away at an old Underwood upright, and of course, that day has long since gone forever. In those days Ben Hecht would have probably said you cannot do it anyway but that way.

It is a peculiar thing, because you are dealing with a lot of electronic material as well as paper material, and maybe the idea of speeding up the process by some quantum leap is impossible. But you are hoping to get it to 2 to 3 to 4 months at least, to have some information.

As a matter of fact, when you make an application, do you get an acknowledgement back that yes, we have received it, and yes, we are working on it, and do not call us, we will call you? Or what do you get?

Mr. ROWE. I have not filed a request of the CIA myself. We have dealt with other government agencies. I would be pretty certain that they do make a response fairly quickly acknowledging receipt of the inquiry.

Mr. MAZZOLI. OK. So you are not waiting for months and years to know if they even got your mail?

Mr. ROWE. I would think Mr. Mayerfeld can assure us that the initial response would go out.

Mr. **MAYERFELD**. I can so assure you, that I think except for some margin of error, that every request is replied to within 10 days, at least acknowledged.

Mr. **MAZZOLI**. Just out of curiosity, is it possible to do anything in the use of automation or using equipment to do this work? Would that speed up the process at all? Do you think it lends itself to that kind of use?

Mr. **MAYERFELD**. Well, I am not an expert at this. I think Mr. Strawderman could comment on this more reliably, but any kind of automation would not solve the basic problem which Chairman Boland referred to, which is the requirement that someone who understands the subject matter must review it personally before it can be released.

Mr. **MAZZOLI**. The chairman put his finger on the crux of the problem.

I see Professor Gammon is nodding.

Mr. **GAMMON**. Automation depends very heavily. I know the State Department has lots of its material in electronic retrieval files, but for purposes of this sort we depend on very sophisticated coding and indexing when it went in so you can call it up with a punch of a button and you would still, of course, have to review it from the sensitivity angle once you had it retrieved.

Mr. **MAZZOLI**. So it could be at the beginning of the process rather than the end that changes ought to be made.

Well, it is an interesting thing. If a bill like this passes, of course, we are going to have a lot of responsibility, which you pointed out, Mr. Rowe, in overseeing this, and it could be that the first thing we will try to do is have some kind of working task force set up on whether there is a way to use modern technology to speed up the process of yielding information through FOIA.

John, let me ask you just a couple of questions.

You were probably not in the room this morning, but I freely confess I am in over my head when we talk about all this judicial review. It is very difficult for me, but essentially speaking, your position and the ABA's position is that the courts should be extremely deferential to the decisions of the DCI on classification of information, on what is sensitive, what is sources and methods.

Now, given that, can there be a judicial review process worthy of the name judicial review which gives this great deference?

Mr. **SHENEFIELD**. It is difficult. The process begins when someone comes into a court and says that the CIA has made a mistake, and that there are two or three bases for thinking that, and that they are willing to put on the record, particularly under H.R. 4431, a statement as to why they believe that to be so. That would then shift the burden to the Agency to come forward with its rebuttal statement. What that avoids, and why it seems to me that provision is so important, is the judge himself looks at the files, and sees whether, as the chairman said, he happens to agree with the DCI's analysis. That is where the danger potentially is lurking. And we do have examples. While the CIA may not have lost a case, we do have examples of the wrong result from a judge who independently look through papers and comes to a conclusion.

Now, what the bill proposes may not be the kind of de novo review that in the best of all worlds, in a nonsensitive situation, we

would all prefer, but given the constraints it seems to me to be the best available in these circumstances.

Mr. MAZZOLI. Try to help me. I believe in the Senate, I thought it was a footnote, but it is in the text, in the body of the Senate report is a statement to the effect that under their review process in extraordinary circumstances the court could order produced the exact document. After going through the *Vaughn* affidavits and indexes and everything else, if the court still says to itself that I want this material, the court can order it.

Do you see that to be a problem? Could you strike the word "extraordinary" and say that under certain circumstances the court could and let the law evolve? Do you think you still have to make it extremely difficult for the judge to get that document?

Mr. SHENEFIELD. Well, the standard, as I recall it, in that report had to do with a "rational basis." If the judge thinks there is no rational basis for the DCI to come to the conclusion that he did, then he may himself inquire into the merits of the controversy. That is essentially the same standard that a judge uses in our courts when he looks at a jury verdict, in a civil case challenged by the losing party. The judge may say to himself, I do not agree with that jury, but there was some evidence so that, they could rationally have come to that result. Because they are the finders of fact, therefore logically, in this bill, the DCI's judgment on this ought to be sustained.

Now, the extraordinary circumstance would be—and it is hard for me to imagine, but it is possible, I suppose—that a fairminded judge looking at the DCI's judgment would say to himself, I cannot see any rational basis for this decision, and therefore I myself am going to inquire further. That seems to be so unlikely that it may not be of great concern to the Agency, yet it seems to me to preserve the essential review that is necessary in this context.

Mr. MAZZOLI. And you still have judicial review in the sense of those who suggest that you cannot have some sort of review of this whole activity. It would be a review, it would be in the context in which other court reviews are held, is that right?

Mr. SHENEFIELD. Yes, sir, it is essentially the same standard that our courts apply to general administrative agencies. It is the substantial basis or rational basis test, where they look to see whether an expert in this area could have come to that conclusion.

Mr. MAZZOLI. Now, you used the term earlier, John, about non-frivolous.

Mr. SHENEFIELD. Yes, sir.

Mr. MAZZOLI. "Any nonfrivolous action," would that sort of be "is this rational?" Is that rational, nonfrivolous, not capricious?

Mr. SHENEFIELD. Yes. I think the origin of that is now Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia who persuaded the ABA that such language was the best way to state the concept that the ABA wanted to come up with, that if it is roughly in that zone—

Mr. MAZZOLI. Let me ask—I should be going back to law school for sure, I am admitting my intense ignorance of what I used to know a little bit about—what is a de novo review? What actually is de novo review?

Mr. SHENEFIELD. It is pretty much what the Congress wants it to be in a particular statute, but what it means as a kind of common-sense matter to a lawyer practicing administrative law, is that the judge completely throws out what went on before and looks at it all over again coming fresh to the problem and makes up his own mind. That is essential de novo review.

Mr. MAZZOLI. So the judge basically does not give much credence or weight to the activities or judgment of the DCI, for example?

Mr. SHENEFIELD. Pure de novo review would give no weight to it.

Mr. MAZZOLI. My time has expired.

The gentleman from Virginia?

The gentleman from Massachusetts?

Mr. BOLAND. What is your judgment, John, on whether or not there ought to be a de novo review?

I understand that Mr. Rowe thinks it ought to be that kind of review.

What is your judgment on that? This is one area in which I think there is a difference, is there not?

Mr. SHENEFIELD. Yes, sir. My judgment and the ABA's judgment is that de novo review here is improper, that you want a standard that is much more deferential to the DCI, and that that standard ought to speak in terms of rational basis, or nonfrivolous nature, or something of that sort.

Mr. BOLAND. The judge really can make a judgment.

I think I would agree with you that he can listen to the parties and he can listen to the DCI and suddenly make the judgment, well, this is an arbitrary abuse of the DCI's power here, and I think you have to trust the judgment of the courts in this area. A de novo review would certainly delay proceedings considerably and place an additional burden upon the court.

Mr. SHENEFIELD. Moreover, it places the corpus of what you are trying to protect here, in a sense, in the courtroom. It is in camera, but every once in a while there will be a wrong result, if those documents are alluded to in an opinion or they are described, that just is not what you want to have happen.

Mr. BOLAND. Can we get agreement from Mr. Rowe and you on which particular bill you favor?

I will ask the ambassador a little bit later.

Mr. ROWE. Of the two House bills, if I had to opt for one over the other, I think 4431 would be my choice.

Mr. BOLAND. Now, you have got——

Mr. SHENEFIELD. By a nose, I would agree.

Mr. BOLAND. Ambassador Gammon, you have a marvelous opportunity to strike a historical niche in the American Historical Association by having the association favor one of the bills on the occasion of its 100 anniversary. [Laughter.]

Mr. GAMMON. On the principle of the lesser evil that has been described, 4431.

Mr. BOLAND. They were founded in 1884, and you know, since it has been around that long, not you personally——[Laughter.]

Mr. BOLAND. But since the association has been around that long, it deserves to be heard.

I think if you could get another look at this that you could understand you will probably get something. We will make it as light as we can.

Thank you very much. I appreciate it.

Mr. MAZZOLI. Thank you very much.

I understand Mr. Shenefield has to catch a plane. I want to get him out of here.

But one of the things that occurs to me, again to get back to what Mr. Rowe was saying, which I think is important, and that is the kind of way people deal with one another and again trying to improve the service to the public, it could well be that possibly the people of the CIA would want to sit down with the historians and newspaper writers and publishers just to see if there is any agreement that can be reached or if there is any way that the service to the requesters can be improved without compromising your standards, without devoting an immense amount of resources which they need for gathering information to this task. It could be that something stemming from this bill may actually be a healthy step in the direction of trying to see if there is a certain degree of tenuous coexistence.

My colleague talks about report language. It could be well as part of our oversight that the historians be allowed to at least take part in some kind of a task force or working group and see if you could find ways to set time limits with periodic examinations and without making it too formal, but maybe informally you can reach a lot of agreements.

Anyway, gentlemen and my colleagues, thank you very much.

Staff, any questions at all?

Thank you all very much, John, Ambassador. Nice to see you, Mr. Rowe. Have a good day.

The Committee is adjourned.

[Whereupon, at 2:48 o'clock p.m., the subcommittee recessed subject to the call of the Chair.]

APPENDIX A

98TH CONGRESS
1ST SESSION

H. R. 3460

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 29, 1983

Mr. MAZZOLI introduced the following bill; which was referred jointly to the Permanent Select Committee on Intelligence and the Committee on Government Operations

A BILL

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Intelligence Information
4 Act of 1983".

5 SEC. 2. (a) The National Security Act of 1947 is
6 amended by adding at the end thereof the following new title:

1 "TITLE VII—RELEASE OF REQUESTED INFORMA-
2 TION TO THE PUBLIC BY THE CENTRAL IN-
3 TELLIGENCE AGENCY

4 EXEMPTION OF CERTAIN OPERATIONAL FILES FROM
5 SEARCH, REVIEW, PUBLICATION, OR DISCLOSURE

6 "SEC. 701. (a) Operational files located in the Director-
7 ate of Operations, Directorate for Science and Technology,
8 and Office of Security of the Central Intelligence Agency
9 shall be exempted from the provisions of the Freedom of In-
10 formation Act which require publication or disclosure, or
11 search or review in connection therewith.

12 "(b) Subsection (a) of this section shall not prevent the
13 search and review of operational files for information con-
14 cerning—

15 "(1) United States citizens or aliens lawfully ad-
16 mitted for permanent residence who have requested in-
17 formation on themselves pursuant to the provisions of
18 the Freedom of Information Act (5 U.S.C. 552);

19 "(2) any special activity the existence of which is
20 not exempt from disclosure under the provisions of the
21 Freedom of Information Act;

22 "(3) the subject of an investigation by the intelli-
23 gence committees of the Congress, the Intelligence
24 Oversight Board, the Office of General Counsel of the
25 Central Intelligence Agency, the Office of Inspector

1 General of the Central Intelligence Agency, or the
2 Office of the Director of Central Intelligence for any
3 impropriety, or violation of law, Executive order, or
4 Presidential directive in the conduct of an intelligence
5 activity.

6 “(c) The provisions of subsection (a) of this section shall
7 not be superseded except by a provision of law which is en-
8 acted after the date of enactment of subsection (a), and which
9 specifically cites and repeals or modifies its provisions.

10 “(d) For the purposes of this title the term ‘operational
11 files’ means those files which document—

12 “(1) the means by which foreign intelligence infor-
13 mation, counterintelligence information, or counterter-
14 rorism information is collected through scientific and
15 technical systems;

16 “(2) foreign intelligence operations, counterintelli-
17 gence operations, or counterterrorism operations;

18 “(3) investigations conducted to determine the
19 suitability of potential foreign intelligence sources,
20 counterintelligence sources, or counterterrorism
21 sources; or

22 “(4) intelligence or security liaison arrangements
23 or information exchanges with foreign governments or
24 their intelligence or security services.

1 " (e)(1) Nonoperational files which contain information
2 derived or disseminated from operational files shall be subject
3 to search and review.

4 " (2) The inclusion of information from operational files
5 in nonoperational files shall not affect the exemption under
6 subsection (a) of this section of the originating operational
7 files from search, review, publication, or disclosure."

8 (b) The table of contents at the beginning of such Act is
9 amended by adding at the end thereof the following:

"TITLE VII—RELEASE OF REQUESTED INFORMATION TO THE PUBLIC BY
THE CENTRAL INTELLIGENCE AGENCY

"Sec. 701. Exemption of certain operational files from search, review, publication, or
disclosure."

10 SEC. 3. The amendments made by section 2 shall be
11 effective upon enactment of this Act and shall apply with
12 respect to any requests for records, whether or not such re-
13 quest was made prior to such enactment, and shall apply to
14 all cases and proceedings pending before a court of the
15 United States on the date of such enactment.

98TH CONGRESS
1ST SESSION

H. R. 4431

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 16, 1983

Mr. WHITEHURST introduced the following bill; which was referred jointly to the Committees on Government Operations and the Permanent Select Committee on Intelligence

A BILL

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Intelligence Information
4 Act of 1983".

5 **FINDINGS AND PURPOSES**

6 **SEC. 2. (a) The Congress finds that—**

7 (1) the Freedom of Information Act is providing
8 the people of the United States with an important
9 means of acquiring information concerning the work-

1 ings and decisionmaking processes of their Govern-
2 ment, including the Central Intelligence Agency;

3 (2) the full application of the Freedom of Informa-
4 tion Act to the Central Intelligence Agency is, howev-
5 er, imposing unique and serious burdens on this
6 agency;

7 (3) the processing of a Freedom of Information
8 Act request by the Central Intelligence Agency nor-
9 mally requires the search of numerous systems of
10 records for information responsive to the request;

11 (4) the review of responsive information located in
12 operational files which concerns sources and methods
13 utilized in intelligence operations can only be accom-
14 plished by senior intelligence officers having the neces-
15 sary operational training and expertise;

16 (5) the Central Intelligence Agency must fully
17 process all requests for information, even when the re-
18 quester seeks information which clearly cannot be re-
19 leased for reasons of national security;

20 (6) release of information out of operational files
21 risks the compromise of intelligence sources and
22 methods;

23 (7) eight years of experience under the amended
24 Freedom of Information Act has demonstrated that this
25 time-consuming and burdensome search and review of

1 operational files has resulted in the proper withholding
2 of information contained in such files. The Central In-
3 telligence Agency should, therefore, no longer be re-
4 quired to expend valuable manpower and other re-
5 sources in the search and review of information in
6 these files;

7 (8) the full application of the Freedom of Informa-
8 tion Act to the Central Intelligence Agency is per-
9 ceived by those who cooperate with the United States
10 Government as constituting a means by which their co-
11 operation and the information they provide may be dis-
12 closed;

13 (9) information concerning the means by which in-
14 telligence is gathered generally is not necessary for
15 public debate on the defense and foreign policies of the
16 United States, but information gathered by the Central
17 Intelligence Agency should remain accessible to re-
18 questers, subject to existing exemptions under law;

19 (10) the organization of Central Intelligence
20 Agency records allows the exclusion of operational files
21 from the search and review requirements of the Free-
22 dom of Information Act while leaving files containing
23 information gathered through intelligence operations
24 accessible to requesters, subject to existing exemptions
25 under law; and

1 (11) the full application of the Freedom of Infor-
2 mation Act to the Central Intelligence Agency results
3 in inordinate delays and the inability of these agencies
4 to respond to requests for information in a timely
5 fashion.

6 (b) The purposes of this Act are—

7 (1) to protect the ability of the public to request
8 information from the Central Intelligence Agency
9 under the Freedom of Information Act to the extent
10 that such requests do not require the search and
11 review of operational files;

12 (2) to protect the right of individual United States
13 citizens and permanent resident aliens to request infor-
14 mation on themselves contained in all categories of
15 files of the Central Intelligence Agency; and

16 (3) to provide relief to the Central Intelligence
17 Agency from the burdens of searching and reviewing
18 operational files, so as to improve protection for intelli-
19 gence sources and methods and enable this agency to
20 respond to the public's requests for information in a
21 more timely and efficient manner.

22 SEC. 3. (a) The National Security Act of 1947 is
23 amended by adding at the end thereof the following new title:

1 "TITLE VII—RELEASE OF REQUESTED INFORMA-
2 TION TO THE PUBLIC BY THE CENTRAL IN-
3 TELLIGENCE AGENCY

4 "DESIGNATION OF FILES BY THE DIRECTOR OF CENTRAL
5 INTELLIGENCE AS EXEMPT FROM SEARCH, REVIEW,
6 PUBLICATION, OR DISCLOSURE

7 "SEC. 701. (a) In furtherance of the responsibility of the
8 Director of Central Intelligence to protect intelligence
9 sources and methods from unauthorized disclosure as set
10 forth in section 102(d)(3) of this Act (50 U.S.C. 403(d)(3))
11 and section 6 of the Central Intelligence Agency Act of 1949
12 (50 U.S.C. 403g), operational files located in the Directorate
13 of Operations, Directorate for Science and Technology, and
14 Office of Security of the Central Intelligence Agency shall be
15 exempted from the provisions of the Freedom of Information
16 Act which require publication or disclosure, or search or
17 review in connection therewith, if such files have been spe-
18 cifically designated by the Director of Central Intelligence to
19 be—

20 "(1) files of the Directorate of Operations which
21 document foreign intelligence or counterintelligence op-
22 erations or intelligence or security liaison arrangements
23 or information exchanges with foreign governments or
24 their intelligence or security services; or

1 “(2) files of the Directorate for Science and Tech-
2 nology which document the means by which foreign in-
3 telligence or counterintelligence is collected through
4 scientific and technical systems;

5 “(3) files of the Office of Security which document
6 investigations conducted to determine the suitability of
7 potential foreign intelligence or counterintelligence
8 sources:

9 *Provided, however,* That nondesignated files which may con-
10 tain information derived or disseminated from designated
11 operational files shall be subject to search and review. The
12 inclusion of information from operational files in nondesig-
13 nated files shall not affect the designation of the originating
14 operational files as exempt from search, review, publication,
15 or disclosure: *Provided further,* That the designation of any
16 operational files shall not prevent the search and review of
17 such files for information concerning any special activity the
18 existence of which is not exempt from disclosure under the
19 provisions of the Freedom of Information Act or for informa-
20 tion reviewed and relied upon in an investigation by the intel-
21 ligence committees of the Congress, the Intelligence Over-
22 sight Board, the Office of General Counsel of the Central
23 Intelligence Agency, the Office of Inspector General of the
24 Central Intelligence Agency, or the Office of the Director of
25 Central Intelligence for any impropriety, or violation of law,

1 Executive order, or Presidential directive in the conduct of
2 an intelligence activity.

3 “(b) The provisions of this section shall not be super-
4 seded except by a provision of law which is enacted after the
5 date of enactment of this section and which specifically cites
6 and repeals or modifies its provisions.

7 “(c) Notwithstanding subsection (a) of this section,
8 proper requests by United States citizens, or by aliens law-
9 fully admitted for permanent residence in the United States,
10 for information concerning themselves, made pursuant to the
11 Privacy Act of 1974 (5 U.S.C. 552a) or the Freedom of In-
12 formation Act (5 U.S.C. 552), shall be processed in accord-
13 ance with those Acts.

14 “(d) The Director of Central Intelligence shall promul-
15 gate regulations to implement this section as follows:

16 “(1) Such regulations shall require the appropriate
17 Deputy Directors or Office Head to: (A) specifically
18 identify categories of files under their control which
19 they recommend for designation; (B) explain the basis
20 for their recommendations; and (C) set forth procedures
21 consistent with the statutory criteria in subsection (a)
22 which would govern the inclusion of documents in des-
23 ignated files. Recommended designations, portions of
24 which may be classified, shall become effective upon

1 written approval of the Director of Central Intelli-
2 gence.

3 “(2) Such regulations shall further provide proce-
4 dures and criteria for the review of each designation
5 not less than once every ten years to determine wheth-
6 er such designations may be removed from any catego-
7 ry of files or any portion thereof. Such criteria shall in-
8 clude consideration of the historical value or other
9 public interest in the subject matter of the particular
10 category of files or portions thereof and the potential
11 for declassifying a significant part of the information
12 contained therein.

13 “(e)(1) On the complaint under section 552(a)(4)(B) of
14 title 5 that the Agency has improperly withheld records be-
15 cause of improper designation of files or improper placement
16 of records solely in designated files, the court’s review shall
17 be limited to a determination whether the Agency regulations
18 implementing subsection (a) conform to the statutory criteria
19 set forth in that subsection for designating files unless the
20 complaint is supported by an affidavit, based on personal
21 knowledge or otherwise admissible evidence, which makes a
22 prima facie showing, that (A) a specific file containing the
23 records requested was improperly designated; or (B) the
24 records requested were improperly placed solely in designat-
25 ed files. If the court finds a prima facie showing has been

1 made under this subsection, it shall order the Agency to file a
2 sworn response, which may be filed in camera and ex parte,
3 and the court shall make its determination based upon these
4 submissions and submissions by the plaintiff. If the court finds
5 under this subsection that the Agency's regulations imple-
6 menting subsection (a) of this section do not conform to the
7 statutory criteria set forth in that subsection for designating
8 files, or finds that the Agency has improperly designated a
9 file or improperly placed records solely in designated files,
10 the Court shall order the Agency to search the particular
11 designated file for the requested records in accordance with
12 the provisions of the Freedom of Information Act and to
13 review such records under the exemptions pursuant to section
14 552(b) of title 5. If at any time during such proceedings the
15 CIA agrees to search designated files for the requested
16 records, the court shall dismiss the cause of action based on
17 this subsection.

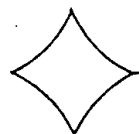
18 “(e)(2) On complaint under section 552(a)(4)(B) of title 5
19 that the agency has improperly withheld records because of
20 failure to comply with the regulations adopted pursuant to
21 subsection (d)(2), the court's review shall be limited to deter-
22 mining whether the agency considered the criteria set forth in
23 such regulations.”.

24 (b) The table of contents at the beginning of such Act is
25 amended by adding at the end thereof the following:

**"TITLE VII—RELEASE OF REQUESTED INFORMATION TO THE
PUBLIC BY THE CENTRAL INTELLIGENCE AGENCY**

**"Sec. 701. Designation of files by the Director of Central Intelligence as exempt
from search, review, publication, or disclosure."**

1 **SEC. 4.** The amendments made by section 3 shall be
2 effective upon enactment of this Act and shall apply with
3 respect to any requests for records, whether or not such re-
4 quest was made prior to such enactment, and shall apply to
5 all cases and proceedings pending before a court of the
6 United States on the date of such enactment.



The Society of Professional Journalists, Sigma Delta Chi

STATEMENT OF THE
SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

before the

SUBCOMMITTEE ON LEGISLATION

of the

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

United States House of Representatives

concerning

"The Intelligence Information Act of 1983"

H.R. 3460, H.R. 4431

Thank you, Mr. Chairman and members of the Committee, for affording the Society of Professional Journalists, Sigma Delta Chi, the opportunity to comment on H.R. 3460 and H.R. 4431, both entitled "The Information Intelligence Act of 1983." Formed in 1909, the Society is the largest organization of journalists in the United States, with more than 24,000 members in all branches of the news media, print and broadcast.

The Society has a longstanding interest in and concern with the government's information policies. We testified in the Senate on S. 1324, and now make known our views on H.R. 3460 and H.R. 4431. We do so out of more than just professional self-interest. The flow of information from the government to the public is the foundation upon which this democracy is based. It is the public which benefits from having direct access to official government information and records rather than just having to rely on the infamous official government spokesman.

As we did in our Senate testimony, we acknowledge that the Central Intelligence Agency has abandoned its effort to gain a complete exemption from the Freedom of Information Act (FOIA). This is a very constructive step by the CIA. The CIA's stated purpose in seeking this bill -- alleviating its administrative work and enhancing its internal security -- is unobjectionable. But while the Society does not object

to this stated goal, there are still too many problems with this bill to allow us to endorse it at present. In short, we fear that the impact of this bill is far greater than its stated purpose. It is also worth noting that should the CIA be granted its exemption, this Committee's oversight role will take on even more importance. Any abuses in designating files that go undetected will be blamed squarely on this Committee.

Part of this reluctance is rooted in the context within which this bill is introduced. The overall information policy of the Reagan Administration has been one of constantly whittling away at the amount of information the American people receive about their government. These policies have already given us a retrogressive package of amendments to the FOIA, the Justice Department's policy of fee waivers and regulations implementing the FOIA, the President's executive order on classification and the President's ill-fated March 11, 1983 directive on national security information.

The Society is also skeptical of the need for this bill because it is redundant; statutes now exist to prevent the disclosure of sensitive CIA information. Exemptions 1 and 3 to the FOIA now protect classified national security information and intelligence sources and methods from disclosure along with Section 102(d)(3) of the National Security Act of 1947. Furthermore, the CIA has been unable to cite examples of courts mandating the disclosure of information

when the CIA argued that such release would harm national security. Our skepticism over the need for this bill is also rooted in the CIA's failure to produce concrete examples of the FOIA's ever leading to the exposure of a source's identity.

But the Society is most concerned that this bill runs counter to the very spirit behind the FOIA -- that the American people are entitled to information about their government. The Senate, in its consideration of S. 1324, made several improvements that are lacking in H.R. 3460, but contained in H.R. 4431. These measures include provisions providing for judicial review of agency decisions, requiring the designation of a file to be reviewed every ten years, continuing the search and review of information in designated files used in an official investigation and mandating that the CIA Director promulgate regulations concerning the designation of CIA operational files.

Before the Society can support a special CIA exemption from the FOIA, one essential concern must be satisfied -- this bill cannot in any way lead to the denial of information that is now available under the FOIA. If this guarantee can be given, then the CIA's goal of greater efficiency is justifiable. But if this bill is used to withhold information that is now releaseable, then greater efficiency is too high a price to pay. As part of this greater efficiency promised in return for passage of the bill, this Committee should re-

ceive guarantees from the CIA that FOIA requests will be complied with more expeditiously and that personnel will be shifted internally to accomplish this. The CIA is now a literal black hole for FOIA requests, with journalists generally waiting at least two years for their requests to be filled.

There are several specific provisions of H.R. 3460 and H.R. 4431 that need to be addressed before the Society can support any FOIA exemption for the CIA.

JUDICIAL REVIEW:

In order to ensure that this bill does not subvert the FOIA's purpose of informing the American people about their government, a strong judicial review provision is essential. The Senate agreed with this statement and inserted such language. However, the Senate version still contains problems. As set forth in S. 1324, to be granted judicial review an individual must have personal knowledge or otherwise admissible evidence of the improper designation of a specific file or the improper placement of a record in a designated file. This standard provides illusory comfort; obviously, very few persons will have the requisite knowledge to obtain judicial review. And, even if a requestor can make this basic showing, S. 1324 limits court review to the CIA's sworn response.

The Society proposes a different judicial review standard that is in keeping with the intent of the FOIA. Any bill passed by the Congress should allow a court to independently

review the designation of the file in question. If necessary, this review can be in camera. Such a judicial review provision is consistent with the FOIA's general requirement of de novo judicial review of withheld classified material.

DESIGNATION OF FILES:

H.R. 4431 contains a section that H.R. 3460 does not, but which should be part of any bill passed by Congress. This provision would require the CIA Director to promulgate regulations setting out the procedures that would be used to designate files as "operational." This provision also includes the important requirement that procedures and criteria be set forth to ensure that files are reviewed once every ten years to ascertain whether designations can be removed and the information made public. H.R. 4431 properly includes in the criteria the historical value of the information or the public interest in it.

OPERATIONAL FILES UNDER INVESTIGATION:

While S. 1324 and both House bills allow the continued search and review of files which generated information used in an official investigation of an abuse by the CIA, this provision needs strengthening. The report accompanying S. 1324 provides helpful language to the effect that all information relied upon as part of an investigation of an illegality or impropriety in the conduct of an intelligence activity should remain open to the public. But report language is not enough.

A provision should be added to the statute to make it mandatory that all information relevant to an investigation of abuse or impropriety remain available.

SPECIAL ACTIVITIES FILES:

S. 1324 and both House bills contain provisions providing continued CIA search and review of operational files concerning "special activities," or covert action operations, if the fact of the activity's existence is not exempt from the FOIA. Since all covert actions are, by definition, classified and therefore covered by FOIA Exemption 1, this provision appears to deny search and review of special activity files. This provision seems to run counter to the intent of the FOIA in that it would allow only files pertaining to covert actions officially acknowledged by an Executive Branch official to be subject to search and review.

PENDING REQUESTS/PENDING CASES:

All three bills contain a section that would make the CIA's exemption to the FOIA effective for all requests for records and pending court cases, whether or not filed before enactment of the bill. This provision should be struck from the bill simply on the ground that it is, on the surface, unfair. Furthermore, inclusion of such a provision is proof that passage of this bill will keep from public disclosure information that is now available to the public.

CONCLUSION:

The Society of Professional Journalists, Sigma Delta Chi realizes both the invaluable service the CIA performs for the citizens of the United States and the need to keep some of its information secret. But this must be weighed against the principle that has allowed our democracy to flourish for two hundred years. Above all else, we must remember that all institutions of our government are answerable to the American people. Secrecy for secrecy's sake erodes that principle.

APPENDIX D

CIA ANALYSIS OF PREVIOUSLY RELEASED DOCUMENTS TO ENSURE CONTINUED AVAILABILITY

KEYED TO CENTER FOR NATIONAL SECURITY STUDIES REPORT NO. 102-4 (March 1981)

114

R84 - 888

Central Intelligence Agency



Washington, D.C. 20505

5 April 1984

The Honorable Edward P. Boland, Chairman
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is to respond to your request that the Agency provide the Committee with certain information as to (1) the anticipated impact of the pending Freedom of Information Act (FOIA) legislation on current Central Intelligence Agency (CIA) FOIA litigation, and (2) the continued availability of information previously released to the public.

Concerning your request for a list of each of our pending FOIA cases and how each would be impacted, I understand that this is no longer a matter of concern. H.R. 5164, as introduced recently by you and Representatives Mazzoli, Robinson, and Whitehurst, limits the retroactivity of the legislation to cases filed after 7 February 1984, thus leaving all pending cases subject to the current law.

In response to the second part of your request, we have set forth in the enclosure our best analysis as to whether the documents referred to in the list you provided us would continue to be available under the FOIA legislation being considered. I trust that you will find this analysis to be helpful.

I look forward to working with you and the other Members of the Committee in securing enactment of meaningful legislative relief.

Sincerely,

A handwritten signature in cursive script, appearing to read "Clair E. George".

Clair E. George

Director, Office of Legislative Liaison

Enclosure

C-1 This category describes a letter, with attachments, from the DCI to the President. Because this letter was written by the DCI, it would be located in the Executive Registry. Since the Executive Registry would not be exempt from search and review, this type of material would continue to be accessible.

C-5 This category describes documents which were referred to in a report presented by the DCI to the Senate Appropriations Committee. It would, therefore, be located in the Executive Registry. Since the Executive Registry would not be exempt from search and review, this type of material would continue to be accessible.

C-5(a) This document describes the organization and function of the Domestic Operations Division. This document is part of the Directorate of Operations (DO) own internal regulations. Since copies of these regulations would be contained in non-designated files, this type of material would continue to be accessible.

C-5(b) Same as answer to C-5(a).

C-5(c) This category describes correspondence between the DCI and an individual outside the Agency. This type of correspondence would be located in the Executive Registry. Therefore, this type of document would continue to be accessible to search and review.

C-5(d) This category describes a document analyzing the international youth movement. These types of documents would be located in the DDI. Since the DDI record system could not be designated as exempt from search and review, these types of documents would continue to be accessible.

C-5(e) This category describes a document to all employees from the DCI. Documents from the DCI to all employees would be stored in the Executive Registry. Since the Executive Registry will not be designated as exempt from search and review, these types of documents will still be accessible.

C-6 These documents describe an agreement between the Federal Bureau of Investigation (FBI) and the CIA. Copies of these documents would likely be contained in the files of the FBI. Since the bill does not affect documents contained in federal agencies other than CIA, this type of material will continue to be accessible.

C-8 This category describes a memo to the DCI from the IG. Documents from the IG to DCI would be located in the files of the IG and Executive Registry. Since the Executive Registry and IG record systems would not be exempt from search and review, this type of material would continue to be accessible.

C-10 This category of documents describes a memo that was examined by the Rockefeller Commission and referred to in the report of that Commission. Since material that was transmitted to an official investigatory body in the course of conducting an investigation into an illegal or improper intelligence activity will continue to be accessible to search and review, the types of documents described in this category will remain accessible.

C-11 These documents describe events in Chile during 1970. The document dated 18 September 1970 and the document describing Allende would have been contained in the Office of Public Affairs. Since the files of the Office of Public Affairs would not be exempt from search and review, this type of material would continue to be accessible. With respect to the document entitled "Developments During the Week of 20 September 1983," we cannot make a definitive determination on the accessibility of this type of document because it is unclear where this document was filed within the CIA record system.

C-12(a) This category describes documents pertaining to activities outside the CIA's charter. These documents were generated in response to a DCI directive requesting CIA to report activities outside the charter of the Agency. This material would likely be located in the Executive Registry since it was in response to DCI request for information. The material would also be located in the IG record systems since it was part of an IG investigation. Since the files of the IG and Executive Registry would not be exempt from search and review, the type of material described in this category would continue to be accessible.

C-12(b) Same as answer to C-5(d).

C-12(c) Same as answer to C-12(a).

C-13/15 This category describes documents regarding Project RESISTANCE and MERRIMACK, which was run by the Office of Security. These types of documents will not be located in record systems to be designated by the Office of Security. They, therefore, will remain accessible.

C-16 This category describes a memo to the DCI concerning restrictions on covert operations. Documents sent to the DCI would be located in the Executive Registry. Since the Executive Registry would not be exempt from search and review, this type of material will continue to be accessible.

C-19 This category describes documents located within CIA that originated from other federal agencies. Since this bill is restricted to CIA, documents produced by other federal agencies will be available from other federal agencies.

C-21 This category describes a memo from the General Counsel to the DCI. Memos from the General Counsel to the DCI will be located in the Executive Registry and the OGC. Since the Executive Registry and the files of OGC will not be exempt from search and review, this type of material will continue to be accessible.

C-22 This category describes National Intelligence Estimates relating to the Cuban Missile crisis. This type of intelligence product would be located in the DDI record system, which could not be designated as exempt from search and review under the bill. Thus, these types of documents would continue to be accessible to search and review.

C-24 This category describes documents detailing non-operational relationships between CIA and the University of California. Since documents concerning non-operational relationships would be located in nondesignated files, these types of materials will continue to be accessible.

C-25 This category describes documents concerning the Agency's relationship with a law firm hired to represent the Agency. Documents concerning such a relationship would be in the OGC. Since the files of OGC would not be exempt from search and review, these types of documents will continue to be accessible. This category also describes documents dealing with CIA's relationship with a public relations firm. It is not possible to determine whether this type of document would continue to be accessible without obtaining a copy of the document.

C-26 This category describes documents dealing with Oswald's connection with Cuba, which was provided to the Rockefeller Commission. Since material referred to or relied upon an official investigatory body in the course of conducting an investigation into an illegal or improper intelligence activity will continue to be accessible to search and review, the types of documents described in this category will remain accessible.

C-27 This category contains documents describing CIA drug experiments. These documents would be accessible because they were relied upon by an official investigatory body in the course of conducting an investigation into an illegal or improper intelligence activity.

C-28 This category describes a memo from the IG to the DCI concerning CIA's mail interception operation. Memos from the IG to the DCI would be located in the Office of the Inspector General and Executive Registry. Since the Executive Registry and the files of IG will not exempt from search and review, this material will continue to be accessible.

C-29 This category describes a memo from the General Counsel to the DCI regarding CIA activities in Laos. Memos from the General Counsel to the DCI will be located in the Executive Registry and the OGC. Since the Executive Registry and the files of OGC will not be exempt from search and review, this type of material will continue to be accessible.

C-30 This category describes documents dealing with the government's investigation of Jack Anderson. This type of material will not be included in files which are to be designated within the Office of Security. It would therefore be accessible to search and review. This material may also be accessible because it was relied upon in an investigation of illegal or improper intelligence activities. A definitive opinion on this matters cannot be given without obtaining the actual documents.

C-32 This category describes Director of Central Intelligence Directives. DCID would be located in the Executive Registry. Since documents in the Executive Registry would not be exempt from search and review, this type of material will continue to be accessible.

C-33 This category describes documents pertaining to the disappearance of Professor Riha. Certain of the documents pertain to correspondence between DCI Colby and the SSCI and therefore would be contained in the Executive Registry. As to the rest of the documents, it is not possible from the description to ascertain whether they would continue to be accessible. It would therefore be necessary to obtain the actual documents.

C-34 This category describes documents pertaining to Peter Camejo, Head of the Socialist Workers Party and to operation CHAOS. It is likely that documents on Camejo were released pursuant to a Privacy Act request. Since Privacy Act requests will continue to be searched without restriction, this type of material will remain accessible. With regard to the CHAOS material, it is likely that this material was relied upon by the Rockefeller Commission and Church Committee investigation into illegal or improper intelligence activities. It therefore will continue to be accessible.

C-35 Same as answer to C-27.

C-36 This category describes documents pertaining to meetings held by the DCI Helms and statements by DCI Colby concerning the Agency's mail intercept operation. Since these types of documents would likely be found in the Executive Registry, which would not be exempt from search and review, this type of material will continue to be accessible.

C-37 This category describes a memorandum from the General Counsel to the DCI. This type of memorandum would be stored in OGC and Executive Registry. Since the files of OGC and Executive Registry would not be exempt from search and review, this type of material will continue to be accessible.

C-39 Same as answer to C-24.

C-40 This category describes material concerning CIA assistance to local police departments. This type of material is likely to be found in Office of Security files that will not be designated. Therefore, this type of material will continue to be accessible.

C-41 This category describes a CIA critique of a Bar Association report. This type of material will likely be found in OGC files, which cannot be designated. This type of material will, therefore, continue to be accessible.

C-42 This category describes documents pertaining to the testimony before Congress of two Directors of Central Intelligence. Documents pertaining to congressional testimony of the DCI will be found in the Executive Registry and Office of Legislative Liaison. Since records in the Executive Registry and Legislative Liaison Office will not be designated, this material will continue to be accessible to search and review.

C-44 Same as answer to C-13/15.

C-45 Same as answer to C-24.

C-46 Same as answer to C-13/15.

C-47 This category describes documents pertaining to CIA's relationship with a journalist that was sent to the House and Senate Intelligence Committees and the Rockefeller Commission. CIA documents sent to Congress would be contained in the Office of Legislative Liaison. Since the files in the Office of Legislative Liaison will not be exempt from search and review, these materials will continue to be accessible.

C-48 These documents pertain to contacts between the CIA and the Internal Revenue Service regarding Rampart Magazine. These documents originated within the Office of General Counsel (OGC). Since the files of OGC will not be exempt from search and review, this type of material will continue to be accessible.

C-49 This category describes White House press releases, CIA documents listing the contents of the Agency's biological arsenal, and the text of international agreements prohibiting developments of such weapons. CIA biological weapons were the subject of investigation by the Church Committee and it is likely that the documents described in this category were relied upon in the course of the investigation. Therefore, these documents would be accessible because they were the relied upon in the course of an investigation into improper intelligence activities.

C-54 This category describes correspondence of a private citizen intercepted by CIA. It appears that these items were requested by this private citizen. Since the bill provides that request by individuals for information concerning themselves will be searched without restriction, the accessibility of documents described in this category will not be affected by the passage of the bill.

C-55 This category describes unclassified publications sent to various colleges and universities on Soviet Government personnel, international terrorism and other subjects. Unclassified documents analyzing the Soviet Government and international terrorism will likely be found in the DI, which cannot be designated as exempt from search and review. Therefore this type of material will continue to be accessible.

C-58 This category describes documents analyzing trends in international terrorism. This type of analysis will likely be found in the DI, which cannot be designated as exempt from search and review. Therefore, this type of material will continue to be accessible.

C-61 This category describes a three page statement by the DCI regarding contact with university officials. Written statements by the DCI are likely to be contained in the Executive Registry. Since the Executive Registry will not be exempt from search and review, this type of document will continue to be accessible.

C-63 This category describes articles written in the "Studies of Intelligence." Since "Studies of Intelligence" will be located in nondesignated files, this material will continue to be accessible.

C-64 This category describes documents regarding plans by CIA to assassinate various foreign officials. It is likely that these documents were provided to the Rockefeller Commission and Church Committee investigation into improper intelligence activities. Since documents which are relied upon in the course of an investigation into improper intelligence activity will be subject to search and review, this type of material will continue to be accessible.

C-65 This category describes documents pertaining to overt and covert relationship between the CIA and various universities. Material relevant to overt relationships would be contained in nondesignated files. It is not possible from the description of the documents pertaining to covert relationships with universities to determine whether they will continue to be accessible.

C-66 This category describes documents pertaining to DCI Colby's efforts to keep the Glomar Explorer story out of the newspaper. These documents were retrieved from the Executive Registry. Therefore, these types of documents will continue to be accessible to search and review.

C-69 This category describes documents obtained through discovery in the course of a litigation. Since the bill will not affect the scope of search and review in response to a discovery request, documents requested through the discovery process will continue to be accessible.

C-70 This category describes correspondence with universities regarding CIA Academic Relations. These types of correspondences would be contained in the Office of Public Affairs. Since files of the Office of Public Affairs will not be designated as exempt from search and review, this type of material will continue to be accessible. This category also describes CIA regulations regarding relations with the academic community, which would also be in files of the Office of Public Affairs, and other nondesignated files.

C-71 This category describes deletions from a book submitted for prepublication review. Classified information deleted from books or articles submitted for prepublication review will be found in files of the Office of Public Affairs. Since the files of the Office of Public Affairs will not be designated, this type of material will continue to be subject to search and review.

C-75 This category describes documents pertaining to a meeting between former DCI Turner and several university officials. Since these types of records will be found in the Executive Registry, they will continue to be accessible to search and review.

C-91 This category describes a transcript of CIA testimony before EPSCI. Since unclassified transcripts can be obtained from Congress, this type of material will continue to be accessible.

C-95 Same as answer to C-13/15.

C-96 This category describes a special study on the Berlin Tunnel Operation. Since these special studies will not be in designated files, this type of material will continue to be accessible.

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C-100 This category describes documents which relate to CIA's relationship with Tufts University. Material relevant to overt relationships would be contained in nondesignated files. Those documents which concern an intelligence activity which was the specific subject of an investigation by an official investigatory body would also be subject to search and review under the legislation.

C-107 This category describes documents regarding Project OFTEN. These documents would be accessible because they were relied upon by an official investigatory body in the course of conducting an investigation into the legality or propriety of an intelligence activity.

EXTRACT: Center for National Security Studies
Report No. 102-4 (March 1981)

C. CENTRAL INTELLIGENCE AGENCY

C-1. COLBY REPORT; December 24, 1974; 64 pages. A letter from Colby to the President regarding a December 22, 1974 *New York Times* article revealing CIA domestic intelligence activities. Nine annexes are attached to the letter, which include discussions of the Huston Plan, interagency programs, a counterintelligence office, Schlesinger's request asking employees to report non-chartered CIA activities [may be ordered as C-5(e)], and a March 5, 1974 memo terminating Operation CHAOS. (\$6.40/copy)

C-5. "This series of documents (through C-5e) were referred to in a report on CIA domestic activities presented by Director Colby to the Senate Appropriations Committee on January 15, 1975:

C-5(a). ORGANIZATION AND FUNCTIONS, DOMESTIC OPERATIONS DIVISION AND STATION (DODS); February 11, 1963; 1 page. The mission of the DODS is described as directing, supporting and coordinating "clandestine operational activities . . . within the United States against foreign targets . . ." (\$1.00/copy)

C-5(b). REDESIGNATION OF COMPONENT; January 28, 1972; 1 page. An intra-agency memo from Thomas Karamessines, Deputy Director for Plans, announcing the change in the name of the Domestic Operations Division (DO) to Foreign Resources Division (FR). (\$1.00/copy)

C-5(c). CORRESPONDENCE BETWEEN DAVID GINSBURG, EXECUTIVE DIRECTOR OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, AND RICHARD HELMS, DIRECTOR OF THE CIA; August 29, 1967 and September 1, 1967; 3 pages. Contains a request by Ginsburg for information on any civil disorder intelligence the CIA may have, and Helms' reply. (\$1.30/copy)

C-5(d). RESTLESS YOUTH; September 1968, No. 0613/68; 41 pages. The report analyzes the international youth movement of the late 1960s, studies its sociological base, and attempts to understand its structure, purposes, goals, and possible ramifications. The report cites the Civil Rights Movement of the early 1960s as proving to dissidents later in the decade that confrontational politics is the only means of accomplishing political change. See also C-12(b) (\$4.10/copy)

C-5(e). MEMORANDUM FOR ALL CIA EMPLOYEES FROM JAMES R. SCHLESINGER, DIRECTOR; May 9, 1973; 2 pages. The Director requests that all CIA personnel report to him any past or present activities which lie outside the Agency's charter, and directs that if an order is given to a CIA employee which is inconsistent with the

Agency's charter, the employee should report the incident to the Director. See also C-1. (\$1.20/copy)

C-6. DELIMITATION AGREEMENT OF 1948; September and October 1948; 7 pages. The documents constitute an agreement between the FBI and the CIA permitting CIA contacts with émigré groups and individuals in the United States. (\$1.70/copy)

C-8. "POTENTIAL FLAP ACTIVITIES." MEMO TO WILLIAM COLBY FROM WILLIAM V. BROE, INSPECTOR GENERAL; May 21, 1973; 26 pages. The first portion of the Memo discusses CIA contacts with Watergate figures, and CIA participation in the Intelligence Evaluation Committee and Staff, established to evaluate domestic intelligence studies. The second portion of the Memo covers Support, Real Estate, Procurement, Cover, Activities Directed Against U.S. Citizens, and Collection Activities. (\$2.60/copy)

C-10. FORMAL MEMORANDUM ON RESPECTIVE RESPONSIBILITIES OF THE FBI AND CIA IN THE UNITED STATES; February 7, 1966; 2 pages. This memo referred to on page 57 of the Rockefeller Commission Report. The memo contains no information not included in that Report. (\$2.00/copy)

C-11. DOCUMENTS REFERRED TO IN "COVER ACTION IN CHILE 1963-1973"; September 1970 and undated; 11 pages. This file contains three CIA documents released to CNSS through the FOIA litigation and describing events in Chile during September 1970. The reports concern alleged attempts by the Chilean Communist Party to take over media outlets, splits within the Christian Democratic Party, the growth of "Patria y Libertad," and Allende's character and career. (\$1.10)

C-12(a). FAMILY JEWELS—ACTIVITIES CONSTRUED TO BE OUTSIDE THE CIA CHARTER; May 1970 - May 1973; 65 pages. DCI James Schlesinger's directive of May 9, 1973 [see C-5(e)] requested CIA employees to report activities which could be considered outside the charter of the Agency. The request released this partial file of questionable activities, including domestic surveillance operations, arrangements with American firms, assistance to local police departments, and Office of Security support to the Bureau of Narcotics and Dangerous Drugs. (\$6.50/copy).

*C-12(b). RESTLESS YOUTH; 1968; 245 pages. A version of the CIA's 1968 study of worldwide student dissidence which includes a 199-page section reporting on student movements in 19 foreign countries. Part I is identical to C-5(d) except that it includes some photographs and one paragraph deleted from that version. (\$24.50/copy)

* C-12(c). "FAMILY JEWELS" MEMORANDA; 1968 and 1973; 18 pages. Memoranda to the DCI from various offices responding to his request that CIA activities which may be outside the Agency's charter be reported. The memoranda show that the Agency examined satellite photographs in analyzing domestic civil disturbances, that the Domestic Contact Service collects information on foreign students studying in the U.S., and that in 1969 and 1970 several studies were prepared on black radical movements in the Caribbean, one of which focused on possible links to the U.S. black power movement. (\$1.80/copy)

*C-13/15. CIA/DOCUMENTS ON PROJECTS RESISTANCE AND MERRIMAC; 1966-1975; 1987 pages. Documents in this file, released to CNSS through the FOIA, contain a number of discrepancies from, or additions to, the account of the projects in the Rockefeller and Church Reports. These relate to the use of informants in Resistance; the scope of Resistance; the use of Army counterintelligence information in Resistance reports; a proposed expansion of Merrimac in 1968; and Merrimac operations outside the Washington, D.C. area. (\$150.00; selected documents \$3.50)

Also available is a 22-pp. subject index to the Resistance Merrimac documents describing the date, number of pages, groups mentioned and titles described in each of 456 documents. (\$2.50 copy)

C-16. RESTRICTIONS ON OPERATIONAL USE OF ACADEMICS; 1970 and 1973; 8 pages. Tom Huston's 1970 memo informing DCI Helms that restrictions on domestic use of several intelligence gathering techniques had been lifted; and guidelines reprinted in 1973 prohibiting the Agency from covert funding of U.S. Educational or private voluntary organizations. (\$1.80/copy)

C-19. FILES ON CHE GUEVARA; 1958-1976; 184 pages. A request to the CIA for all files on Che Guevara and others produced responses from the State Dept., FBI, DIA, and Navy. The file includes accounts of Che's alleged activities in Cuba, Latin America, Africa and Vietnam; numerous false reports of his death; and several accounts of his capture and execution in Bolivia in 1967. (\$18.40/copy)

C-21. TWO MEMORANDA FROM CIA GENERAL COUNSEL TO CIA DIRECTOR; up to January 1962 - April 1962; 8 pages. The three memoranda from CIA General Counsel Lawrence Houston to the Director discuss the legality of subversion and sabotage, and paramilitary cold-war activities. These memoranda argue that covert operations are legal despite the lack of congressional authorization in the 1947 NSC Act. (\$0.80/copy)

C-22. NATIONAL INTELLIGENCE ESTIMATES RELATING TO THE CUBAN MISSILE CRISIS; October 19 and 20, 1962; 30 pages. These papers concern the problem of assessing the strategic and political implications of the Soviet military buildup in Cuba. They provide a history of the military buildup, discuss its implications, and note that the possibilities exist for an expansion of the buildup. The reports conclude that the Soviet objective is to prove that the U.S. can no longer prevent a Soviet presence in the hemisphere, and discusses the probable effect of a warning. (\$3.00/copy).

C-24. CIA RELATIONSHIPS WITH THE UNIVERSITY OF CALIFORNIA; 1958-1977; 914 pages. Nathan Gardels received these files through requests and litigation under the FOIA. They document CIA relationships and contracts with UC for research in political science, Chinese and Slavic studies, physics, and other fields; CIA use of academic cover; and covert recruiting.

C-25. CIA RELATIONSHIPS WITH DOMESTIC FIRMS; 1975-1976; 67 pages. These documents, released in *Halperin v. CIA*, provide a limited look at the Agency's relationships with the Arnold & Porter law firm, hired to represent it during the 1975-1976 Senate investigation, and with Robert R. Mullen and Co. The CIA used Mullen Co., a public relations firm which hired E. Howard Hunt in 1970, for cover and other purposes. (\$6.70/copy)

C-26. OSWALD AND THE CUBAN CONNECTION; April and May, 1973; 27 pages. This report represents a review of items in the CIA's Lee Harvey Oswald File "regarding allegations of Castro Cuban involvement in the John F. Kennedy assassination." The analysis was requested by the Rockefeller Commission. The report seeks, in part, to explain Oswald's "feelings toward and relations with Castro's Cuba." (\$2.70/copy)

C-27. CIA DRUG EXPERIMENTS; up to July 25, 1975; 146 pages. A collection of 59 documents detailing various CIA projects relating to drug and behavioral experiments. The file includes some documents from the Frank Olson case (see C-35), as well as documents describing MKULTRA, the CIA's top-secret project to investigate "the manipulation of human behavior." The research is said to be "considered by many in medicine and related fields to be professionally unethical. A final phase of the testing of MKULTRA products places the rights and interests of U.S. citizens in jeopardy." (\$14.60/copy) [The entire 40,000-page release of CIA behavior control documents is available by appointment for inspection at the CNSS Library.]

C-28. MEMO FROM INSPECTOR GENERAL TO DIRECTOR OF CIA INVESTIGATING THE CIA'S NEW YORK MAIL INTERCEPT PROGRAM; June 4, 1976; 11 pages. Colby's affidavit in an FOIA case—stating that all mail covers operated by the CIA's New York Intercept Program (HTLINGUAL) on US-USSR mail were indexed—sparked an investigation on the entire project by the Inspector General. The report examines the history of the project, its mail interception procedures, and analyzes how many and what kind of letters were photographed, opened, and indexed. (\$1.10/copy)

C-29. CIA ACTIVITIES IN LAOS: MEMO FROM CIA GENERAL COUNSEL TO DIRECTOR; October 30, 1969; 2 pages. The memo resulted from Senator Fulbright's assertion that the CIA is "waging war" in Laos. The General Counsel proceeded to inform the Director of CIA operations in Laos (which he characterized as assisting the native population to prevent a military takeover) and of the Agency's authority to carry out such operations. (\$.20/copy)

C-30. PROJECT MUDHEN—GOVERNMENT INVESTIGATIONS OF JACK ANDERSON; 1972; 39 pages. This file includes a copy of the complaint Anderson filed against Nixon, Kissinger, Helms and several others. Also included is a paper, "Chronology of a Conspiracy," which summarizes the government's investigation of Anderson, and a series of five memos detailing certain aspects of Project MUDHEN including operations, logs, and photos. (\$3.90/copy)

C-32. DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVES; 1946-1976; 285 pages. The directives are procedural memos from DCIs over a period of twenty years. They cover intelligence-related issues, including procedures for the Intelligence Advisory Committee, control of dissemination of foreign intelligence, security policy guidelines on liaison relationships with foreign intelligence organizations, recognition of exceptional service to the Agency, and exploitation of foreign language publications. Also included are directives relating to coordination of overt collection abroad, domestic exploitation of non-governmental organizations, and production of atomic energy intelligence. (\$28.50/copy)

C-33. CIA DOCUMENTS ON THE DISAPPEARANCE OF PROFESSOR RIHA; April 1969 - August 1975; 230 pages. The disappearance in April 1969 of Dr. Thomas Riha, a naturalized U.S. citizen born in Czechoslovakia who was a professor of Russian history at the University of Colorado, caused considerable publicity, and prompted a CIA investigation. The documents concern the unexplained disappearance and the subsequent involvement of University of Colorado President Joseph Smiley, local news reporters, and the CIA in investigations of the matter. Correspondence from William Colby to the Senate Intelligence Committee explains the limited role of the CIA in an affair that "was a domestic concern and beyond the jurisdiction and responsibility" of the Agency. News coverage concerning the disappearance is included. (\$23.00/copy)

C-34. CIA DOSSIER ON PETER CAMEJO AND OPERATION CHAOS FILES ON THE SOCIALIST WORKERS PARTY; 1968-1974; 220 pages. These files include an incomplete CIA dossier on Peter Camejo, the presidential candidate of the Socialist Workers Party. The Agency released 47 of the 108 extant documents on Camejo, which describe his political activities. Also included are Operation CHAOS files that add new details to the description provided by the Rockefeller and Church Reports on domestic spying by the CIA. The documents reveal the Agency's use of agents provocateurs and the widespread monitoring of SWP leaders. (\$22.00/copy)

C-35. THE DEATH OF FRANK OLSON; January 11, 1976; 174 pages. These are the documents provided by the CIA to the family of Dr. Frank Olson, the government biochemist who died in November 1953 when he jumped from a tenth story window after taking LSD. The documents trace the CIA's investigation of the Olson death as well as its involvement over the years with drug experimentation. Some of these documents are also included in C-27. (\$17.40/copy)

C-36. CIA MAIL OPENINGS, 1971-1973; 238 pages. The documents include two meetings conducted by CIA Director Helms on HTLINGUAL, the Agency's mail opening project, as well as a 1973 statement by Director Colby concerning termination of the project. The Helms memoranda explain the Agency's collaboration with the Postal Service and the FBI; participants in the meeting decided to continue the program despite reservations over possible adverse publicity and embarrassment should the mail opening scheme surface. The "memorandum for the record" signed by Colby expresses his desire to transfer the operation to the FBI and directs that "the project be suspended until appropriate resolution of the problems involved." (\$23.80/copy)

C-37. CIA JUSTICE DEPARTMENT AGREEMENT REGARDING INVESTIGATION OF POSSIBLE CRIMINAL ACTIVITIES ARISING OUT OF CIA ACTIVITIES: 1954-1975; 19 pages. The memorandum from CIA General Counsel J.R. Houston to the Director of Central Intelligence explains the "balancing of interest between the duty to enforce the law . . . and the Director's responsibility for protecting intelligence sources and methods." Included is a brief summary of twenty cases in which violations of criminal statutes were reported to the Department of Justice between 1954 and 1975. A detailed examination of circumstances involved in the drug prosecution of Mr. Puttaporn Khamkhruan, former CIA employee, is also included. (\$1.90/copy)

C-39. CIA CONTRACTS WITH THE UNIVERSITY OF CALIFORNIA-SAN DIEGO: 1966-1976; 121 pages. Copies of a negotiated contract between the CIA and U. of Cal. San Diego, describing completion dates, scope of work, location where research will be conducted, deliverable items and costs. The CIA contracts were for research in the field of image processing, a review of Soviet Geochemical Literature, and a study of agriculture in Communist China. (\$12.10/copy)

C-40. THE CIA AND LOCAL POLICE: 1967-1973; 177 pages. A series of memos and letters concerning direct CIA assistance to 12 municipal and/or county police departments including those of New York, Los Angeles, Boston, and Washington. The documents trace the history of CIA training seminars in photo and audio surveillance, narcotics, and "radical terrorist" control. (\$17.70/copy)

C-41. CIA CRITIQUE OF BAR ASSOCIATION REPORT: October 29, 1975; 39 pages. In response to a pamphlet, "The Central Intelligence Agency: Oversight and Accountability," prepared by a Committee of the Association of the Bar of the City of New York, the CIA issued "a careful critique of the report. . . together with a short summary." As the Agency explained, "This paper is not a brief in opposition; it is designed to question the validity of some of the research and thus raise legitimate questions as to some of the statements and conclusions." It includes sections on factual errors and misconceptions, misquotations, and material taken out of context. (\$3.90/copy)

C-42. SECRET LEGISLATIVE HISTORY OF THE CIA: 1947-1948; 143 pages. These documents reveal the secret congressional testimony of the first two Directors of Central Intelligence, Lt. General Hoyt S. Vandenberg and Rear Admiral R.H. Hillenkoetter. Director Hillenkoetter's April 1948 testimony before the House Armed Services Committee describes the problems which the fledgling intelligence agency faced in its first two years. The Vandenberg testimony was presented to the Senate Armed Services Committee in April 1947 in support of the National Security Act of 1947 which provided for unification of the armed services and establishment of the CIA. (\$14.30/copy)

*C-44. CIA/RESISTANCE/BLACK STUDENT UNIONS: 1968-1971; 33 pages. This file was released to researcher Murv Glass following a request for CIA files on the Black Student Union at the University of California at Santa Barbara. The documents show that Project Resistance and other CIA programs regularly used informants. [The Church Report stated that Resistance did not run unilateral informant operations. —Ed.] (\$3.30)

*C-45. CIA FILE ON UNIVERSITY OF MICHIGAN AND CENTER FOR CHINESE STUDIES: 1965-1976; 279 pages. This file was requested under FOIA by the editors of *Michigan Daily*. It documents confidential contacts between various CIA research offices and China scholars at the University of Michigan. It also shows the Agency's attempt to maintain academic contacts in a period when the propriety of classified government research was increasingly called into question. A 1966 CIA memo in the file states: "If a university wishes to stipulate provisos or qualifications we will be glad to consider them. The university need only say what they are." (\$27.90/copy)

*C-46. CIA/RESISTANCE/PEACE AND FREEDOM PARTY: 1968-1974; 85 pages. This file was obtained by the Peace and Freedom Party under FOIA. The Party was an object of CIA domestic surveillance under Project Resistance. This file shows that more than 50,000 names of PFP members from a single state (California) were indexed by Resistance; the figure given by the Church Committee was 12-16,000 names nationwide. These indexes were retained at least as late as May 1974. (\$8.50/copy)

*C-47. CIA/POLICY ON RELATIONSHIPS WITH JOURNALISTS/MATERIAL SENT TO INTELLIGENCE COMMITTEES: 1973-1976; 47 pages. After litigation under FOIA, these documents were released to journalist Judith Miller in response to a request for all material on CIA use of journalists which had been sent to the House and Senate Intelligence

Committees and the Rockefeller Commission. The file contains little factual information, but does include statements of CIA policy. Certain comments in the file raise the possibility that CIA contacts with journalists were more extensive than reported to the Committees. (\$4.70/copy)

C-48. CIA/IRS RECORDS ON RAMPARTS MAGAZINE/SPECIAL SERVICE STAFF: 1964, 1967, 1972; 12 pages. When *Ramparts* disclosed in 1967 that the CIA was funding the National Student Association, the CIA initiated an investigation of the tax status of the magazine. Also in the file are statements of the mission of the Special Service Staff, an IRS office which collected information on taxpayers based on political criteria. (\$1.20/copy)

C-49. CIA/WHITE HOUSE/DESTRUCTION OF BIOLOGICAL WEAPONS AND TOXINS: 1967-1970; 49 pages. In 1969 and 1970, President Nixon ordered the destruction of existing stockpiles of biological and toxic weapons. This file includes White House press releases, CIA documents listing the contents of the Agency's biological arsenal accumulated under MKNAOMI, and the text of international agreements prohibiting the development, production and use of such weapons. (\$4.90/copy)

C-54. CORRESPONDENCE OF VICTOR REUTHER INTERCEPTED BY THE CIA: 1968; 11 pages. Five items of Victor Reuther's correspondence intercepted in 1968. At that time an official of the United Auto Workers (UAW), Reuther's name was also on HTLINGUAL's "watch list" for mail intercepts from 1969-1971. (\$1.10/copy)

C-55. CIA DISTRIBUTIONS TO ACADEMICS: 1976; 11 pages. Lists of more than 40 colleges and universities to which the CIA sent unclassified publications produced by its overt research branch on Soviet government personnel, international terrorism, and other subjects. (\$1.10/copy)

C-58. INTERNATIONAL TERRORISM IN 1976: July 1977; 22 pages. An analysis of trends in international terrorism which finds, among other things, that while the number of terrorist incidents increased in 1976, the number of acts involving kidnaping and hostages, and the proportion of acts directed against US citizens and property, declined. Cuban exile formations emerged as "among the most active and most disruptive terrorist groups." (\$2.20/copy)

C-61. DCI TURNER'S STATEMENT ON HARVARD GUIDELINES: August 1977; 3 pages. Turner states that the CIA will ignore Harvard's requirement that university officials be informed of all CIA contacts with university personnel, and dodges the issue of covert recruitment on campus. (\$3.30/copy)

C-63. STUDIES IN INTELLIGENCE: 1972-1975; 297 pages. Seventeen previously classified articles and 33 book reviews written for circulation within the Intelligence Community. Subjects range from a post-mortem of U.S. involvement in Vietnam, to the use of logic in intelligence analysis, to a review of Agee's *Inside the Company*.

C-64. CIA ASSASSINATION PLOTS: MEMOS ON TRUJILLO, CASTRO, SOUTH VIETNAMESE LEADERS, BELGIAN CONGO LEADERS, MESSAGES CONCERNING TRUJILLO; 1960-1970, 198 pages. CIA discussions and planning of assassination plots concerning Trujillo, Castro, and S. Vietnamese and Belgian Congo leaders. CIA agents discuss eventual outcomes of such assassinations, and what effect the assassinations would have in those countries. These documents were released pursuant to FOIA litigation. (\$19.80/copy)

C-65. CIA USE OF ACADEMICS; 1967-1975; 148 pages. Released through litigation under the FOIA, these documents contain information on open and covert CIA-university relationships for purposes of research, recruitment, and surveillance of student dissent. (\$14.80/copy)

C-66. GLOMAR EXPLORER STORY; January 1974 - March 1975; 221 pages. Agency documents showing DCI Colby's vigorous efforts to keep the *Glomar Explorer* story out of the papers by briefing reporters and editors on its importance to the national security. The story was held for more than a year through the cooperation of the *New York Times*, *Los Angeles Times*, *Washington Post*, *Parade Magazine*, *Time*, *Newsweek*, CBS, AP, UP, and other news organizations. The file contains the incidental statement by Colby that the Agency uses prostitutes to obtain information. (\$22.10/copy)

C-69. CIA OPERATION CHAOS; 1962-1977; 125 pages. Obtained through discovery in *Halkin v. Helms*, these documents from Operation Chaos and the Rockefeller Commission show that the extent and variety of domestic aspects of Chaos, as well as resistance to the project within the CIA, were greater than revealed by the Church Committee. They also contain evidence of CIA domestic spying as early as 1962, and of a cover-up of the operation from OMB auditors. They also discuss the preservation of information gathered by CHAOS and other issues. (\$12.50 copy)

* These documents form the appendix to a published CNSS Report on Operation CHAOS. The report is available for \$2.50.

C-70. CIA CORRESPONDENCE WITH UNIVERSITIES ON GUIDELINES FOR CIA-ACADEMIC RELATIONSHIPS; 1976-1978; 97 pages. This file was released by the CIA after CNSS brought suit to obtain responses to 12 FOIA requests and consists for the most part of already-public

information. The file contains correspondence between the CIA and officials of Harvard and Amherst Universities and the University of Pennsylvania. The university officials argue that covert recruitment by and operational use of academics are inconsistent with the proper functions of a university; the CIA officials argue that these activities are necessary and should be allowed if individual academics choose to engage in them. The CIA officials also say that no full time university staff or faculty are used on an unwitting basis and that none are coerced into working with the Agency. The file contains copies of CIA regulations on relations with the U.S. academic community as well as its far stricter policy statements on relations with U.S. media and religious organizations. (\$9.70/copy)

C-71. DELETIONS FROM *THE CIA AND THE CULT OF INTELLIGENCE*; 1977-1980; 23 pages. Twenty-five of the 168 deletions withheld by the CIA from this 1974 book have recently been made public under the FOIA. This 23-page package contains the release as reinserted into the text of the hard cover edition as well as references to the paperback and manuscript page numbers. These now-released deletions deal with CIA activities in Cuba and Chile, CIA proprietaries, CIA-university ties, U.S. Africa policy, and other subjects. (\$2.30/copy)

C-75. CIA MEETINGS BETWEEN CIA OFFICIALS AND UNIVERSITY PRESIDENTS; April 1978-July 1978; 40 pages. This file was released in a suit brought by CNSS to obtain responses to 12 FOIA requests. The file contains correspondence and internal memoranda concerning a June 14, 1978 meeting between Admiral Turner and four university presidents which was intended to improve CIA-academic relations. The file also mentions a similar meeting with three university presidents on March 10, 1978. All participants agreed to accept the briefings under conditions of secrecy. (\$4.00 copy)

C-91. CIA TESTIMONY ON EMPLOYEE SECRECY CONTRACT. March 6, 1980. 69 pages. Transcript of testimony of CIA officials before the House Intelligence Committee which explains the CIA's review procedures and the Agency's interpretation of the *Snepp* Supreme Court decision upholding the secrecy contract, why only CIA critics have been punished for breach of contract, how present CIA employees are held to extra restrictions, why books and articles but not columns, speeches and lectures are reviewed, and other points. (\$6.90 copy)

C-95. CIA/RESISTANCE/WILLIAM AND MARY; November 1969-June 1977; 40 pages. These documents, released to the William and Mary student newspaper *Flat Hat* under the FOIA, include three detailed informant reports on political activity at the campus. The reports were prepared for Project RESISTANCE, which according to the Church Committee did not use informants. The file also contains correspondence between the CIA and college administrators concerning overt recruiting. (\$4.00/copy)

C-96 "THE BERLIN TUNNEL OPERATION"; June 1968; 57 pages. A Clandestine Services History of the planning, execution and eventual compromise of a 500-yard tunnel from West to East Berlin built by the CIA in order to tap major Soviet and East German phone lines. Although "from the beginning it was realized that the duration of this operation was finite," the project was considered one of the significant intelligence successes of the Cold War. The study was obtained under the FOIA by David Martin, author of *Wilderness of Mirrors*. (\$5.70/copy)

C-100 CIA/TUFTS UNIVERSITY; 1963-1978; 88 pages. These CIA files released to Tufts under the FOIA include a 1969 list prepared by the Agency's CHAOS office of all SDS chapters nationwide. The files also reflect open CIA-University ties including overt recruiting, participation of Tufts professors in CIA-sponsored seminars, and possible employment of a professor by the CIA during sabbaticals. One document, apparently supplied to the CIA by the Tufts administration, is a break-down of a first year class with emphasis on foreign students. (\$8.80/copy)

C-107 CIA/BEHAVIOR CONTROL/PROJECT OFTEN; 1962-1973; 2020 pages. Files released under the FOIA from the CIA's Project OFTEN, a successor to MKULTRA. Files on the project, conducted by the Agency's Office of Research and Development, include a history of the project, discussions of interrogation, incapacitation, psychological assessment, microwave tolerance in humans, electrical stimulation of the brain, and plant and animal studies. (\$202.00/copy. Portions of the file may be ordered separately at 10¢/page)