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

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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.

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. McMahon, 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. McMahon, 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.

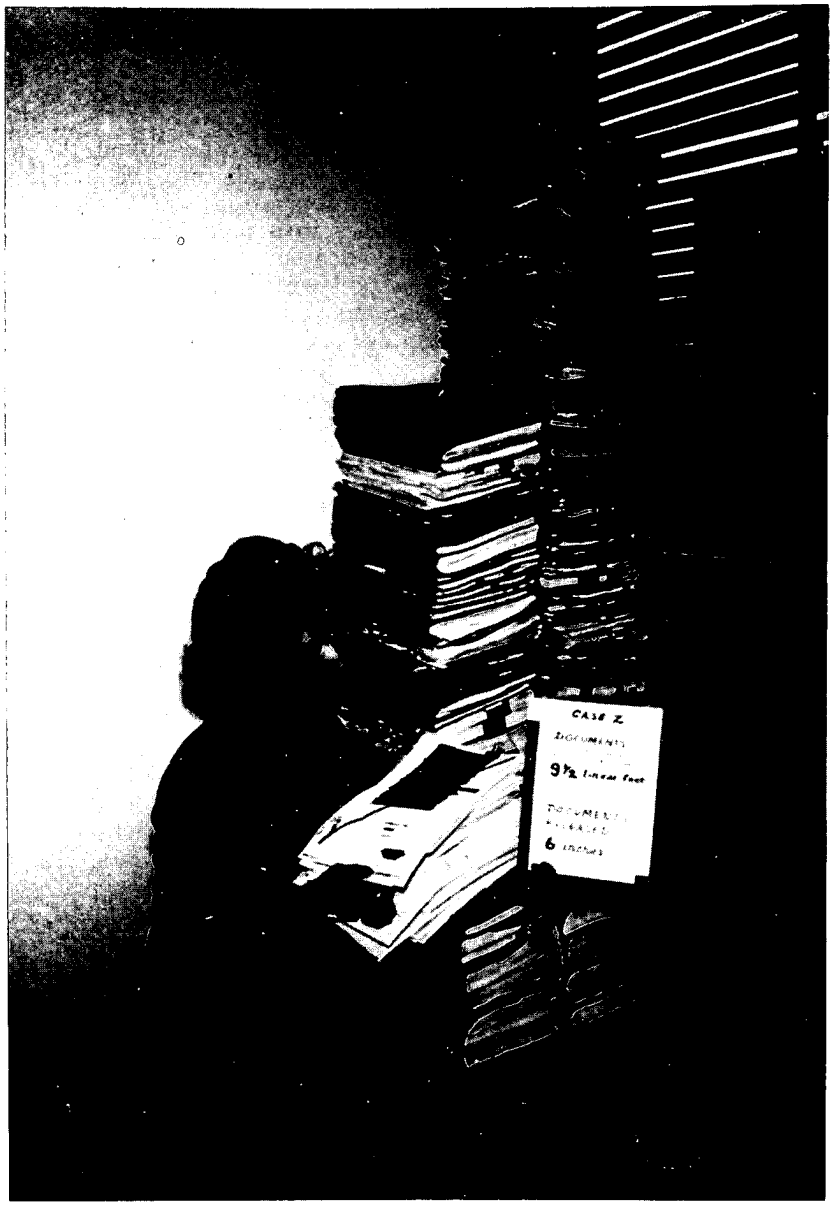
They ask, with justification, in my view, that in exchange for the risks which they undertake on our behalf and in your behalf, we provide them with absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as potential-

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:



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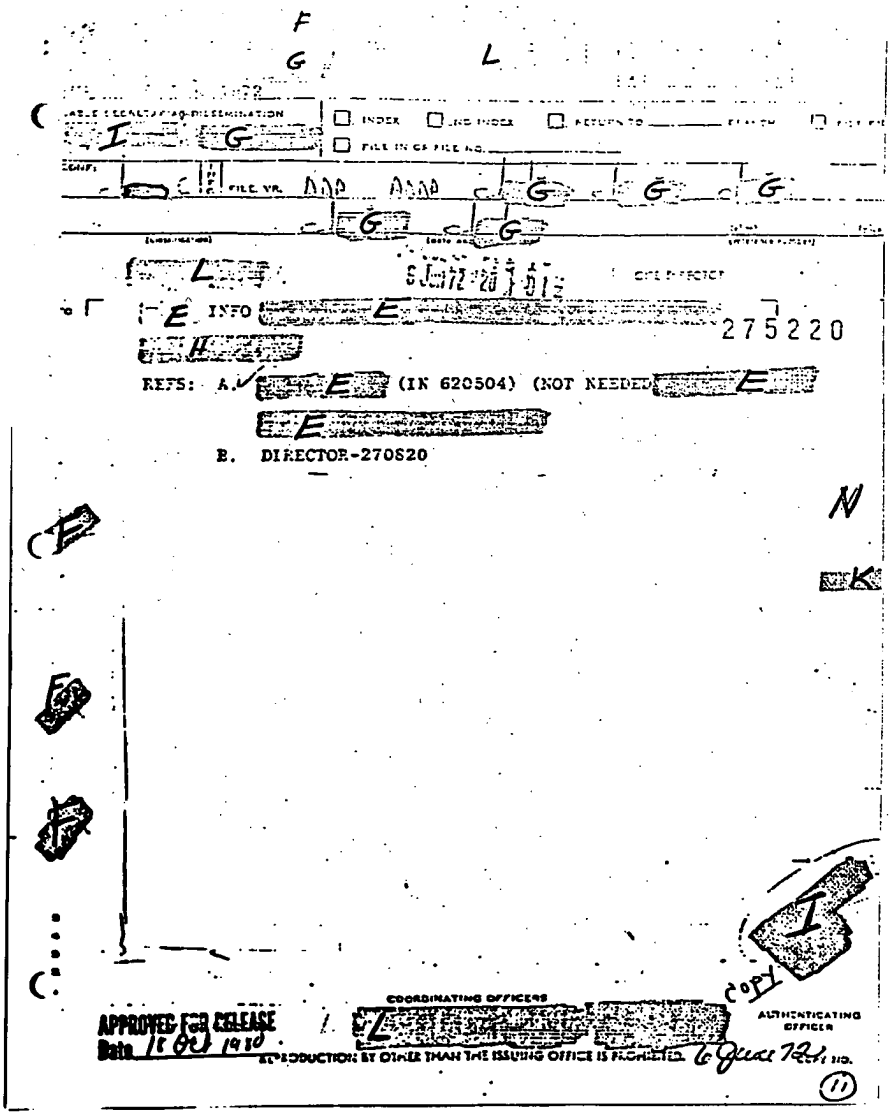
Although in the case of records gleaned from operational files, virtually none of this information is released to the requester, security risks remain which are inherent in the review process.

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:



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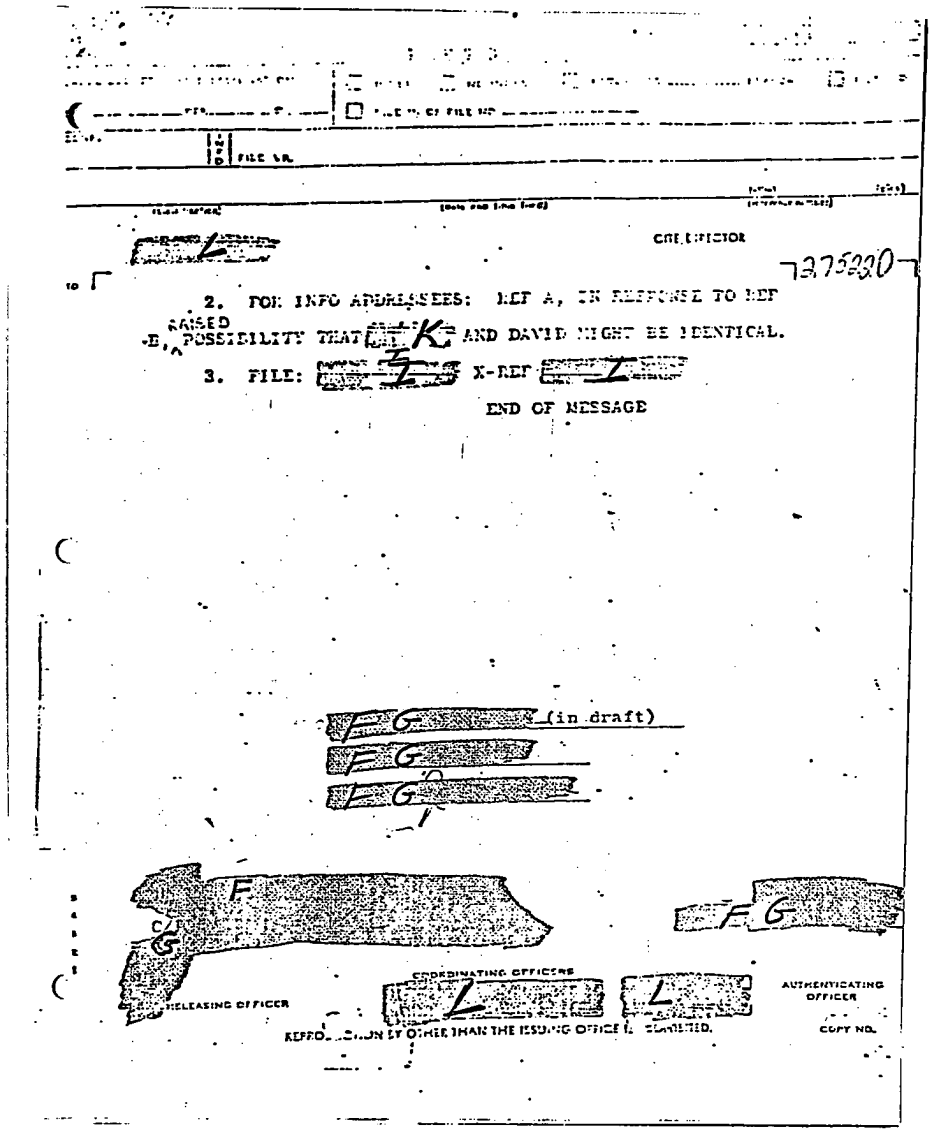

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After the responsive records have been properly reviewed, the public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we 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.

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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. McMahon.

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. McMahon.

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. McMahon, 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. McMahon, 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 dedesignate 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 dedesignate 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. McMahon, 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 nondesignatable 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. McMahon 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. McMahon, 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. McMAHON. 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. McMahon, 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. McMahon 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.

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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-

isfied 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 AMERCIAN 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 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 provisos 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

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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