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STATEMENT OF [redacted]
ON BEHALF OF
THE AMERICAN CIVIL LIBERTIES UNION

ON S. 1324

BEFORE THE
SENATE SELECT COMMITTEE ON INTELLIGENCE

JUNE 28, 1983

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on S. 1324, a bill to 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 introduction of S. 1324 by Chairman Goldwater and Senator Thurmond and last week's testimony on the bill by Mr. John N. McMahon, the Deputy Director of Central Intelligence, mark 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, Mr. Mc Mahon stated that if this bill is passed "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, the bill 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. In this regard, the ACLU's position is quite similar to the views expressed by Senators Durenberger, Huddleston, and Leahy in their statements at last week's hearing on this bill. The assumptions about the Agency's filing system on which this bill rests must be examined and substantiated by the Committee. Furthermore, in order to be sure that there will be no meaningful loss of currently available information, we wish to submit to the Committee examples of declassified information released by the CIA under the FOIA which was of public significance. We need to be assured that this type of information will continue to be accessible under this bill. We are also awaiting the CIA's analysis of the impact this bill would have on pending litigation.

At this point, I would like to set forth our understanding of what this bill would do. If this understanding is mistaken or incomplete in any respect, we request clarification so there will be no misunderstanding over the bill.

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. The findings section of the bill states that the organization of the Agency's records system permits such a division between operational files and gathered intelligence. According to last week's testimony, most items of gathered intelligence, whether "raw" or "finished," are routinely disseminated outside the components identified in the bill and are stored in non-operational files. In exceptional circumstances where gathered intelligence is stored in an operational component, it will be indexed in a non-operational file and will be subject to search and review. By making all gathered intelligence accessible, this bill is a significant improvement over past proposals which would have made only finished intelligence reports, such as national intelligence estimates, accessible. This is an important development, because finished intelligence may omit raw information that is important to understanding events.

2. 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 activities 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).

3. 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.

4. Only the operational files of the CIA's Directorate of Operations, Directorate of Science and Technology, and Office of Security will be eligible for exemption from search and review. Thus, operational information located elsewhere in the Agency will be subject to search and review. For example, if operational matters become the subject of policy debates within the Agency (e.g., a debate over tasking or other resource allocation) or the subject of investigations into alleged abuses (e.g., by the Office of the Director of Central Intelligence, by the Intelligence Oversight Board, the Office of General Counsel, or the Office of the Inspector General), the records of such debates or investigations will be subject to search and review.

On this last point, we believe that the bill needs further clarification. Last week's testimony from the CIA indicated that all relevant information concerning an investigation of impropriety would be in the files of the component that conducts the investigation and therefore would be accessible. However,

there have been instances where investigations have been conducted by sending an investigator into the files of an operational component rather than bringing those files to the investigating component. For example when the first internal reports on Operation CHAOS were prepared, the CHAOS files were not removed from the Directorate of Operations. Other aspects of the so called "Family Jewels" were also compiled in this manner. Thus, we believe that when an intelligence activity has been the subject of an investigation for impropriety or illegality, the relevant underlying files should be subject to full search and review. If the bill is not amended in this respect, we fear that large numbers of important documents such as the CHAOS and the MKULTRA files would be removed from the FOIA, and such a result would be wholly unacceptable.

Another issue which requires clarification is judicial review. Indeed, the CIA's testimony last week on this matter was quite disturbing. We believe that it is essential for courts to have the authority to conduct de novo review whenever a question is raised as to whether a non-operational file has been improperly characterized as an operational file. Without this check, the public will not have sufficient confidence that the Agency has not succumbed to the temptation to broaden the designation of files beyond the definitions established by the bill.

It was a surprise to hear the CIA assert that there would be no judicial review on this issue because there is

nothing in the bill which precludes judicial review or reverses the general presumption of reviewability of agency decisions under the FOIA. However, in light of the interpretation which the Agency's testimony has suggested, we believe that it is imperative that both the bill and the legislative history clearly indicate that de novo judicial review is available. In this regard, we urge that the concept of designation by the DCI be deleted from the bill so that it is clear that Congress rather than the DCI is setting the standards for determining which files will be removed from search and review.

Let me stress that the judicial review we regard as essential does not have to involve the document by document examination which seems to be the Agency's principal concern. When a question arises over whether the Agency has failed to search a particular file and the issue is whether that file meets the definition of operational, a court can resolve the controversy by inquiring about the nature of the file itself rather than inquiring into its particularized contents.

Finally, Mr. Chairman, I would like to turn to 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 endure has greatly diminished the Act's utility. As Mr. McMahon acknowledged last week, some people have given up making requests to the CIA because of the backlog.

In addition to the backlog itself, the Agency's attitude toward requesters has too frequently been grudging and uncooperative.

Indeed, the Agency's Information and Privacy Division, perhaps at the urging of other components, has developed a number of strategems to stymie the processing of requests. 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 repsonse, 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 to suggest that the CIA 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 and 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.

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, Congress must 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.

In summary, if this bill will not result in the loss of information now available under the FOIA, if it will result in improved processing of requests, and if the other problems I have identified, as well as any other legitimate problems

which may be identified by others, are resolved, the ACLU will support this bill.

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