S. HRG. 98-464

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

JUNE 21, 28, OCTOBER 4, 1983

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[Established by S. Res. 400, 94th Congress, 2d Session]

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PREFACE

The Senate Select Committee on Intelligence heard testimony concerning S. 1324 at public hearings on June 21 and June 28, 1983. The June 21 hearing included testimony from the original cosponsor, Senator Strom Thurmond, and witnesses from the Central Intelligence Agency who explained how the Agency interpreted the legislation as introduced.

The June 28 hearing presented testimony from the following individuals and organizations interested in the legislation: Maj. Gen. Richard Larkin, president of the Association of Former Intelligence Officers; John Norton Moore and John Shenefield, two members of the American Bar Association's Standing Committee on Law and National Security; Mary Lawton, Counsel for Intelligence Policy in the Department of Justice; Mark Lynch, representing the American Civil Liberties Union; Charles S. Rowe, testifying on behalf of the American Newspaper Publishers Association; Steven Dornfeld, representing the national president of the Society of Professional Journalists; and Dr. Anna Nelson, representing the National Coordinating Committee for the Promotion of History.

On October 4, 1983, the committee met to mark up the legislation and then voted unanimously to report S. 1324 as amended. Since then the bill has passed the Senate.

BARRY GOLDWATER,
Chairman.

DANIEL PATRICK MOYNIHAN,
Vice Chairman.

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S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

TUESDAY, JUNE 21, 1983

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 1:56 p.m., in room SD-124, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater, Chafee, Huddleston, and Leahy.

The CHAIRMAN. The meeting will come to order.

Today we welcome John McMahon, the Deputy Director of Central Intelligence, who is appearing on behalf of the CIA to present the Agency's view on S. 1324. He has brought with him Ernie Mayerfeld, Deputy General Counsel, and Larry Strawderman, Chief of the Information and Privacy Section of the Agency.

I also welcome Senator Strom Thurmond, who I will introduce in just a few moments.

Next Tuesday afternoon I will again have a public hearing so that interested individuals and organizations can testify.

This bill amends the National Security Act of 1947 so that the major operational components of the Central Intelligence Agency will be relieved of the overwhelming burden of searching and reviewing sensitive operational files in response to certain requests for information under the Freedom of Information Act.

This relief will allow these components to devote their resources to gathering the vital intelligence our Government needs to make informed decisions in foreign policy and national defense.

In order to expedite these hearings, I will insert the remainder of my opening remarks to be printed in the record as if read.

[The prepared opening statements of Senators Goldwater and Leahy follow:]

PREPARED OPENING STATEMENT OF CHAIRMAN BARRY GOLDWATER

The hearing will come to order.

Today I welcome John McMahon, Deputy Director of Central Intelligence, who is appearing on behalf of the CIA to present the Agency's views on S. 1324. He has brought with him Ernie Mayerfeld, Deputy General Counsel, and Larry Strawderman, Chief of the Information and Privacy Division for the Agency. Next Tuesday afternoon, I will again have a public hearing so that interested individuals and organizations can testify.

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relief will allow these components to devote their resources to gathering the vital intelligence our Government needs to make informed decisions in foreign policy and national defense.

Let me explain very briefly why I think that this legislation is needed.

In the eight years since FOIA has been in its present form, the CIA has worked hard to comply with the Act. However, it has been darned near impossible to keep up with all the requests in the way the Act requires. I don't think Congress really contemplated what burdens FOIA would place on an intelligence agency.

FOIA mandates that if someone requests all the information on a certain subject that all the files have to be located. In the intelligence agency, most of the information is classified. But that fact does not end the agency's job. An experienced person must go through stacks and stacks of these papers, sometimes they are many feet tall, and justify the reason that almost every single sentence should not be released. If this is not done well, a court could then order the information released.

What has been the result of this burdensome process? Very little information, if any, is released from operational files when the request seeks information concerning the sources and methods used to collect intelligence. Even then the released information is usually fragmented.

There is a great risk of a mistaken disclosure due to this mandatory search and review of sensitive files and the possibility that some court may order the release of information which could reveal a source's identity or a liaison relationship. It is only these most sensitive operational files which this bill would exempt from search and review.

It is important to know that this legislation does not frustrate the essential purposes of the FOIA. Requestors will continue to have access to CIA files containing the intelligence product, and to information on policy questions and debates on these policies. Additionally, access to files for individual U.S. citizens and permanent resident aliens who seek information on themselves will not be affected by S. 1324.

The American public can only stand to benefit by this bill. By exempting those operations files from search and review, the processing of all other requests can be completed much sooner. The public will receive that information which is releasable under the Freedom of Information Act and Privacy Acts in a far more efficient and satisfying manner. The wait for a response from the CIA now takes anywhere from two to three years. This kind of situation benefits no one.

In short, this bill relieves the CIA of certain time consuming search and review requirements. By so doing, it provides the FOIA requestor speedier responses for those areas which should be subject to public scrutiny. At the same time, it will enable the Agency to take a number of experienced personnel out of the business of reviewing files and permit them to get back to intelligence work.

We scheduled this hearing so that the public can know, as much as possible within security restrictions, how this legislation will work at the Agency. John, let's begin.

PREPARED OPENING STATEMENT OF SENATOR PATRICK LEAHY

Welcome Mr. McMahon. Today, we are taking up an issue which concerns me as a defender of the Freedom of Information Act . . . whether to exempt a portion of the central intelligence agency's files from search and review.

As a member of the Select Committee on Intelligence, I of course understand and share your concerns about protecting sensitive information on intelligence sources and methods. In the abstract, protection of the CIA's operational files is unarguable. The FOIA was never meant to require disclosure of our intelligence sources and methods.

In practice, however, I wonder how much of a genuine problem you have on your hands. As I understand it, there is no question of the Agency's being compelled by the FOIA now to release sources and methods information. The courts sustain your denials of such information. The courts support your policy of refusing to acknowledge or to confirm the existence of "special activities." On that basis you do not search files for information bearing on such activity.

Therefore, it seems to me that the FOIA is not jeopardizing sensitive intelligence information. Your problem, in reality, is something else.

Let me be certain I understand the heart of your argument for S. 1324.

Despite FOIA's existing exemptions and the protection afforded by the courts, good faith compliance with the search and review requirements of the FOIA is

alleged to be imposing an unnecessary and unproductive burden on the Agency. The situation you describe seems to be that the Agency is forced to search and review the operational files of the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security which it patently cannot release.

From the materials before me, there appear to be three major costs in meeting this requirement:

1. Because of the sensitivity of the sources and methods information in operational files, case officers must be diverted from their normal duties to review and sanitize these materials. This is at the expense of regular intelligence work.

2. The need to amass all relevant documents pertaining to a request is breaking down vital compartmentation of operational information. You fear that sooner or later information will be released which will lead to the identification of human sources or intelligence methods.

3. The search and review of operational files, which for the reasons already stated will not produce significant releasable information, is causing a major backlog in responding to FOIA requests, including those which would otherwise result in the release of useful information. As I understand it, the backlog is more than 2,500 cases and the delay in responding is about two years.

Mr. McMahon, before I make up my mind on this bill, I must be shown that the consequence of its passage will not be the release of less information from the CIA's files than at present. I cannot support a bill whose purpose or result is to deny information to the public that would otherwise be made available. My view is that public access through the FOIA to intelligence information used by policy makers, consistent with national security requirements, has been valuable—and must be continued. A good example is the release of national intelligence estimates from the 1950's and early 1960's, such as the NIE's on the Cuban Missile Crisis.

Moreover, I will need to see solid Agency assurances on the record that relief from search and review of designated operational files will lead quickly to elimination of the backlog, and to better and more expeditious response to future FOIA requests.

Signs of CIA seriousness about dealing with FOIA in the future will be important in helping me decide whether I can support S. 1324. Frankly, the Agency's attitude toward FOIA in the past has not been encouraging. This bill offers an opportunity for you to show that the CIA accepts the public's right to access to information which does not jeopardize intelligence sources and methods or disclose secrets vital to the nation's security.

Finally, Mr. McMahon, I want to review carefully with you and your associates precisely how operational files would be designated, which files would fall in this category, and how information in operational files which does not fit the four categories in the bill would be reachable through FOIA. I realize much of this will have to be handled in a classified manner. Nevertheless, to the extent possible, it is important to have at least general answers on the public record.

In short, we must establish a thorough record which addresses all legitimate concerns of FOIA users if this bill is to have my vote.

The CHAIRMAN. I welcome Senator Strom Thurmond, the distinguished chairman of the Senate Judiciary Committee, who is an original cosponsor of S. 1324. For this reason, I have asked him to say a few words as lead-off witness. Because of other commitments that he has, he cannot stay for questions.

Strom, why don't you begin.

STATEMENT OF HON. STROM THURMOND, MEMBER OF THE U.S. SENATE FROM SOUTH CAROLINA

Senator THURMOND. Thank you very much, Mr. Chairman. I am pleased to comment today on S. 1324, the Intelligence Information Act of 1983. It was my great pleasure to join the able chairman of this committee, Senator Goldwater, in introducing that bill on May 18, 1983.

Mr. Chairman, I believe that we are all in accord on several basic premises. First, the workings of a democratic government must be as

open to its citizens as is consistent with protecting the national security. The electorate must have sufficient information to make national choices concerning the policies and representatives which best serve their interests.

We contrast our cherished tradition of open government with the chilling secrecy of countries behind the Iron Curtain. Those citizens are captive, not only by the threat of jail and torture, but by the lack of information and the manipulated information which they receive.

The second principle upon which we agree is that effective security measures are essential to the preservation of our form of government. We need only look abroad and south of our borders to see certain elements determined to undermine the liberties of freedom-loving peoples throughout the globe. This imposes upon our democratic government the unfortunate, but absolutely imperative burden of preserving our security against those forces.

Finally, we can agree that our brave intelligence officers and agents, on whose shoulders the day-to-day responsibility of protecting our freedom falls, deserve the maximum protection that our democratic society can afford them. These individuals place their lives in jeopardy to protect our safety and the safety of our families. They must not be repaid with Government policies, no matter how well intentioned, that unnecessarily risk their lives.

I am proud to have worked with the members of this committee to pass the Intelligence Identities Protection Act last year. This was a long-overdue effort to address one threat to the safety of these courageous men and women. In addition, on June 16 of this year, the Judiciary Committee reported S. 779, the Intelligence Personnel Protection Act, which will make it a Federal crime to kill, or attempt to kill, an intelligence officer or employee.

Mr. Chairman, as chairman of the Committee on the Judiciary, one of my highest priorities has been revision of the Freedom of Information Act to address the three goals that I have outlined—open government, national security, and agent protection.

I am pleased to report that the Committee on the Judiciary, at its executive session on June 16, 1983, only last week, ordered reported S. 774, the Freedom of Information Reform Act of 1983. This is a bipartisan compromise which addresses some of the problems which have arisen under the original act, while recognizing our shared goal of open government. I am hopeful that we will soon be able to send that bill to the House so that legislation can be on the President's desk by the end of this Congress.

S. 1324 is a complementary piece of legislation which deals with the unique problems that the Central Intelligence Agency faces in this area. Specifically, it amends the National Security Act of 1947 to exempt from disclosure and attendant search and review under the Freedom of Information Act certain operational files designated by the Director of Central Intelligence to be concerned with specified matters, including foreign intelligence, counterintelligence, or counterterrorism operations.

In order to protect the public's access to certain information, the bill specifically states that nondesignated files which contain information from designated files remain subject to search and review and that designation will not prevent the search and review of a file for information concerning special activities which are not exempt from disclosure under the Freedom of Information Act.

Finally, the bill states categorically that these new provisions will not affect proper requests by U.S. citizens and lawfully admitted resident aliens for information concerning themselves under the Privacy Act or the Freedom of Information Act.

Mr. Chairman, I realize that this is a modest effort to address the FOIA problems which the Central Intelligence Agency has encountered. However, I believe that it is an absolutely essential proposal which has a realistic chance of enactment in this Congress.

Not only will it continue protection for information which is clearly exempt from disclosure under the Freedom of Information Act and court decisions under the act, but it will substantially reduce the administrative burden on the Central Intelligence Agency.

This accrues to the benefit not only of the hardworking taxpayers of this country, but also to those who have filed or plan to file Freedom of Information Act requests. The reduced administrative burden will permit the CIA to respond to requests more quickly, thus providing more useful and timely information.

Mr. Chairman, I want to commend you for your outstanding leadership in this area and for scheduling such prompt hearings on this important bill. I look forward to working with you on this and other legislation aimed at protecting our brave agents, our national security, and the openness of our Government which we so dearly cherish.

The CHAIRMAN. Thank you very much, Senator Thurmond. We appreciate those remarks more than I can tell you and thank you for coming over.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness will be Mr. John McMahon, Deputy Director of Central Intelligence, who I believe has served that agency over 30 years.

Mr. MCMAHON. Yes, sir.

The CHAIRMAN. We are very happy to have you with us, John, so you may proceed as you desire.

STATEMENT OF JOHN McMAHON, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY JOHN STEIN, DEPUTY DIRECTOR OF OPERATIONS, CENTRAL INTELLIGENCE AGENCY; R. EVAN HINEMAN, DEPUTY DIRECTOR FOR SCIENCE AND TECHNOLOGY, CIA; ERNEST MAYERFELD, DEPUTY GENERAL COUNSEL, CIA; LARRY STRAWDERMAN, CHIEF, INFORMATION AND PRIVACY DIVISION, CIA; AND WILLIAM KOTAPISH, DIRECTOR OF SECURITY

[Prepared statement of John N. McMahon follows:]

PREPARED STATEMENT OF JOHN N. MCMAHON, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Mr. Chairman, Members of the Select Committee on Intelligence, it is a pleasure to appear before you today to discuss S. 1324. The Central Intelligence Agency urges enactment of this Bill. It is carefully crafted to have positive benefits for all those affected by it. It is unique legislation in this area of conflicting public interests because it does not require the agonizing trade-offs between protection of the Agency's intelligence mission and the public's access to government information. In essence, this legislation would exclude the Agency's sensitive opera-

tional files from a search and review process that results in an ever-present risk of exposure of sources and methods, and creates a perceived risk on the part of our sources and potential sources which greatly impairs the work of this Agency. At the same time, with this exclusion, the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act. It is hoped the CIA can substantially curtail the present 2–3-year wait that requesters must now endure.

Under present law, there is in effect a presumption of access to CIA operational files, and the Agency must defend a denial of our most 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, but 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, we provide them with an absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as potentially public documents, we are unable to provide the iron-clad 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 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 limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific filing systems 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 records systems to be searched, a difficult request can involve over 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. [Exhibit 1.] 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 and 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 is a typical example. [Exhibit 2.]

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 cannot be completely certain of the composite information in our adversaries possession or what further element they need to complete a 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 a 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; 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 which 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 secret contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the United States Government.

This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationships is trust. 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 come from societies where secrecy in both government and everyday life prevails. In these societies, 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 that 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 some day 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 the CIA officer trying to convince the foreign source to cooperate with the United States. The source, who may be leaning towards cooperation, will demand that he be protected. He wants absolute assurance that nothing willl be given out which could conceivably lead his own increasingly sophisticated counter-intelligence service to appear at his doorstep. Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, unauthorized disclosures by former Agency employees, 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 United States 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 reason is given but if known would be for similar reasons, I cannot say. I submit, that, based upon the numerous cases of which we are aware, there are many more cases of sources who have discontinued a relationship or reduced their information flow based on 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 also has had a negative effect on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation over what is seen as an inability to keep information entrusted to us secret. 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 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. A distinguished Judge of the U.S. Court of Appeals, Judge Robert Bork, in a recent dissenting opinion, had this to say about the need to protect those sources that provide valuable information to the nation: "The CIA and those who cooperate with it need and are entitled to firm rules

that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less."

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 releaseable under the FOIA as it now stands. The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. It is crucial to note in this regard that their determinations have been consistently upheld when tested in litigation. 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 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 responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources 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 the 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 specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not designated operational files will remain accessible under the FOIA even if documents taken from an operational file are placed in them. This will ensure 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, without exclusion of operational files. And of particular importance, a request by a U.S. citizen of permanent resident alien for personal information about the requester would trigger all appropriate searches throughout the Agency without exception.

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 two to three 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, should S. 1324 be enacted, the CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, if this Bill is enacted, I assure you that 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 the disseminated intelligence product and all other information in files which would not be designated under the terms of the Bill.

There is one final issue, Mr. Chairman, which I would like to address before concluding my testimony. This is 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 House, there will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill 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, records of such an investigation will be found in nondesignated files. In such a case, information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this Bill. The same would be true, for similar reasons, Mr. Chairman, whenever a senior Intelligence Community official reports an illegal intelligence activity to this Committee or to the House Intelligence Committee pursuant to the requirements in Section 501 of the National Security Act.

Mr. Chairman, the CIA urges adoption of this legislation, and I understand that the Administration also supports your Bill. This concludes my testimony, Mr. Chairman. I have with me my Deputy General Counsel, Ernest Mayerfeld, as well as Chief of the Information Privacy Division, Larry Strawderman. In addition, accompanying me to provide substantive expertise are Deputy Director for Operations John Stein, Deputy Director for Science and Technology Evan Hineman, Director of Security William Kotapish, as well as others who will be pleased to answer any specific questions you or the other Members may have.

Mr. McMAHON. I am also very grateful for Chairman Thurmond taking the time to give us his strong support for this bill, and I also welcome the opportunity to address the members of the Select Committee on Intelligence and discuss S. 1324.

The Central Intelligence Agency urges enactment of this bill. It is carefully crafted to have positive benefits for all those affected by it. It is unique legislation in this area of conflicting public interest because it does not require the agonizing tradeoffs between protection of the Agency's intelligence mission and the public's access to Government information.

In essence, this legislation would exclude the Agency's sensitive operational files from a search and review process that results in an ever-present risk of exposure of sources and methods and creates a perceived risk on the part of our sources and potential sources which greatly impairs the work of the Agency. At the same time, with this exclusion the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the act.

Under present law, there is in effect a presumption of access to CIA operational files and the Agency must defend a denial of our most 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, but that assurance is too often seen as hollow. They ask, with justification, in my mind, that in exchange for the risks which they undertake on our behalf we provide them with an absolute assurance of confidentiality.

So long as we are compelled by law to treat our operational files as potentially 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 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 limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific filing systems 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 20 Agency record systems to be searched. A difficult request can involve over 100. In many instances, the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search, although in the case of records gleaned from operational files virtually none of this information is released to the requester.

Security risks remain which are inherent in the review process.

The CHAIRMAN. May I interrupt? Is that one request?

Mr. MCMAHON. Yes, sir, that is one request, and we had to screen those two mountains of files in order to produce 6 inches of releasable material.

The CHAIRMAN. Would you guess how many pages you had to go through to get to that information?

Mr. MCMAHON. The documents are 9½ linear feet.

The CHAIRMAN. Nine and a half linear feet.

Senator LEAHY. Is that a typical result? I mean, that would be the median one, the average?

Mr. STRAWDERMAN. This would probably be in the minority, but when you have one like this you have quite an extensive search process to go through, and every page has to be read and scanned word by word and line by line. No, this is not the garden variety case, but we do have a number of these in the Agency to deal with at any particular time.

Senator LEAHY. Thank you.

Senator CHAFEE. Could I ask a question here, Mr. Chairman?

A request comes in, Mr. McMahon. Is it a generalized request such as please send me all the information you have on your Operation in Chile?

Mr. MCMAHON. Yes, sir. Often it is like that. What we have done in recent years is attempt to negotiate with the requester to narrow down the request into a topic that is specific enough for us to target where the information is located.

In earlier days we had to take a request like that and fan it out all through the Agency and seek information from files that may not have it in there. That took a considerable amount of time. But by negotiating with requesters we are able to narrow the requests down so that we know what files to look at. Even though it may be as many as 21 different systems, at least that is a lot better than 100 or more.

Senator CHAFEE. Now the typical person that is asking, would they be an author or columnist or would it be an individual just wanting to——

Mr. MCMAHON. It has varied over the years, Senator Chafee. Right after the enactment of the new provisions or the amendments to the FOIA back in 1974, we had a tremendous rush from citizens all throughout the United States. That has now narrowed down to what I would call the professional requester.

These are people from think tanks and institutes, from professors and possibly even other intelligence services seeking to acquire information on what CIA may have regarding them. So the composition is still a good cross section, but we seem to have drifted away from the average U.S. citizen coming in with a request.

Senator CHAFEE. And they have to pay a certain amount per page?

Mr. MCMAHON. We negotiate not so much with the private citizen as opposed to an institute or a journalist who wants CIA to do their reference work for them. So we negotiate that out.

I must say in some $21 million or more that we have spent since FOIA was enacted, we have only extracted about $76,000 in fees.

Senator CHAFEE. Thank you. Thank you, Mr. Chairman.

Mr. MCMAHON. The documents which we review, as I mentioned, Mr. Chairman, 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 piece 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 interspersed with a few disconnected phrases which have been approved for release, and the exhibit here typifies what happens to a good number of our released information, and I believe the staff has prepared for you examples of this.

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 cannot be completely certain of the composite information in our adversary's possession and what further element they need to complete a picture for them.

Perhaps we missed a 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, and, indeed, their lives. The well-being of their families is at stake if one apparently innocuous item falls into hostile hands and it 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 error is, of course, unknown and incalculable. 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 which 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 secret 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. 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. 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 come from societies where secrecy in both government and everyday life prevails.

In these societies individuals suspected to anything less than total allegiance to the ruling party or regime can lose their lives, and in societies such as these the concepts behind the Freedom of Information Act are totally alien, frightening, and indeed contrary to all that 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 that 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 the 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, unauthorized disclosure by former Agency

employees, 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't be protected.

How many cases of refusal to cooperate where no reason is given but if known would be for similar reasons I cannot say. I submit, however, that based upon the numerous cases of which we are aware that there are many more cases of sources who have discontinued a relationship or reduced their information flow based on the 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 impact on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation of what is seen as an inability to keep information entrusted to us secret. 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 I have outlined. The exclusion from the FOIA of operational files will send a clear signal to our sources and to those 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 will not be looked at by people who have no need to know that information.

A distinguished judge of the U.S. court of appeals, Judge Robert Bork in a recent dissenting opinion had this to say about the need to protect those sources that provide valuable information to the Nation. He said, and I quote:

> The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will aways be subject to judicial second-guessing.

Our national interest which is expressed in the authority to keep intelligence sources and methods confidential requires no less. 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 as it now stands.

The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. It is crucial to note in this regard that their determinations have been consistently

upheld when tested in litigation. 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 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. 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 the desk officer with current responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources of our operating components.

That is so because we have a practice in the operational directorate which requires that every piece of paper which is released, even including those covered with black marks like the ones I have shown you here before, must be reviewed by an officer from the particular desk that wrote the documents or received them 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 their work that they are supposed to do in order to review a document prepared for release under the FOIA. It is obvious, of course, that when a CIA operation makes the front pages of the 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 FOIA only specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not designated operational files 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 without exclusion of operational files.

And, of particular importance, a request by a U.S. citizen or permanent resident alien for personal information about the requestor would trigger all appropriate searches throughout the Agency without exception.

I would also like to address the benefit to the public from this legislation. Because of the backlog, FOIA requesters now wait 2 to 3 years to receive a final response to their request for information when they involve the search and review of operational files within the Directorate of operations. We estimate that should S. 1324 be enacted, the

CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, if this bill is enacted, 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 effective manner. The public would continue to have access to the disseminated intelligence product and all other information in files which would not be designated under the terms of the bill.

There is one final issue, Mr. Chairman, which I would like to address before concluding my testimony. This is 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 the executive orders and Presidential directives, along with the effective oversight provided by this committee and its counterpart in the House, there will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill Casey and I consider it our paramount responsibility that the rules and the 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, records of such an investigation will be found in non-designated files.

In such a case, information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this bill.

The same would be true for similar reasons, Mr. Chairman, if under the Congressional Oversight Act a senior intelligence community official reports an illegal intelligence activity to this committee or to the House Intelligence Committee.

Mr. Chairman, the CIA urges adoption of this legislation. I understand that the administration also supports your bill.

This concludes my testimony, Mr. Chairman. You have introduced those colleagues of mine who have joined with me here to testify on this bill. But before I close, I would like to note the words of Judge Gerhard Gesell of the U.S. District Court for the District of Columbia in addressing an FOIA case.

He said, and I quote, "It is amazing that a rational society tolerates the expense, the waste of resources, and the potential injury to its own security which this process necessarily entails." I share his views. This country needs S. 1324.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. McMahon.

Now I must apologize for having made my opening statement and not having recognized other members of the committee who might have wanted to do the same.

Senator Chafee.

Senator CHAFEE. I have nothing, Mr. Chairman.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. I do, Mr. Chairman, if I might.

This is a matter of some interest to me. I was glad to hear Senator Thurmond's support for the compromise legislation that Senator Hatch and I worked out in the Judiciary Committee. It was a matter of about a year and a half of work.

Today we take up an issue that follows on with that, an issue that concerns me as one who has spent a great deal of time as a defender of FOIA. That issue is whether to exempt a portion of the Central Intelligence Agency's files from search and review.

I think Mr. McMahon's testimony, as always, was to the point, very substantive, and is welcomed by us here. As a member of the Select Committee on Intelligence I understand and I share your concerns about protecting sensitive information on intelligence sources and methods. I have stated this over and over.

In the abstract, protection of the CIA's operational files does not even rate an argument. It is a given. The FOIA was never meant to require disclosure of our intelligence sources and methods. It should not, and it would be absolutely wrong if it did.

But in practice you have to question just what the problem is, the real problem that CIA may have on its hands. As I understand it, there is no question of the Agency being compelled by the FOIA now to release sources and methods information, and the courts have sustained your denials of such information. The courts support your policy of refusing to acknowledge or confirm the existence of special activities. On that basis you do not search files for information bearing on those activities. So it seems to me that FOIA is not jeopardizing sensitive intelligence information per se, and the problem in reality may be something else. Let me make sure I fully understand the argument for this legislation.

Despite FOIA's existing exemptions and the protection afforded by the courts, good faith compliance with the search and review requirements of the FOIA is alleged to be imposing an unnecessary and unproductive burden on the Agency. The situation described here seems to be that the Agency is forced to search and review the operational files of the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security, which are files that patently it cannot release.

There are three major costs in meeting the search requirements for these materials, as I see it. One, because of the sensitivity of the sources and methods information in operational files case officers have to be diverted from their normal duties to review and sanitize these materials. That is at the expense of their regular intelligence work.

Second, the need to amass all relevant documents pertaining to the request is breaking down vital compartmentation of operational information. You fear that sooner or later information is going to be released which will lead to the identification of human sources or intelligence methods—again a major concern.

And, third, the search and review of operational files, which for the reasons already stated would not produce significant releasable information, is causing a major backlog in responding to FOIA requests, including those which would bring about normal release of information. I understand there is a backlog of about 2,500 cases and the delay in responding is around 2 years.

Now, before I make up my mind on this bill, I want to be shown that the consequence of its passage will not be the release of less information from the CIA's files than at present. I understand from your testimony that that is not the intent of the CIA. Is that correct?

Mr. McMahon. That is correct, Senator.

Senator Leahy. I would not support a bill whose purpose would result in denying information to the public that would otherwise be made available. My view is that public access under FOIA to intelligence information used by policymakers, consistent with national security requirements, has been valuable. It has resulted, for example, in the release of National Intelligence Estimates from the 1950's and early 1960's, such as the NIE on the Cuban missile crisis.

I also want to see solid Agency assurances on the record that relief from search and review of designated operational files will lead quickly to elimination of the backlog and a more expeditious response to future FOIA requests.

Signs of the Agency's seriousness about dealing with FOIA in the future will be important in helping me to decide whether to support S. 1324. In the past, its attitude has not been encouraging. The bill offers an opportunity for you to show that the CIA accepts the public's right to access to information which does not jeopardize intelligence sources and methods or disclose secrets vital to the Nation's security.

I very much appreciate the statements made here. The Director of the CIA said in a speech that FOIA should not even apply to the CIA. The facts are, of course, that it does. You are not suggesting that here, and I am glad of that.

I want to review carefully with you and your associates precisely how these operational files would be designated, which files would fall in this category, and how information in operational files that does not fit the four categories in the bill would be reachable under FOIA.

Some of that will have to be done in a classified session, Mr. Chairman, but a lot can be handled on the public record. This is the longest opening statement I have given in this committee on any matter, Mr. Chairman. But I probably have spent as much time as any Senator, and perhaps more than most, on FOIA during the last 2½ years. The progress of our bill in the Judiciary Committee on FOIA will to a greater or lesser degree be affected by the progress of this one. I thought it best to set my feelings on the record for those who are following what I might be doing on it.

Thank you.

The Chairman. Senator Huddleston.

Senator Huddleston. Well, thank you very much, Mr. Chairman.

As you know, this committee for at least the last 4 years has been trying to resolve the issue of the CIA's role under the Freedom of Information Act. In 1979 Admiral Turner asked us to exempt from the act the operational files of every agency of the intelligence community. Some of us felt that was a little too broad, and instead the intelligence charter bill in 1980 included a narrower provision just for the CIA's operational files.

When that bill was introduced, I thought the exemption ought to be considered within the framework of charter legislation and I still think so. The safeguards in a new CIA charter would make it less

necessary to have the Freedom of Information Act as a check against abuses. However, without a new charter the issue takes on a different light.

In 1981 we held hearings on separate legislation to exempt operational files of all intelligence agencies, as well as Director Casey's proposal to exempt the entire CIA. At that time it became clear to me that any legislation on CIA and the Freedom of Information Act must be very carefully balanced. The new bill introduced by Senator Goldwater this year represents an effort to benefit both CIA's operational interests and the public's right to know and to have as much information as possible about their government.

It seems to me our job is to determine whether or not this bill does in fact serve both of those interests adequately. There is no question that CIA would gain from not having to search its operational files in response to an FOIA request, but what about the public's need to know? Some of the questions I want to check out are:

Is it true that the bill would not reduce the actual amount of information that comes out because the courts already let CIA withhold operational data?

Will reporters and scholars still have access to as much information as possible consistent with national security about the CIA intelligence product that goes to national policymakers?

What will happen to the enormous backlog of CIA requests, and how does CIA plan to improve its processing of requests for information that can be declassified?

And, finally, does the bill affect the right of an American citizen to have the courts review CIA decisions to keep secret the facts about controversial operations or alleged intelligence abuses?

The committee needs to submit detailed questions to the CIA on these matters, and some of them will be discussed during this hearing. I hope that most of the information or all of it can be made public so that everyone who is interested can understand the purpose and the effects of this particular legislation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

We will begin the questioning with Senator Chafee, who was very instrumental in this work in the past year. John.

Senator CHAFEE. Thank you very much, Mr. Chairman.

Mr. McMahon, we have some statistics here before us. I do not know whether you have the same group that show a very dramatic decline in the FOIA requests. Let me take these statistics starting in 1975.

It shows in 1975 you received 6,600 requests; in 1982 you received 1,000. Furthermore, in the bar graphs that you have here, although 1975 was the peak—well, this shows 1975, and then it jumps to 1978, and then 1979 right to the present. There has been a rather astonishing decline in these requests.

Is there any particular reason for that? Was it the novelty of it that started it off? Let us see. This started in 1975, did it not?

Mr. STRAWDERMAN. I will take that, Senator Chafee. In 1975 we had an influx of people asking for what do you have on me, or a my-file request when the act was passed in 1974. We can service those fairly easily, since for about 84 percent of them there are no records available.

Senator CHAFEE. That disappointed them probably, did it not?

Mr. STRAWDERMAN. We have gotten down to the more serious requesters in the last couple of years, so it seems to be a gradual tailoff of the my-file requests coming in from the early days.

Senator CHAFEE. But, even so, take the difference between 1978 and 1982. It went down 50 percent from 2,100 to 1,000, and——

Mr. STRAWDERMAN. The green line on the chart, Senator, is the Privacy Act requests. The middle line, I believe, are the Freedom of Information Act requests, so it really came down from 1,600 to 1,010, and it is continuing at about that same rate this year.

Mr. MCMAHON. I think you also have to bear in mind, Senator Chafee—and I hate to admit this—but I would suspect that a number of well-meaning requesters when they know it is going to take 2 to 3 years to get an answer are discouraged.

Senator CHAFEE. Well, I suspect that might well be so.

Is the term "operational file" a term of art? Does that mean something by its very terminology? If so, why is it not very convenient for you or the Director just to mark everything an operational file?

Mr. MAYERFELD. I think the bill defines that quite clearly because it does say that operational files may be designated only if they concern the items listed on page 5, beginning line 20. In other words, they have to concern the means by which foreign intelligence, et cetera, is collected by scientific and technical means. They have to concern foreign intelligence operations, counterintelligence and counterterrorism operations, and on those files in the Office of Security that are concerned with the investigations conducted to determine the suitability of sources, and a very important item, beginning on line 4, page 6, intelligence and security liaison arrangements or information exchanges with foreign governments or their intelligence or security services.

In other words, if you will, this constitutes the definition of operational files.

Senator CHAFEE. I see. Let me ask you—Mr. Chairman, when my time is up, just let me know.

The CHAIRMAN. Go ahead.

Senator CHAFEE. On these charts here it shows the appeals from 1975 to 1982. Now is that a litigating appeal, an appeal to a court?

Mr. STRAWDERMAN. This is an administrative appeal, right.

Senator CHAFEE. That is an administrative appeal.

Mr. STRAWDERMAN. That is right.

Senator CHAFEE. I must confess I do not know. Who do you appeal to? Is there an appeal procedure set up?

Mr. MAYERFELD. Yes; to a committee composed of Deputy Directors.

Senator CHAFEE. But in addition there is a judicial right of appeal, is there not?

Mr. MAYERFELD. That is right, Senator.

Senator CHAFEE. Now how many of those—is it my understanding that the CIA has won every one of those?

Mr. MAYERFELD. It has won every one of those where we asserted a national security exemption, a classification exemption, or the authority under the Director's authority to prevent disclosure of sources and methods. We have won every one of those. I should say, Senator, with one exception.

Senator CHAFEE. When you say every one, roughly how many are you talking about—not exactly, just roughly?

Mr. MAYERFELD. Well, we are talking in terms of hundreds. We have had, I think, some 300 FOIA lawsuits since the act has been in effect.

Senator CHAFEE. Well, that is a pretty good batting average. You have won 299.

Mr. MAYERFELD. 256 to be precise. That is the exact figure.

Senator CHAFEE. That is better than Lou Hall's.

Mr. MAYERFELD. Well, in a way, Senator, if I may, this proves the need for this bill because what we usually battle over in the courts is this kind of operational information.

Senator CHAFEE. Now in the course of defending ourselves, do you have to go and reveal the information, or how do you work that? Is that a problem in itself?

Mr. MAYERFELD. It is a very serious problem. The law requires that every segregable piece of a document that you withhold has to be individually described. It is very hard to describe an item of secret information without giving away the secret, and once you have described it you have to justify the need to withhold that.

If I may take you back to that document here, those block letters in there, this was a document which was subject to litigation, and in the affidavit that we had to file to support our arguments to withhold these, each one of these, beginning from A and it runs through L, was a certain kind of information which we were withholding, whether it was the name of an agent, the name of an employee, the identification of a source, the location of a CIA secret installation, and so forth.

And each one of those block letters represents one of those. And in the accompanying affidavit we had to say wherever the letter K appears the name of a CIA source appeared, and then we have to go on and say in the affidavit that we are required to file why it is necessary to protect Mr. K as a CIA source.

Senator CHAFEE. I see, that is dangerous. Now let me ask you this, in conclusion, Mr. McMahon. You testified in favor of this act and you are for it. Does it do you much good? On a scale of 10, if 10 were your best wish—which I suspect might be to be exempt entirely from the act—how much does this do for you?

Mr. MCMAHON. If you are running an intelligence service, Senator Chafee, you would like to have total exemption for the Agency.

Senator CHAFEE. I am not faulting you for that one bit.

Mr. MCMAHON. But if you are trying to live within the spirit of FOIA and what it was intended to do for the American people, then I support this bill because it makes available or accessible to the citizens of the United States that information which they might legitimately inquire about, and hence we are obliged under this bill to do a search and make sure that we search information against that request.

But the key is that it protects our sources. There will not be instances where our source's name may be inadvertently revealed or an incident described which reveals that source through an oversight, and that is what we are trying to do.

Senator CHAFEE. I know that is the objective of the act, but in fact do you think that will succeed largely?

Mr. MCMAHON. Yes, sir, it will, and it will do away with the perception that a number of our sources have that they are threatened because of the present FOIA Act.

Senator CHAFEE. Do you agree with that, Mr. Stein?

Mr. STEIN. I do indeed, Senator Chafee. I would add simply to it another very important feature of the bill.

In the espionage business, as mentioned in Mr. McMahon's testimony, the mere act—the mere act of searching—causes a breakdown in one of the cardinal rules of the intelligence business, namely, the compartmentation of its information.

When a request comes in, anything relating to that request is lumped together and it is taken out of compartmented sections of the operational files, put together, xeroxed, and so forth, and so there is an automatic breaking down of security within the Directorate of Operations itself—a very dangerous practice.

Senator CHAFEE. Well, thank you, Mr. Chairman.

The CHAIRMAN. Thank you, John. Do you have some questions?

Senator HUDDLESTON. Yes, Mr. Chairman.

One of the key questions, of course, raised about the bill itself is how it will affect information that might appropriately come out relating to intelligence abuses. I think if we look back we can point to the fact that each of the CIA Directorates covered by the new exemption was involved in some kind of abuse disclosed by the Rockefeller commission and by the Church committee.

The MKULTRA program for testing drugs on unwitting subjects was conducted by a component of the Directorate for Science and Technology, for instance. And the CHAOS program for collecting information about domestic protests and dissent was carried out by the Directorate of Operations. And then two projects of the Office of Security, Resistance and Merrimack, involved infiltration of domestic groups protesting against the CIA itself.

Now in your opening statement, Mr. McMahon, you said that CIA would search the records of investigations of abuses, but what about the operational files as they relate to the abuses themselves? Would they be subject to search and review?

Mr. MCMAHON. Yes, sir, if there is any abuse, Senator Huddleston, within the Agency, that would automatically be reported upward. I am sure this committee can attest to Agency employees carrying to its attention things that they are concerned about, whether they are illegal or not. So we know that happens.

The Agency is also spring-loaded as an institution right now regarding the propriety and legitimacy of everything it is doing. The whole structure, the whole management structure, within the Agency is designed to make sure that abuses do not occur, and if they do occur that they are addressed. And any process by which that takes place would not be a part of the operational file. It would be part of either my office or the Inspector General's office, or General Counsel's office and would be available for search and review under the FOIA.

Senator HUDDLESTON. So you do not see this act as inhibiting in any way the information that is available or the investigation that may be conducted that might relate to some actual or alleged abuses by CIA?

Mr. MCMAHON. No, sir, no more so than it does right now.

Senator HUDDLESTON. What about when an operation has become declassified or has been officially acknowledged by the Government? What happens then to an actual operation?

Mr. McMAHON. Then that would become a nondesignated file and would be subject to search and review.

Senator HUDDLESTON. Would that be an automatic process?

Mr. McMAHON. Go ahead.

Mr. MAYERFELD. Yes; the bill specifically provides, Senator, that information in operational files on special activities, that is covert action operations which, as the bill says, the fact of which can no longer be classified would be subject to search and review.

Senator HUDDLESTON. That is an automatic process?

Mr. MAYERFELD. The bill provides for that specifically as to covert action.

Senator HUDDLESTON. Now, questions have been raised as to whether or not the bill would reduce the amount of information actually produced by the CIA to reporters and scholars and concerned citizens, and as I understand it the bill is not intended to exempt files that contain intelligence product—that is, either raw or finished intelligence reports used by CIA analysts and by the policymakers.

And the bill is not supposed to exempt declassified special activities, even covert activities, that go beyond intelligence collection. Is that correct?

Mr. MAYERFELD. That is correct.

Senator HUDDLESTON. What about historically valuable information on collection operations themselves? I think one example is a document that we have that is entitled "The Berlin Tunnel Operation," which is a very intriguing document. It was a clandestine service history of the tunnel from West to East Berlin built by CIA back in the 1950's. The study was obtained from the CIA under the Freedom of Information Act by David Martin, who was then a Newsweek reporter, and he used it in writing his book "A Wilderness of Mirrors."

Now, would studies like this that deal with important CIA collection operations be subject to search and review under the bill?

Mr. STRAWDERMAN. Yes, sir, we envision that intelligent studies would be subject to search and review. We have studies of intelligence that are produced and articles from those have been released over recent years—67 of them in total—and they would be subject to search and review under the bill. So, they would be accessible to historians and researchers seeking that sort of information.

Senator HUDDLESTON. So, the bill providing for search and review of information about declassified covert operations, would it also permit the search and review on those rare cases when the existence of a collection operation can be declassified for historical purposes?

Mr. MAYERFELD. Well, as to the Berlin Tunnel example, that particular document released to David Martin was found in nonoperational files. There is a constant process going on where our Center for Studies in Intelligence writes pieces of historical value and actuallly puts out an in-house publication. Much of the contents of that particular publication is unclassified. but even the classified portions of that will be subject to the act, will be subject to requests for declassification review under FOIA.

Senator HUDDLESTON. Mr. Chairman, I have a few more questions.

Senator CHAFEE [presiding]. Go ahead.

Senator HUDDLESTON. Well, I think another area is the role of the courts. I would like to get that pinned down. The basic principle of

the Freedom of Information Act for many is that the courts will have an opportunity to review the bureaucratic decisions that keep information secret.

Looking at the role of the courts in this specific legislation, we have already dealt with the definition of "operational files" and I assume that the courts would be able to review the determination that a particular file or set of files is exempt from search and review. Is that your understanding?

Mr. MAYERFELD. No, Senator, I do not think it is. I think the way this bill is crafted it leaves that discretion to the DCI because it does specifically state that if such files—in other words, they will be exempt if such files have been designated by the DCI. My understanding of that bill would be that the designation by the DCI would not be judicially reviewable and that this bill would delegate that authority to the DCI.

Quite frankly, any other interpretation I think would turn this legislation on its head, because if every time the designation by the DCI were challenged in court, we would be right where we started.

Mr. McMAHON. I think your concern, Senator Huddleston, can be handled through the oversight process where this committee will be knowledgeable of our files and what files have been so designated.

Senator HUDDLESTON. So the person seeking information, then, would have to pretty well rely on the oversight committees to assure that the Agency is making a proper designation of the files.

Mr. McMAHON. I think that goes to the very essence of everything we do.

Senator HUDDLESTON. Do you think any kind of court review would be detrimental to what you hope to accomplish by this act?

Mr. MAYERFELD. I would say so, Senator.

Mr. McMAHON. I think it would defeat it, Senator. In fact, the courts have found in cases in the past that the best authorities on the sources and methods and the classification are those in the business of doing it.

Senator HUDDLESTON. You do not see this as a major problem for those who are seeking the information?

Mr. McMAHON. No, sir. Knowing what I know about our operational files and the content and the information in there, what the citizenry of the United States should have access to is our product and the disseminated intelligence, and that is where the information is of interest to them.

Senator HUDDLESTON. I will have some further questions.

Senator CHAFEE. All right. Senator Leahy.

Senator LEAHY. Thank you. Let me just make sure I understand one part of this—how we would move into what files to be looked at.

Suppose we have a covert operation, but then it is acknowledged, thereby becoming an overt operation. Can someone then request a search of the operational files on this operation?

Mr. McMAHON. They could request information that is contained in those operational files and they would then be considered nondesignated files and a search and review would take place and we would then apply the standards that presently exist under FOIA.

Senator LEAHY. So the President having acknowledged a covert operation in Nicaragua makes those files a lot different than they were say 2 months ago?

Mr. MCMAHON. If the President acknowledged a covert operation in Nicaragua, we would still be obliged to protect any alleged sources or methods we have there.

Senator LEAHY. I understand. I just wanted to use a concrete example to make it easier. [Laughter.]

You have got to understand us small town lawyers. We come down here to Washington, Mr. McMahon, and we have to just go simple fact by simple fact.

Mr. MCMAHON. Coming from New England I appreciate that.

Senator LEAHY. That's how we keep up with you big city fellows.

Let me ask a couple of specific questions. By the way I think that this type of open session is very good, and I think that you well understand and encourage us to lay down a solid legislative history. Your answers to Senator Huddleston's questions just now are going to be an integral part of the legislative history if this act is to be passed.

To follow up on one of Senator Chafee's lines of questions, again an important area to go into, the Agency has a present position on FOIA. I understand your own feelings as an intelligence professional would be what any of us would have in a similar position. Given your preferences as a professional intelligence officer, there would be no FOIA requirement of the Agency whatsoever. I do not think anybody disputes that.

But, within the context of the way our Government functions, the Agency being part of the Government, and in the context of FOIA applying to the rest of the Government, what is the Agency's position on the public's right to access to information influencing this Nation's foreign and national security policy?

Mr. MCMAHON. That is a tough call, Senator. I think that we are obliged to support the wisdom that Congress and the Constitution determined years ago when it gave the President the responsibility for conduct of foreign affairs. And in order to carry that out it was determined that certain forms of classification or secrecy had to exist.

I think that we would support the secrecy which protects the ability of the President to prosecute foreign policy in a manner that is effective and efficient.

Senator LEAHY. Well, let me go to a followup question on that. Is this bill what you want, or is it a camel's nose under the tent kind of bill? Is it a prelude to renewed pressure for broader exemption?

Mr. MCMAHON. I think it is a bill that is a compromise of the Agency's recognizing that it cannot have total exemption and must seek something that protects our sources, yet at the same time lives within the spirit and the intent of Freedom of Information. I think we have struck an arrangement which just borders on acceptability in CIA.

Senator LEAHY. I see. Well, your answer to that is still important in gathering whatever kind of support there might be. It is like the FOIA work that Senator Hatch and I have done in the rest of the FOIA legislation.

Depending upon what particular problem each one of us may have been looking at, everybody has had to give somewhat to reach a workable compromise. A lot of the areas where we reached agreement has been on the basis of an understanding of where the bill is going, and that if we agree on a particular area, for example, we would do our best to fight off further amendments.

I would think that in trying to get support for this Goldwater-Thurmond bill, a telling factor in the minds of a lot of Senators, and certainly in mine, will be whether this is the final product or prelude for a quick followup.

Now I am not suggesting CIA or anybody else is precluded from coming back on a piece of legislation if it is not working out, to seek the normal kinds of adjustments, as we are doing in FOIA. But I want to know if this is a prelude to asking next year for a wider exemption?

Mr. MCMAHON. There is no hidden agenda here, Senator Leahy. What you see is what you get, and this is what we are standing by.

Senator LEAHY. Do you understand my question and the reason for it?

Mr. MCMAHON. Yes, I do.

Senator LEAHY. Is that the White House position on this bill?

Mr. MCMAHON. I am led to believe that, yes.

Senator LEAHY. So we should not expect further efforts from them to exempt more of the intelligence community from FOIA?

Mr. MCMAHON. Not from them. I imagine there may be an effort or two, but it would not be sanctioned.

Senator LEAHY. Well, if it is not sanctioned, it isn't going anywhere, let me tell you. [Laughter.]

Whoever did that would have two strikes against them. That would be interesting. At that point the White House and I would be joining hands.

I have a number of questions for the record, Mr. Chairman, but there is one more I would like to ask Mr. McMahon.

On page 8 of your prepared testimony you state that:

> 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 these allegations are not frivolous, records of such investigation would be found in nondesignated files.

I applaud that conclusion. I want to know who makes the determination that an allegation of abuse or impropriety is either serious or frivolous—the sort of threshold determination.

Mr. MCMAHON. Well, I think that the process of the investigation which the Inspector General or the General Counsel would undertake would determine that and that is usually done in concert with the Director or myself.

Senator LEAHY. Does that mean that documents relating to any allegation deemed frivolous would be placed in designated files and therefore would not be searchable?

Mr. MCMAHON. I do not think so.

Senator LEAHY. Did you want to comment?

Mr. MAYERFELD. Well, that was not the intent, I do not think, that is what Mr. McMahon had in mind there, but there are an awful lot of frivolous allegations that arrive in our mailbox. There is a large volume of crank letters that we do get that I think would have to be treated as frivolous.

Senateor LEAHY. I have a great deal of sympathy for that.

A few weeks ago I was walking across the west front of the Capitol, Mr. Chairman, on the first nice day we had. It had stopped raining. And a guy walked up to me and made some statement about Japan. Unfortunately, I am blind in my left eye, which makes me a sucker for the right punch. He hauled off and belted me.

I thought that was an unfriendly sort of thing to do, and fortunately so did a police officer who made me look like a midget and who suggested that the man might want to stay around for a bit.

It turned out he had been released the day before from St. Elizabeth's, where, among other things, he had been visiting following his criminal charges of assault with intent to kill a police officer and other things—not enough to keep him there, but just enough for observation.

He has now written to the Democratic leader of the Senate, from whose State he comes—by coincidence, of course. [Laughter.]

We try to keep this thing all in the family—saying that he had a very definite reason for hitting me, because after I committed a murder in Chicago. He said I let poor Mr. Loeb and Mr. Leopold take the blame for it. As nearly as I can tell, that murder occurred about 20 years before I was born, so I would categorize that as a frivolous accusation. [Laughter.]

So if I get a few of those, I can imagine the number you get.

There is a person who prowls the Halls here who has told each one of us that she is protecting us from rays from some machine you have out at CIA directing the activities of the members of this Intelligence Committee. At least all of us now know how to explain to our constituents just why we vote the way we do.

Mr. McMahon. I think we have to put that machine in for a rehab; it's not working very well. [Laughter.]

Senator Leahy. My last question is, can you assure the committee that any information relating to alleged abuse or impropriety will be searchable?

Mr. McMahon. Definitely.

Senator Leahy. Thank you, Mr. Chairman.

The Chairman [presiding.] Thank you very much.

The question was asked about the President's position on this legislation. I wrote to President Reagan on April 11 this year and reminded him that the 1980 Republican Party platform stated, "We will support amendments to the Freedom of Information Act to reduce costly and capricious requests to the intelligence agencies."

I then asked him whether he and his administration would suppport some form of legislative relief for the intelligence community from the Freedom of Information Act in the 98th Congress. The President responded to me a few days later and said that he would support a bill which would allow CIA to devote more attention to their primary mission of developing accurate and timely intelligence while assuring continued access by the public, to information in nonoperational files, which would still be subject to the existing FOIA exemptions.

And then he went on to say that he looked forward to early introduction of the bill and that he would work with me and my Senate colleagues to achieve this important goal. In summary, then, I think it is very fair to say that the President and the administration will support this piece of legislation which Senator Thurmond and I have introduced.

Now let's address some of the smaller problems that you have. I understand that the Ayatollah Khomeini has submitted four requests to the CIA for information about the Shah of Iran. Must the CIA answer FOIA requests by the Ayatollah Khomeini under the language of my bill?

Mr. McMahon. No, not under the language of your bill, as long as that information is contained in operational files. If it is contained in disseminated intelligence, then we would have to do a search and review.

The Chairman. Did you have an answer to that?

Mr. Mayerfeld. No; that is correct.

The Chairman. I thought that was just a little bit farfetched to have that fellow asking anything from the U.S. Government.

Mr. McMahon. Mr. Chairman, I think that a rough count of the FOIA requests shows that about 7 or 8 percent of it comes in from overseas.

Senator Leahy. Mr. Chairman, I should note that the bill that Senator Hatch and I have worked on would preclude a foreign national from making such a request.

The Chairman. I just want to say under the language of this act the CIA will still be required to respond to proper requests from U.S. citizens and lawful aliens under the Privacy Act.

Mr. Stein. Mr. Chairman, may I comment there with regard to the comment of Senator Leahy? In the case of the request by the Ayatollah for information on the Shah, that was done by a New York law firm.

Senator Leahy. That does create a problem under either of these acts.

Mr. Stein. Yes, sir.

The Chairman. Can Philip Agee submit a request under this bill?

Mr. McMahon. Yes, he can, sir. You may recall that we have been working for a number of years on a request for Philip Agee. We estimated that we have done research totaling the equivalent of about 300,000 dollars' worth of man-year effort which went into review of his request.

The Chairman. But under this legislation a fellow like Agee or any other requester could not get information from your designated files?

Mr. McMahon. No, sir, they may not. That is why we endorse this bill.

The Chairman. What will be the effect of the bill on the workload required by pending lawsuits?

Mr. McMahon. I am sorry, sir, I did not hear that.

The Chairman. What will be the effect of this bill on the workload required by pending lawsuits?

Mr. Mayerfeld. I have some pretty close figures on that, Mr. Chairman. There are currently 77 pending lawsuits before the court. If this legislation is enacted, 46 of those lawsuits would be affected. Twenty-two of them should be dismissed entirely because they only deal with documents culled from files which would be designated. As to the remaining, 24, the majority of the documents that are involved in the lawsuit would be taken out of the controversy.

[An updated and more complete response to this question follows:]

Mr. Mayerfeld submits the following information to amend his response to the Chairman's question concerning the potential effect of S. 1324 on pending lawsuits.

There are now 69 currently active lawsuits under the Freedom of Information Act in which CIA is a defendant. From among these, it is believed that 39 litigations would be unaffected if S. 1324 is enacted.

Although, on a basis of a preliminary examination I had believed that 22 currently pending lawsuits would be dismissed entirely because they only involved documents found in files that are likely to be designated as exempt from search and review under S. 1324, a closer look into these litigations now leads me to conclude that I cannot with certainty state how many, or if indeed any, of these 22 would be dismissed. Some of these cases involve issues such as fee waivers or attorneys' fees which would not be affected by this bill. Others involve issues such as the scope of the search. One case concerns the question of whether or not the fact of the existence of a given special activity is classified. Several lawsuits which had been included in the original number of 22 lawsuits expected to be dismissed, concern documents culled from files likely to be designated but, inasmuch as the designation process has not yet taken place, I cannot with certainty state that all the records involved in these lawsuits would be found only in designated files.

In addition, with respect to the remaining 8 lawsuits that will also be affected by the enactment of S. 1324, there may be a narrowing in scope and simplification of issues, however, the impact of this legislation on each of these individual lawsuits cannot be predicted with certainty at this time.

The CHAIRMAN. Thank you. How many full-time positions are assigned to handling FOIA requests in each component and subcomponent of the CIA?

Mr. STRAWDERMAN. We have 56 positions allocated to FOIA, but that is not a good measure really of the workyears that we devote to it. We actually devote 128 workyears to the effort, which is really the hours worked of more than 200 people working on the project throughout the course of a year.

I would judge that over 100 of those people are professionals with other disciplines in intelligence that are pulled away from their regular duties and work on FOIA. So I guess a better measure of the effort that goes into FOIA is the workyear effort that we provide each year, and that was 128 for 1982.

The CHAIRMAN. I have heard that the FBI has several hundred people.

Mr. STRAWDERMAN. I believe that is correct.

The CHAIRMAN. And these several hundred people do nothing but FOIA requests at a cost of about $15 million a year.

Mr. STRAWDERMAN. Our cost runs about $3.9 million a year, I believe.

The CHAIRMAN. Oh, well, you are cheap. [Laughter.]

Do you have any idea how many person years or other personnel are devoted to handling such requests in each component or subcomponent of the CIA?

Mr. STRAWDERMAN. Well, the personyears we would refer to are the workyears, or 128. A predominant number of those are in the Directorate of Operations, where we judge about 70 or so are involved in FOIA. In other areas, Science and Technology, there are two; in the Intelligence area there are four; and the others are in the Directorate of Administration; and the DCI area or the independent offices of the Agency.

A lot of those are involved in the legal processes of administrative appeals and the litigations in the DCI area.

The CHAIRMAN. John, I do not know if you have had time to think about this, but what specific steps does the CIA intend to take when this bill is passed to reduce the backlog in processing FOIA requests and to improve CIA responsiveness?

Mr. MCMAHON. I think, Mr. Chairman, that we do realize we have an obligation if we are granted the relief that we seek under this bill to cut down on the backlog as quickly as possible and we will certainly take meaures to do that. I think if we can eliminate a number of the operational files, that will go a long way in reducing the work load just in itself.

The CHAIRMAN. Under Executive Order 12356, will designated operational files remain subject to search and review under this legislation?

Mr. MCMAHON. Yes.

Mr. MAYERFELD. Yes, they do, Mr. Chairman.

The CHAIRMAN. This is a little bit farfetched, but more and more of this type of activity is taking place, and it is taking place, in my opinion, to the detriment of our intelligence community. Have you released a clandestine services history of "The Berlin Tunnel Operation" to David Martin, the author of "The Wilderness of Mirrors"? Have you done that?

Mr. MCMAHON. Yes, sir, we have.

The CHAIRMAN. How many other such studies exist now and would they be exempted from search and review under this bill?

Mr. STRAWDERMAN. I do not have a precise number on those that exist, but we have given out 67 articles over the last 2 or 3 years in the studies of Intelligence area. That information is in nondesignated files and will be subject to search and review under this bill.

The CHAIRMAN. It would be subject?

Mr. STRAWDERMAN. Yes, sir.

The CHAIRMAN. Is there any way you can clamp down on that type of literary effort, if you can call it that? [Laughter.]

I say that seriously because in my association with the activities of other intelligence services in other countries they do not allow anything like that. They do not even print calling cards, and, my God, in this country you can get away with holy murder.

Mr. MCMAHON. We treat a great deal of the articles that go in the studies in Intelligence as really training aids, Mr. Chairman, because we sanitize them from a source and method standpoint. If the document is in an unclassified form, even though it is in an in-house document, for those articles that we feel have a message to tell to our employees, we retain the security classification.

So we would review those documents, but we would be able to extract any revealing or classified information from them as we would under the existing law.

The CHAIRMAN. I just have one more question. If designated files contain information concerning possible illegal intelligence activities, such as violations of Executive Order 12333, would they be exempt from search and review under this bill?

Mr. MCMAHON. No, they would not. The mere process of that illegal action coming up through the process would place that information into nondesignated files which would mean that they would be susceptible to search and review.

The CHAIRMAN. Well, would the CIA support an amendment which would make it clear that designated files will be subject to search and review if they concern any intelligence activity which the DCI, the Inspector General, or General Counsel of the Agency has reason to

believe may be unlawful or contrary to Executive order or Presidential directive?

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

The CHAIRMAN. Do you have any other questions, either one of you gentlemen?

Senator LEAHY. Just one note on the Berlin tunnel operation. Sometimes it is not all bad that some of this information becomes public. In the CIA's own report, in the part that has been made public, it says:

> As a result, the tunnel was undoubtedly the most highly publicized peacetime espionage enterprise in modern times prior to the U-2 incident. Worldwide reaction was outstandingly favorable in terms of enhancement of U.S. prestige. There was universal admiration, including informed Soviets on the technical excellence of this installation. The non-communist world reacted with surprise and unconcealed delight to this indication that the U.S. was capable of a coup against the Soviet Union and thoughtful editorial comment applauded this indication the U.S. was capable of fulfilling its role of free world leadership in the struggle.

It is not all bad that we know some of the things the agency can do. The Chairman's thrust, of course, was that sometimes the other things come out, but so much of the Agency's work is so important to us and yet it remains secret. I wish there were ways that more of the accomplishments could be made part of the record, but unfortunately they cannot.

The CHAIRMAN. Well, I am very happy to report, as I have to your boss, that returning last weekend from a trip to several European countries for the purpose of looking into intelligence matters our intelligence community is increasingly well thought of. It shows an improvement in morale, in how to do things, and I am very proud of the fact that our intelligence now, in my opinion, ranks right up with the best.

I want to thank all of you for your help. Do you have another question?

Senator HUDDLESTON. I guess one other question, Mr. Chairman. I do not want to duplicate anything.

Mr. MCMAHON. I was going to go out on a high roll there, Senator. [Laughter.]

Senator LEAHY. We will adjust the record to show that the last remarks of Senator Goldwater will come after this.

Senator HUDDLESTON. I just want to pull together all the loose ends we can, Mr. McMahon, and there are always some, of course.

This has to do with intelligence product and the policy documents that are in operational files. Now the theory of the bill is that we can exempt operational files from search and review for intelligence product and for policy documents because that kind of information is kept in other file systems that duplicate what is in the operational files.

There might be a problem, however, with the theory if some of those materials are shown to policymakers and then returned for storage to the operational files only. Is it the intent of the bill that the

intelligence products stored in operational files will continue to be subject to search and review, if it was in fact used by policymakers and analysts?

Mr. MCMAHON. I think the answer is unequivocally yes. Whenever there is an occasion such as that where a document which came forward and then say was handcarried back to the operational files for safekeeping, a dummy copy is placed on the Executive Registry which services the Director's office and my office. So a search there would reveal the content, an index of where to go to check that.

So it would be maintained outside of the operational file and there would be an indicator that that information has progressed out of the operational file.

Senator HUDDLESTON. So it would then be accessible?

Mr. MCMAHON. It would then be accessible, yes, sir.

Senator HUDDLESTON. Would you give the committee a report, classified if necessary, on how you do store that kind of intelligence information?

Mr. MCMAHON. We would be happy to.

Senator HUDDLESTON. And on policy documents that go to the Director or to the National Security Council, but that still might be stored only in operational files?

Mr. MCMAHON. I cannot think of an example, but I know how the system would work and we would be happy to give the committee an explanation of that.

Senator HUDDLESTON. All right. Thank you very much.

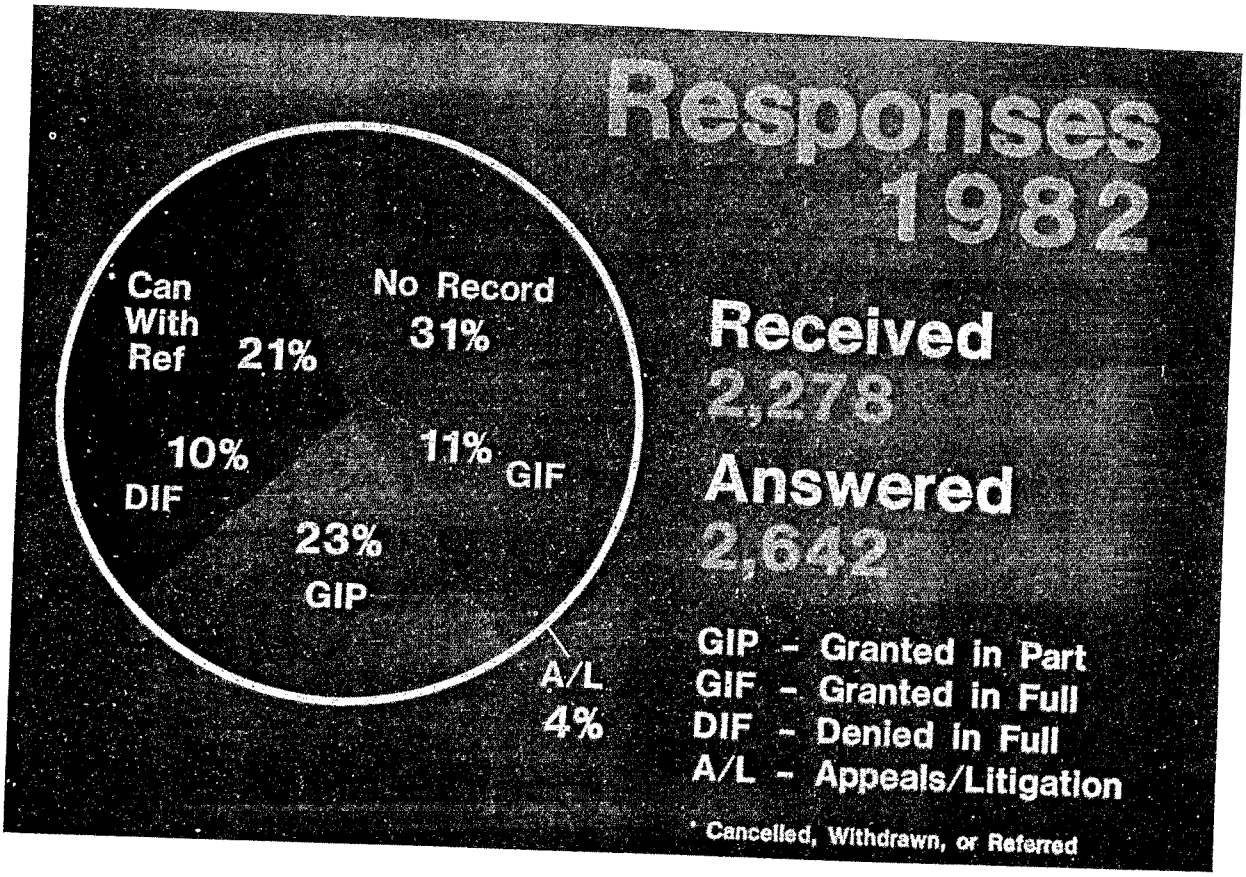
The CHAIRMAN. I have several vugraphs for the record and Senator Durenberger's statement for the record.

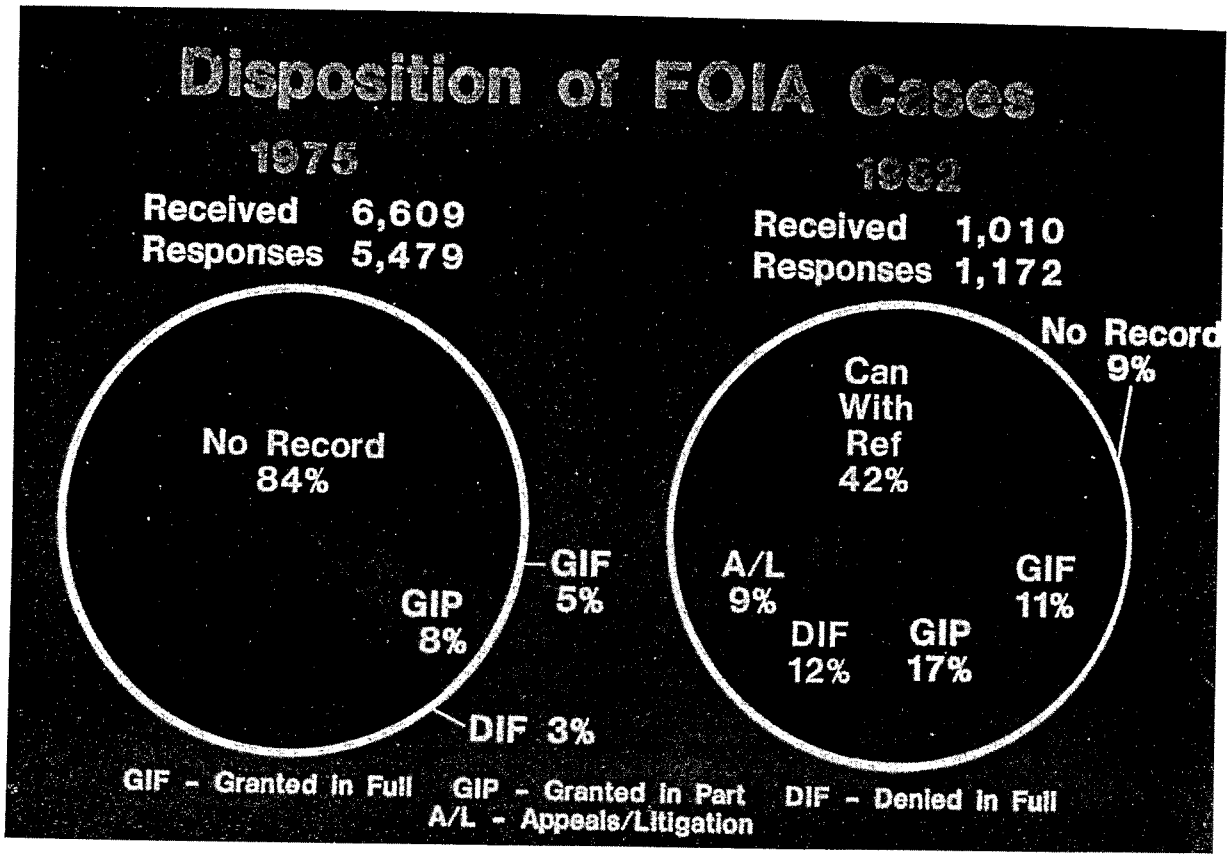
[The information and Senator Durenberger's statement follow:]

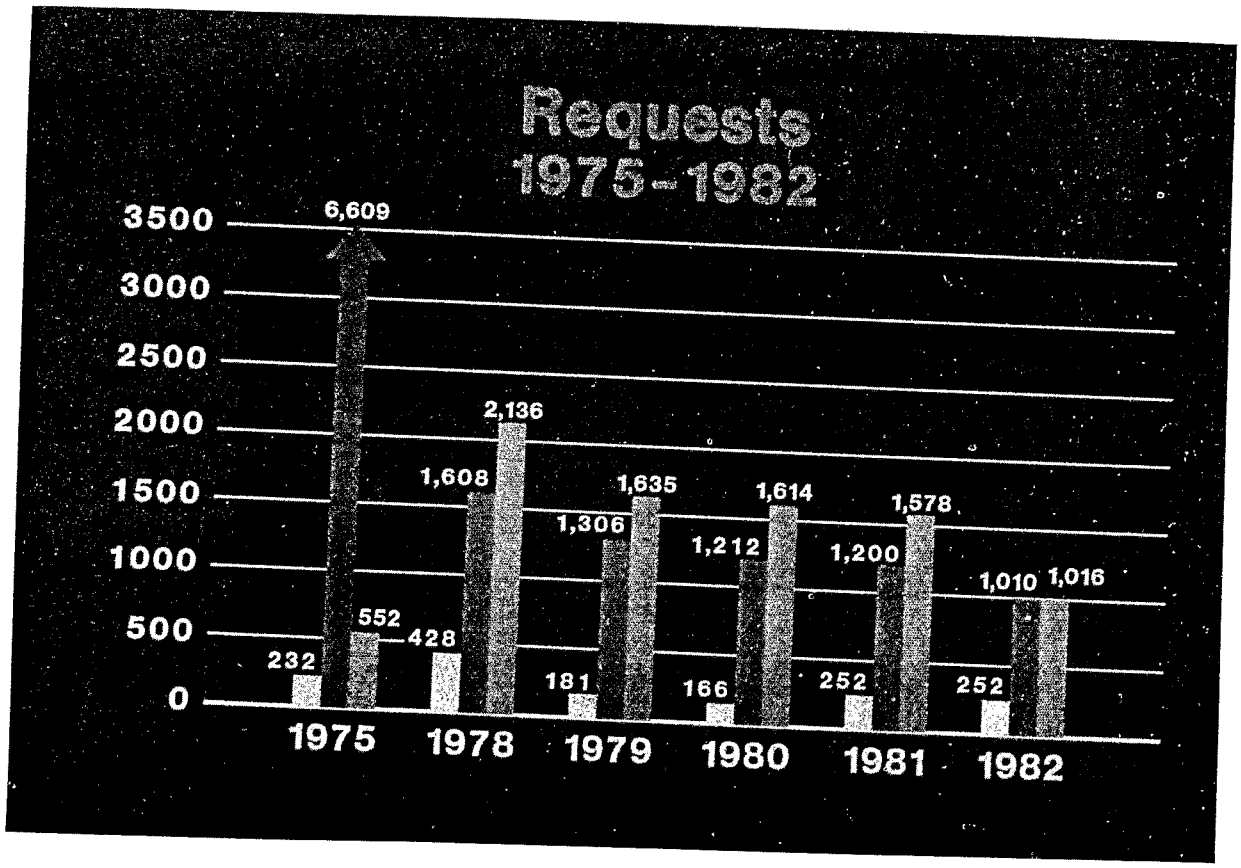
FOIA/PA Activity
1982

Requests Logged:		Responses:	
FOIA	1,010	No Record	807
		Granted in Part	610
PA	1,016	Granted in Full	288
		Denied in Full	272
EO	252	Canceled	456
		Other	209
TOTAL	2,278	TOTAL	2,642

Backlog: 2,739




Disposition of FOIA Cases
1975
Received 6,609
Responses 5,479
No Record 84%
GIF 5%
GIP 8%
DIF 3%
1982
Received 1,010
Responses 1,172
No Record 9%
Can With Ref 42%
A/L 9%
GIF 11%
DIF 12%
GIP 17%
GIF - Granted in Full
GIP - Granted in Part
DIF - Denied in Full
A/L - Appeals/Litigation


Requests
1975-1982
3500
3000
2500
2000
1500
1000
500
0
6,609
232
552
428
1,608
2,136
181
1,306
1,635
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252
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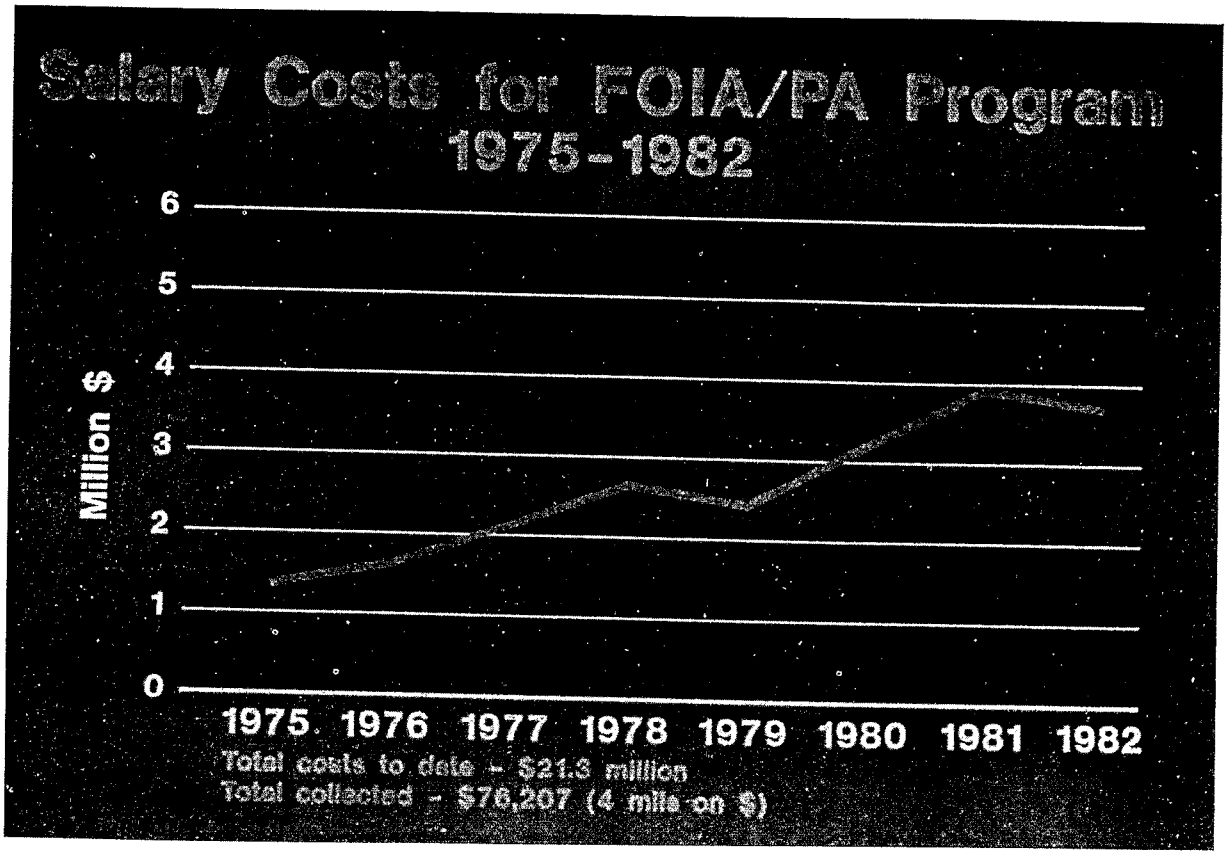
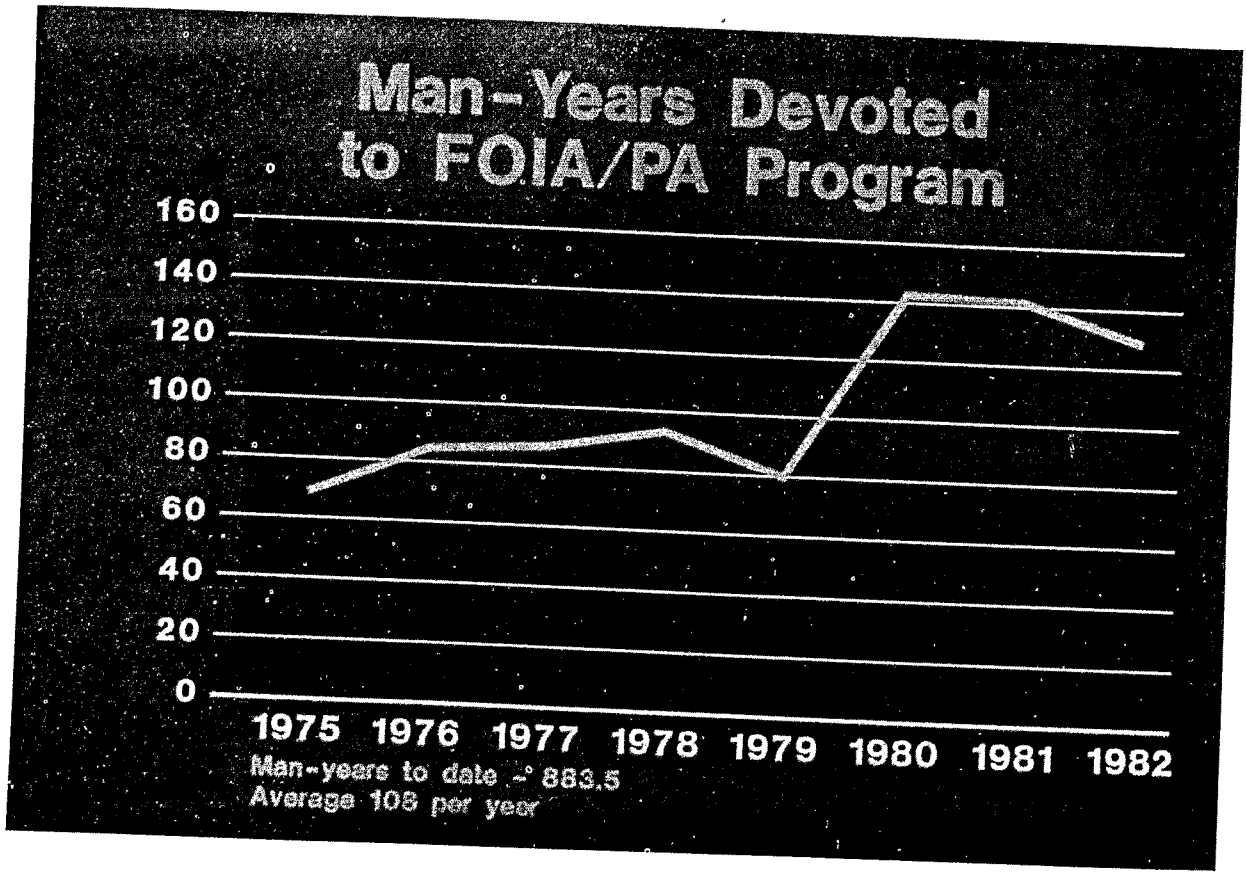
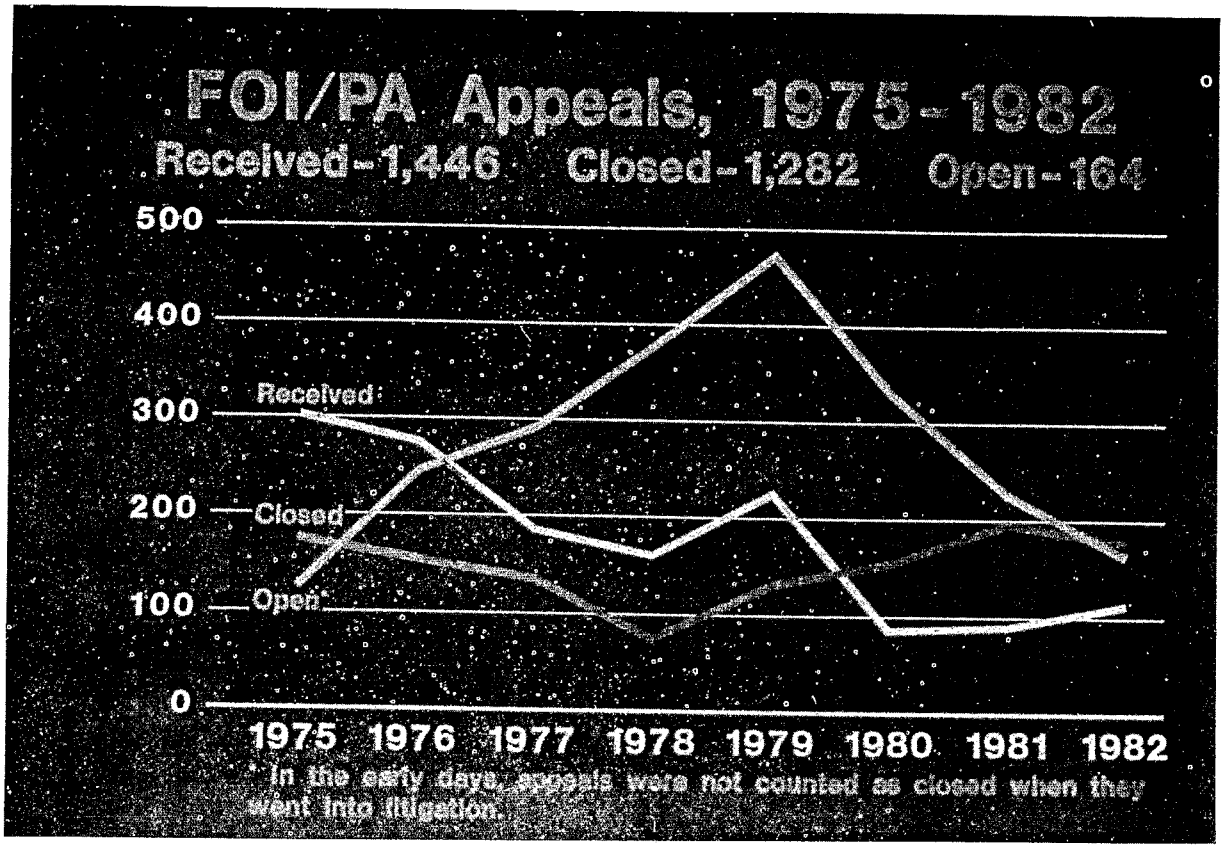
252
1,010
1,016
1975
1978
1979
1980
1981
1982


Salary Costs for FOIA/PA Program
1975-1982
$ Million
6
5
4
3
2
1
0
1975 1976 1977 1978 1979 1980 1981 1982
Total costs to date - $21.3 million
Total collected - $76,207 (4 mills on $)


Man-Years Devoted
to FOIA/PA Program
160
140
120
100
80
60
40
20
0
1975 1976 1977 1978 1979 1980 1981 1982
Man-years to date - 883.5
Average 105 per year



FREQUENT FOIA/PA REQUESTERS

- Former applicants (why wasn't I hired)
- Other personal file requesters
- News media representatives
- Academic researchers and authors
- College students
- Prisoners
- Persons with specific interests (UFO buffs)
- Families attempting to locate missing persons
- Curious and deranged
- "Professional" requesters (Center for National Security Studies, Institute for Investigative Reporting)

[illegible] AFFECTS THE AGENCY

Impossible deadlines and consequent litigations
Inadvertent releases
Perception by sources of potential compromise
Arduous review procedures and drain on resources
Numerous file systems -- coordination/referrals
Cost of $21.3 million (receipts 4 mils per $)

PREPARED STATEMENT OF SENATOR DAVE DURENBERGER ON THE INTELLIGENCE INFORMATION ACT OF 1983

Today's Hearings on the "Intelligence Information Act of 1983" are part of a long process. FOIA relief for the CIA was proposed back in 1980, and the Select Committee held hearings on this issue in 1981. The bill we are considering today is notably better than those we looked at two years ago. We are all indebted to our chairman, Senator Barry Goldwater, for the CIA's progress from rhetoric to realism.

Two years ago, the Intelligence Community was demanding a complete exemption from the Freedom of Information Act. Now their proposal is more modest: an exemption for portions of their operational files. Before, intelligence officials claimed that FOIA was incompatible with an effective intelligence service. Now they strongly endorse a bill that states:

"The Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decisionmaking processes of their Government, including the Central Intelligence Agency."

As they say in the ads, you've come a long way, baby!

But the journey is not yet over. There are many assurances that must be given before we can ask the public to accept this retreat from full FOIA accountability. And there are changes that will have to be made before we can honestly tell the American people that we have struck the proper balance between secrecy and openness.

Two years ago, I called this issue one of a conflict of rights, in which each side had an interesting case to make. I suggested "that finely-honed instruments will do a better job than meat-axe 'reforms'. . . . The executive branch should not let narrow problems be justifications for broad exemptions." We are on the way to crafting such a finely-honed bill. But the executive branch may have to bend a little more if we are to succeed.

The CHAIMAN. The next session will be Tuesday morning next week at 10 in room SD–342.

We stand adjourned. Thank you, gentlemen.

[Whereupon, at 3:30 o'clock p.m., the committee adjourned, to reconvene upon the call of the Chair.]

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

TUESDAY, JUNE 28, 1983

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The select committee met, pursuant to notice, at 10 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater, Durenberger, Inouye, and Leahy.

The CHAIRMAN. The meeting will come to order.

OPENING STATEMENT OF CHAIRMAN BARRY GOLDWATER

Last week the committee heard the CIA's views on S. 1324, a bill to amend the National Security Act of 1947. This legislation would relieve the CIA of searching and reviewing certain operational files under FOIA requests. This relief will enable the Agency to become more efficient so that other FOIA requests may be answered speedily.

I want to take just a few minutes to outline why this legislation is needed.

In the 8 years since FOIA has been in its present form, the CIA has worked hard to comply with the act. However, it has been impossible to keep up with all the requests in the way the act requires. I do not think Congress really contemplated the burdens FOIA would place on an intelligence agency.

As we heard in last week's testimony, FOIA mandates that if someone requests all the information on a certain subject, all the files have to be located. In an intelligence agency, most of the information is classified. But that does not end the Agency's job. An experienced person must go through stacks and stacks of these papers—sometimes they are many feet tall—just to justify why almost every single sentence should not be released. If this is not done well, a court could order the information released.

Now, what has been the result of this burdensome process? Very little information, if any, is released from operational files when the requester seeks information concerning the sources and methods used to collect intelligence. Even then, the information that is released is usually fragmented.

Also, there is always the risk that there will be a mistaken disclosure or that some court may order the release of information which could reveal a source's identity or a liaison relationship. That is why these most sensitive operational files should be exempt from search and review under the provisions of my bill.

It is important to know that this legislation does not frustrate the essential purposes of the FOIA. Requesters will continue to have access to CIA files containing the intelligence product, and to information on policy questions and debates on these policies. Additionally, access to files for individual U.S. citizens and permanent residents who seek information on themselves will not be affected by S. 1324.

Presently, the wait for a response under an FOIA request to the CIA takes anywhere from 2 to 3 years. This kind of situation benefits no one. By exempting these operational files from search and review, the processing of all other requests can be completed much sooner. Thus, the public will receive information which is releasable under the Freedom of Information Act and Privacy Acts in a far more efficient and satisfying manner.

Today we have witnesses from various organizations that could be affected by this legislation. We have the Department of Justice, the Association of Former Intelligence Officers, the American Civil Liberties Union, the Society of Professional Journalists, the American Newspaper Publishers Association, the chairman and a member of the ABA Standing Committee on Law and National Security, and the National Coordinating Committee for the Promotion of History.

We look forward to hearing your testimony.

We have an opening statement from Senator Durenberger.

OPENING STATEMENT OF SENATOR DURENBERGER

Senator DURENBERGER. Mr. Chairman, I thank you very much for the opportunity and for giving me just a couple of minutes to summarize my statement, which I would like to have made a part of the record. I will probably be in and out to help you with this hearing. We are doing a markup on the Clean Water Act this morning.

I was sorry not to be able to be in attendance at the last hearing, and probably even more sorry when I saw the transcript of the hearing, because it created some problems for me with this bill. I really believe that it is possible to balance the needs of the CIA and of outside groups in a way that will give each side a better deal than it now believes it is getting. But I do not think that we have yet quite struck that balance, and until we do I will have to reserve my support for the bill.

What are the problems, at least for this Senator, with the bill as it now stands?

First, it could be used to keep the wraps on intelligence abuses.

Second, it would provide exemptions for all intelligence collection operations, even acknowledged ones, in spite of the fact that these are often more important than covert actions.

Third, it would exempt material that was declassified or ready for declassification, thus cutting off important areas of historical research.

I just want to say, with regard to that, that I do not believe in history for history's sake. I do not believe in history just for the sake of the people who make their living writing history. But as a person who has been in and out of various forms of public and private service during my lifetime, I find a great deal of benefit particularly in my role now as a policymaker, in studying both the achievements and the failures of those who preceded me. For that reason, I would accent my concerns about access to materialfor historical research.

Fourth, it is apparently intended to prevent any form of judicial review.

And fifth, it would appear to remove the Freedom of Information Act as a means by which bereaved families can seek information about family members who have died under mysterious circumstances during or after service in the CIA.

Aside from the provisions of the bill itself, other concerns remain. First, we need concrete assurances that the backlog of FOIA request cases will be ended and the CIA will handle FOIA requests with more sensitivity than in the past.

Second, we must be sure that this bill is not the nose of an Intelligence Community camel or a national security mammouth trying to get in under the tent. The CIA has assured us that they do not intend to let other agencies into their bill, but if this is just the first of many bills for each agency, then we should know about it and consider the full ramifications of what begins as a narrow bill for part of one agency.

We should also think carefully about the message this bill sends to the American people. We in this room may view the bill as a complex compromise, a solution to a conflict of rights. But the people see it simply as an FOIA exemption. If we want to send a balanced message, we would do well to add provisions that clearly buttress FOIA.

Six of us on this committee have cosponsored the Freedom of Information Protection Act, S. 1335, which would do just that.

On the positive side, Mr. Chairman—I do not know why I always leave these things for the end—I am pleased by the CIA's assurances that all disseminated intelligence and all policy memoranda will remain open to FOIA search and review. I have asked the CIA questions for the record to pin down those points and I am very confident that they will be answered satisfactorily. In this respect, congressional oversight is working.

I recognize the importance of the CIA's acceptance of FOIA as it applies to nonoperational materials. That is a great step forward. It compels us to reconcile the differences that I have noted, for we can still craft a bill that will ease the CIA's burdens while reinforcing FOIA in its vital role of keeping Government accountable to the people.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. I think you have summed up your feelings on this. As usual, you are very fair and to the point. I am sure we will come out with a bill that we can all live with.

Our first witness this morning is Ms. Mary Lawton, who is Counsel on Intelligence Policy of the Department of Justice. Welcome.

STATEMENT OF MARY LAWTON, COUNSEL ON INTELLIGENCE POLICY, DEPARTMENT OF JUSTICE

Ms. LAWTON. Thank you, Mr. Chairman.

We appreciate the opportunity to appear before the committee in support of S. 1324. While the bill by its terms relates solely to information in the files of the Central Intelligence Agency, it has significance

for the Department of Justice, which of course represents the CIA in Freedom of Information Act litigation.

As the committee is aware, the Freedom of Information Act requests to the CIA impose enormous burdens on the Agency and on the Department of Justice when litigation ensues. While many agencies are burdened with FOIA requests, the comparted nature of CIA files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. These difficulties are compounded in litigation.

The Department of Justice can only assign to CIA cases 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 required 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 juggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts.

And all to what end? When the litigation is over, the information remains classified, just as it was before the request was filed.

If there were any public benefit served by FOIA requests of this type, consideration of this bill would require this committee to weigh the benefit against security concerns. With respect to the records covered by S. 1324, however, we perceive no such benefit.

The CIA must divert valuable intelligence personnel from their mission to identify and review the records. Processing must be scrutinized to minimize the risk of erroneous release which must jeopardize sources or diminish the value of the intelligence. Attorneys at the Agency and the Department spend countless hours preparing documents. Already heavy court dockets are further burdened by these cases. Yet in the end the public receives only the bill for this needless expense.

The findings set forth in S. 1324 essentially recognize that this process wastes intelligence community and litigative resources without any offsetting public benefit. Equally important, S. 1324 recognizes the problem posed by the perception of those who cooperate with intelligence agencies that protection of information furnished cannot be insured.

Whether or not this perception is justified, it is real. Congressional recognition that the problem exists and that it warrants remedy should help to allay the concern.

I am sure that the committee is aware that the Department of Justice sought in the last Congress and is seeking in this Congress generic relief from some of the undue burdens imposed by FOIA on the Government as a whole. We are delighted that the Senate Judiciary Committee has agreed to report S. 774. The need for that legislation, however, in no way diminishes the need for legislation such as S. 1324.

This bill focuses on the specific protection of CIA sources and methods and addresses the particular problems of processing and reviewing compartmented files. It is, quite properly, an amendment to the National Security Act of 1947. As exemption (b) (3) of the Freedom

of Information Act itself contemplates, it addresses the specific need for protection of an agency's files in the organic act applicable to that agency.

Only a proposal of this type could address with such specificity the files to be protected. Precisely because S. 1324 deals with the CIA alone, it can describe the exempt files in terms which address that agency's particular filing system. It is entirely appropriate that it be considered by the committee as separate and distinct from efforts to secure Government-wide amendments to the Freedom of Information Act itself.

We have no further comments, Mr. Chairman, other than to reiterate our wholehearted support of S. 1324 and urge its speedy enactment.

The CHAIRMAN. Thank you very much, Ms. Lawton. I just have a couple of questions.

Could you describe the kind of affidavits you refer to in *Phillippi* v. *CIA* and *Ray* v. *Turner*?

Ms. LAWTON. They are public affidavits that must be filed in the court explaining why disclosure of the information, or in some cases a simple response to the existence or not of the files, would endanger the national security. And when you are filing a public affidavit, of course, you cannot lay out in detail the precise reasons. So the wording of those affidavits is difficult.

In addition, the courts have in some cases required much more elaborate affidavits in camera, protected affidavits, spelling out step by step how the disclosure of each item would endanger the national security. And even though those are protected in the court, they too are extremely difficult to draft because you are trying to protect the information and at the same time you are describing it in terms that are sometimes more elaborate than the document you are trying to protect.

It is a difficult process. The Agency works beautifully with us on this. We can get it done. We have done it. But it is an extremely difficult process and one which produces no result in the end.

The CHAIRMAN. This all adds to the length of time?

Ms. LAWTON. Oh, yes, to the length of time and the cost.

The CHAIRMAN. Do you have any particular memory of the extremely long period taken by the court to come by a decision on these affidavits?

Ms. LAWTON. I cannot name a particular case, Mr. Chairman, at the moment. But you do have the situation that has occurred more than once of the district court deciding that it need not examine the records in camera, that it is satisfied with the public affidavit. That is appealed to the court of appeals, the court of appeals says, no, you should have looked at it. The court of appeals sends it back, the district court looks at it again, it goes back to the court of appeals.

So you do have cases running 5 or 6 years on this.

The CHAIRMAN. S. 1324 states that the DCI shall designate certain operational files if they meet a specific definition. Do you think this designation should be subject to judicial review?

Ms. LAWTON. It would be very difficult, it seems to me, Mr. Chairman, for a court which has no knowledge of or experience with the CIA filing system to second-guess the Director on a description of whether the files fit the statutory definition.

Now, the act, of course—the bill—does not address it one way or the other, but courts have, when a bill is silent, been deferential pre-

cisely because they do not have the kind of knowledge of the filing system. I do not have that knowledge. I could not second-guess the Director on that designation, and I work in intelligence all the time. I do not know how a judge could.

The CHAIRMAN. When you get down to it, you probably have to go to a computer anyway, do you not?

Ms. LAWTON. That is it.

The CHAIRMAN. I have one more question. FBI counterintelligence would get some benefits from the bill worked out in the Judiciary Committee by Senators Hatch and Leahy. Could the Justice Department give the committee an analysis of that bill, S. 774, so that we can understand just how it will affect FBI counterintellligence?

Ms. LAWTON. I am not sure I could do it on the spot. We could certainly supply it for the record, Senator.

The CHAIRMAN. That would be fine.

I wonder if Senator Leahy would like to answer that question.

Senator LEAHY. I am sorry, Mr. Chairman, I was making a note. What was the question?

The CHAIRMAN. It applied to your bill, S. 774. What prompted the question was the idea that the FBI counterintelligence could get some benefits from the bill that you have worked out in your committee and which has been reported to the floor. And I was asking counsel if she could give the committee an analysis of S. 774 so that we could understand how it might affect FBI counterintelligence.

Senator LEAHY. We have asked some of the same questions of Judge Webster on that bill. I would rather we use his answer and let him speak for himself.

In fact, I have a question for Ms. Lawton that is going to followup along that line, to point out that we are still talking about different procedures and different ways of carrying out the procedures.

The CHAIRMAN. Would you supply the answer for the record?

Ms. LAWTON. Certainly, sir.

[The material and statement of Mary C. Lawton follow:]

IMPACT OF S. 744 ON FOREIGN INTELLIGENCE AND FOREIGN COUNTERINTELLIGENCE RESPONSIBILITIES OF THE FEDERAL BUREAU OF INVESTIGATION

As a general matter, S. 774 provides Government-wide relief from the stringent time limits of the Freedom of Information Act (FOIA), permits agencies to charge fees for processing requests, as well as for search and duplication, and permits agencies to retain half of the fees collected to offset part of the cost of FOIA compliance. The Intelligence Division of the FBI, like all other Government units, will benefit from these proposals.

There are, in addition, certain sections of S. 774 which have a more direct impact on the FBI's foreign intelligence collection and counterintelligence responsibilities.

The bill would limit FOIA requests to U.S. persons. Accordingly, it will no longer be necessary to process requests from foreign officials or foreign corporations.

Further, the Attorney General, by regulation, would be permitted to limit or condition FOIA access by imprisoned felons in the interests of law enforcement, foreign relations or national defense.

Access to informant record would be barred in circumstances in which a third party requests access by identifying an individual as an informant. Thus, the FBI could avoid responding to a request for "your informant file on John Doe" in a manner which admits the existence of such a file even while denying access to its contents.

There are several changes to the FOIA exemptions proposed by S. 774 that will be helpful to the Intelligence Division of the FBI.

Proposed amendments to exemptions 2 and 7 would make explicit the intent to protect from disclosure investigative manuals and guidelines the availability of which could jeopardize the investigative process or aid in the circumvention of law. Such a provision would afford the FBI's Guidelines for Foreign Intelligence Collection and Foreign Counterintelligence Investigations greater protection. The FBI would be able to withhold from public disclosure not only the classified portions of the guideliness but also unclassified portions the disclosure of which might hinder its ability to investigate. The same would be true of corresponding FBI Manual provisions.

Other proposed amendments to exemption 7 recognize explicitly that foreign government agencies may qualify as confidential sources and that information received from such agencies may be protected. Existing law protects information received solely from a confidential source and does not indicate whether foreign government agencies may be treated as confidential sources. The proposed language not only affords protection to these sources but also affords them greater assurance of such protection by the very specificity of language. An added protection for individual sources is found in another change proposed by S. 774. Currently information may be withheld if disclosure would endanger the life of law enforcement personnel. The bill would expand this provision to allow withholding of information the disclosure of which would endanger any person.

A new exemption, to be added by S. 774, would assist the FBI, as well as other agencies, in stemming the flow of sensitive technolobgy. It would exempt from disclosure the type of technical data subject to export control limitations. Under the current law foreign governments can request such data from the federal government under FOIA even though they could not obtain it from a manufacturer unless that manufacturer had an export license.

One other provision of S. 774 which may prove particularly helpful in the counterintelligence field is an amendment to the FOIA provision requiring that "reasonably segregable" portions of exempt documents be made available to requesters. Under the proposed language the FBI would be permitted to consider what other information is available to the requester when deciding what is reasonably segregable without disclosing the sort of information exempt under exemptions 1 through 7. For example, if the FBI knew that a requester bent on disclosing undercover operations previously was engaged in or knowledgeable about such operations it could consider that knowledge in deciding what information could be disclosed to him.

All of these proposed changes in FOIA will, for obvious reasons, assist the Intelligence Division of the FBI in protecting sensitive information.

[Prepared statement of Mary C. Lawton follows:]

STATEMENT OF MARY C. LAWTON, COUNSEL FOR INTELLIGENCE POLICY

Mr. Chairman and Members of the Committee: We appreciate the opportunity to appear before the Committee in support of S. 1324. While the bill, by its terms, relates solely to information in the files of the Central Intelligence Agency, it has significance for the Department of Justice which, of course, represents the CIA in Freedom of Information Act litigation.

As the Committee is aware Freedom of Information Act requests to the CIA impose enormous burdens on the Agency and on the Department of Justice when litigation ensues. While many agencies are burdened with FOIA requests, the compartmented nature of CIA files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. These difficulties are compounded in litigation. The Department of Justice can only assign to CIA cases 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*, 546 F.2d 1009 (D.C. Cir. 1976) and *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978), without at the same time disclosing the very information they are required 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. And all to what end? When the litigation is over the information remains classified just as it was before the request was filed.

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We have no further comments, Mr. Chairman, other than to reiterate our wholehearted support of S. 1324 and urge its speedy enactment.

The CHAIRMAN. Senator, do you have an opening statement or questions you would like to ask this witness?

Senator LEAHY. No, I do not, Mr. Chairman. I do have a couple of questions, but no opening statement.

The CHAIRMAN. You have a few questions? Go ahead.

Senator LEAHY. I should also point out, on the FOIA legislation that Senator Hatch and I and others tried to work out on the FBI, that we were primarily concerned with the question of protecting their informants in organized crime cases. That is somewhat different than what we have here.

We were concerned that organized crime, Mr. Chairman, has gotten so sophisticated—it is a multibillion-dollar industry, and uses of computers, accountants, lawyers, and everything else—that criminals could make inquiries from several different areas. For example, they could make inquiries of different branch offices and, by putting the bits and pieces together, try to figure out who a particular informant was.

What we are trying to do is guarantee that that informant's name could not be disclosed. Obviously it is not going to be disclosed directly, but we want to make sure there is no way it is going to be disclosed inadvertently. Organized crime people tend to play for keeps. It not only cuts down the enthusiasm of informants if they start finding some of their fellow informants with lead overshoes, but it also diminishes the effectiveness of those informants who are suddenly wearing the lead overshoes. We wanted to cut out that.

Ms. Lawton, along these lines, in the hearings last week I made it very clear that I did not want this bill to be a prelude to an attempt to

gain a generalized exemption from FOIA for the FBI, the NSA, DIA, or any other intelligence agency. The testimony was clear that this bill is just for the particular situation of the CIA.

Is it your understanding that this bill appplies only to the CIA and is intended only for the CIA?

Ms. LAWTON. Yes, Senator, it is.

Senator LEAHY. Is it the Justice Department's understanding that this is not just a prelude to opening it up for other agencies?

Ms. LAWTON. It is my understanding that it is agreed throughout the administration that there will be no amendments proposed by us to this bill to involve any other agencies.

Senator LEAHY. You said something about judicial review and the circumspect way the courts would look at it. Is judicial review precluded from the question of whether these files are properly classified?

Ms. LAWTON. Judicial review of classification is not precluded—no. As you know, under the existing law the standard is that the information is in fact properly classified. That is the requirement.

Senator LEAHY. What about designation of the files? Is judicial review of the question of whether they are properly designated precluded?

Ms. LAWTON. The bill does not address it. That would be left to the court's own judgment as to whether there was an intent or not of Congress to preclude judicial review of the designation.

Senator LEAHY. Do you see anything in the bill that precludes judicial review of the designation?

Ms. LAWTON. It is silent on that, absolutely silent on it. It neither invites nor bars it in terms of the bill. I think courts would be very reluctant under just standing judicial practice to engage in judicial review of the categorization of files of an agency by the head of the agency, who is the legal custodian of the files.

Senator LEAHY. Would it be your position that the courts should be reluctant to review that designation?

Ms. LAWTON. Oh, yes, Senator. Whenever we go to court on this, we always urge them to give the greatest deference to the executive branch on this.

Senator LEAHY. So your position would be that even though the law is silent on it, you would urge the court that they not go into a review of the designation?

Ms. LAWTON. I would not be doing the litigation, but based on the past record the Department is likely to take exactly that position, yes.

Senator LEAHY. And would it be the Department's position that the courts are precluded or that the choice is totally theirs?

Ms. LAWTON. That simply has not been addressed.

Senator LEAHY. But the Department well could argue that they would be precluded.

Ms. LAWTON. Yes. I think a legal argument could be made, based on existing case law.

Senator LEAHY. So the only way the Department could be stopped from making such an argument would be to have it written in the bill itself that the courts are allowed to look at that designation.

Ms. LAWTON. Even then, we would probably make a great deference argument, unless you told us not to make a great deference argument.

Senator LEAHY. So even if the Congress were to write in that the

court is allowed to review the designation question, you feel it would still be the administration's argument that, notwithstanding, the court should give great deference to the agency's designation?

Ms. LAWTON. That is an argument we make now, Senator, under the regular Freedom of Information Act on classification, and I would assume, yes; it would continue.

Senator LEAHY. In effect what you would be doing is telling them not to review the designation.

Ms. LAWTON. Oh, no. Under the existing Freedom of Information Act, it is absolutely clear that the court reviews the classification.

Senator LEAHY. I am talking about the designation.

Ms. LAWTON. But we still make the argument that they should defer, give great deference to us, and the same would be true on designation. That is not to say if you wrote it in that we would urge them not to review it, but only that we would urge them to review it on a standard that gives the executive determination great deference.

Senator LEAHY. As a practical matter, the court normally follows your argument; does it not?

Ms. LAWTON. Most courts have, yes; in this area.

Senator LEAHY. And with the language remaining silent, you feel the Justice Department would be free to argue that they were not to look at it at all?

Ms. LAWTON. It could make the argument. Again, I cannot predict what the litigating division will do in litigation arising under a bill not yet passed. But certainly the argument could be made. I could formulate one as a lawyer.

Senator LEAHY. Mr. Mayerfeld argued last week that the bill does not provide for judicial review of DCI designation of operational files. Do you agree with that?

Ms. LAWTON. As it is presently written I think that is quite clear; yes.

Senator LEAHY. So if we want to be clear that the court could make such a review, we have got to write it in. But even if we write it in——

Ms. LAWTON. I am not going to urge that, Senator.

Senator LEAHY. I understand, but I am asking you for your legal opinion here. Even if we do write it in, it would be the Department's position that, notwithstanding having it there, great deference must be given to the DCI's designation?

Ms. LAWTON. Yes; I believe that would be the position.

Senator LEAHY. Considering past courts' preferences as well as precedents in this area, that could pretty well determine there would be no review of that designation; is that correct?

Ms. LAWTON. Well, if it says the court shall review, the court will review. What standard of review it will apply, whether it will substitute its judgment or go on an arbitrary and capricious or clearly erroneous standard would vary. But the court would have the review if it were put there.

Senator LEAHY. In your prepared statement you welcome S. 774 as reported by the Judiciary Committee. Let me ask you two questions.

Do you regard S. 1324 as completely independent of S. 774, or do you see any relationship between S. 774, S. 1324, and the Durenberger-Leahy bill?

Ms. LAWTON. I regard it as completely separate and apart, a good parallel but having no direct relationship with the other bills. The others are more generic in their terms. They are Government wide.

Senator LEAHY. Is that what you mean when you say that it is entirely appropriate that S. 1324 be considered by the Congress as separate and distinct from efforts to secure Government-wide amendments of the Freedom of Information Act itself?

Ms. LAWTON. Yes, Senator.

Senator LEAHY. I have questions for the record, Mr. Chairman, but I would like to ask one more if I might. Do all CIA operations in the United States require approval by the CIA or the Justice Department?

Ms. LAWTON. All CIA operations require approval by the CIA. They do not require approval by the Justice Department.

Senator LEAHY. I meant do all CIA operations in the United States require approval by the FBI or the Justice Department?

Ms. LAWTON. No, Senator, they do not.

Senator LEAHY. What can they do on their own without FBI or Justice Department approval?

Ms. LAWTON. Well, overt collection of positive foreign intelligence, for example, would require no approval from us. That is their mission. It is not ours. It doesn't require coordination. It doesn't require approval.

Senator LEAHY. Would the files of any such activity within the United States be exempted from FOIA search under this bill, or would they still be searchable?

Ms. LAWTON. I am not sufficiently familiar with the filing system to tell you that, Senator. You would have to ask the CIA.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. It is a pleasure to have with us this morning, Senator Dan Inouye who was formerly chairman of this committee, and we always welcome his sage advice. I understand you have a statement you would like to make.

Senator INOUYE. Yes, Mr. Chairman. I have a rather lengthy statement. With your permission I would like to have this made part of the record.

The CHAIRMAN. It will be.

[Prepared statement of Senator Daniel K. Inouye follows:]

PREPARED STATEMENT OF SENATOR DANIEL K. INOUYE

Mr. Chairman, I am grateful for this opportunity to state my views and hear testimony from representatives of the government and the public on S. 1324, the proposed Intelligence Information Act. I especially appreciate your role in introducing this legislation, and in seeing that some common ground could be reached among the various interests on this important subject—the accessibility of records held by the Central Intelligence Agency to search and review, and possibly release, under the provisions of the federal Freedom of Information Act.

Mr. Chairman, I will make a brief statement at this time, and with your consent enter more detailed comments into the record.

I understand that the provisions of this bill were constructed with the participation of officials of the C.I.A. and affected public interest organizations, especially the civil liberties community. I recognize, therefore, that the exemption from coverage under the Freedom of Information Act for certain C.I.A. files has been carefully and narrowly drawn. This is as it should be, since there are important interests on both sides—the C.I.A. in the security of its operational records and the public in the accessibility of certain documents in which there is a public or personal interest in disclosure.

At last week's public hearing, at which representatives of the C.I.A. testified about this bill, a number of arguments were made in its favor. I will not repeat these arguments here, except to take note of them in stressing the significance of this type of legislation for our national security.

First, current law imposes on the C.I.A. the requirement to search all its files—including operational files—in response to requests under the Freedom of Information Act. This is true regardless of the fact that the National Security exemption of the Act would shield nearly all such documents from disclosure. This is especially true of operational records, which relate primarily to intelligence source and methods, and which generally do not contain information which would directly contribute to public debate on foreign policy or other topics.

Second, the extensive search and review of files prescribed by current law requires the Agency to divert significant manpower to this task. Due to the sensitivity of intelligence operations and the compartmentation of related operational records, regular intelligence officers must fulfill this task in addition to their other responsibilities.

Third, the existing situation imposes delays on persons seeking information from the Agency under the Freedom of Information and other Acts providing for release to the public of Agency records. The lag in processing F.O.I.A. requests is now said to be 2–3 years.

Fourth, regardless of whether operational records would ever be released under the F.O.I.A., the prescribed search and review of these records causes the Agency to have to collate them in response to requests. Assembling these documents violates the Agency's customary practice of strictly compartmentalizing its files, especially operational files, on the basis of the need to know principle. This produces an internal security problem for the Agency.

Fifth, there is the so-called "perception" problem—the problem that foreign intelligence sources and services may refuse to cooperate fully with U.S. intelligence agencies because they feel that information about their actions may not be properly handled, or could even ultimately be released—either deliberately or inadvertently—to the public.

Mr. Chairman, John McMahon—the Deputy Director of Central Intelligence—reassured members of the Committee at last week's hearing that enactment of this bill would not significantly affect the actual release of information to the public by the C.I.A. I believe that the bill has been carefully crafted to achieve this goal, while it addresses the extremely important security concerns that Mr. McMahon and the other C.I.A. witnesses described last week.

There remain in my mind, nevertheless, certain questions and concerns about the scope of the proposed provisions and their application. Perhaps our witnesses today will help us consider these matters and draft such amendments or take such other legislative action as would help resolve them.

Designation of operational files

The proposed new section 701(a) of the National Security Act—the essence of these amendments—allows the Director of Central Intelligence to specifically designate certain files, which meet the stated criteria in the bill, as operational files exempt from search and review for public release under the F.O.I.A. Nothing in the bill provides any instructions on whose decision would be determinative under this provision, as to whether specific files were properly designated for the exemption.

Now, Mr. Mayerfeld, the Assistant General Counsel of the Agency who appeared last week, indicated in response to questions that he believed that discretion to designate files under this act would rest solely with the Director. As a lawyer, I see little ground for this conclusion on the face of the proposed statute. Perhaps Mr. Mayerfeld was thinking of the citation to the National Security Act in the same section, or on some more general theory of Executive Branch discretion in this area.

However, I would like to correct the record in this regard—that as far as I understand from the language of the bill, there is no definite assignment to the Director or unreviewable discretion to designate operational files. I believe that the courts would normally have this authority, just as they have authority under the F.O.I.A. itself to review whether certain documents withheld from disclosure on the grounds of national security were properly withheld. I have been informed, in fact, that on at least one occasion, a federal judge has visited C.I.A. facilities to determine whether certain files had been adequately searched in

response to a request under the F.O.I.A. A federal judge could similarly determine for himself whether certain files met the criteria for exemption.

Exclusion of certain covert actions

Similarly, the same section 701(a), contains a *proviso* that files concerning certain covert actions—namely those "the existence of which is not exempt from disclosure under . . . F.O.I.A." could not be exempted. This refers to the case in which the existence of a covert action has been acknowledged, and its existence could no longer plausibly be denied—although its operational details could still be exempt from disclosure under the National Security exemption.

At last week's hearing, Mr. McMahon indicated indirectly his Agency's view that it would be the President alone who could acknowledge the existence of a covert action such that it would no longer be exempt under the amendments. But nothing in the provisions before us makes this clear, and—similarly to the case of the designation of files by the Director—my own legal interpretation would be that the question whether a certain covert action was subject to the F.O.I.A. would be a *question of fact* subject to judicial determination. The current situation in Nicaragua is a good case in point: Although there have been widespread reports of the existence of a covert action by the United States, the President has not formally admitted the existence of such an operation.

Time limitation on operational designation

Mr. Chairman, I also note that the Director's designation of files as exempt operational files under the amendments is not constrained by any limits on the duration of exemption. In this respect, the situation with respect to certain files accessible under the F.O.I.A. would be similar to that for other categories of classified material under the President's Executive Order on National Security Information, which eliminated the requirement of mandatory review of classified records for potential declassification.

Yet at some point the details of intelligence operations—which ordinarily would not be within the scope of legitimate public debate on national security—could become a subject of public interest. Historians and other social scientists could ultimately use such files—after they were no longer sensitive—to construct chronicles of the intelligence aspects of important international events. Details concerning cryptographic successes against Japanese diplomatic and naval communications during World War II, for example, have helped the public to understand better the events that led to the attack on Pearl Harbor and its aftermath in the war in the Pacific.

I suggest, therefore, that we consider some limitation on the duration of operational exemptions designated by the Director under these amendments.

Intelligence abuses

Last week, the C.I.A. representaives assured the Committee that information concerning intelligence abuses—improprieties or illegalities performed by intelligence personnel—would not be exempted from F.O.I.A. review by these amendments. The witnesses indicated that sufficient material on any such occurrences would be available in non-designated files maintained by the Director, his Inspector General or General Counsel, or the oversight bodies.

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

Privacy Act information

Mr. Chairman, section 701(c) of the amendments specifically provides that personal information requested by United States citizens or permanent residents under the F.O.I.A. and Privacy Acts would continue to be processed normally. In view of the fact that U.S. intelligence activities occasionally affect Americans, especially abroad, I believe that this is a very important provision. We should certainly emphasize this protection in our deliberations on the amendments.

Unrecorded documents

Because of their extreme sensitivity, certain intelligence reports would probably not be entered into normal channels but would be maintained by their originating unit and disseminated only on a very limited basis. It might be difficult to search for, or review, such reports under the F.O.I.A. if they are maintained exclusively in operational files which are designated by the Director. Perhaps we should seek additional information from the Director, on a classified basis if

necessary, in order to assure ourselves that certain intelligence reports are not exempted from F.O.I.A. search and review because they are located only in operational files.

Designated files of the Office of Security

Mr. Chairman, in the past, as revealed by the Church Committee investigation, intelligence agencies sometimes went overboard in protecting their interests. The MERRIMACK and RESISTANCE projects undertaken by the Office of Security in the C.I.A. involved investigation of domestic political groups that the Agency saw as posing a threat to the security of its domestic operations. The Office of Security still has *some* authority to pursue investigations related to Agency domestic security under section 2.3(g) of the President's Executive Order on Intelligence Activities. eW should be sure that the amendments do not allow the Agency to restrict access to operational files of the Office of Security which could pertain to such matters.

Is this the administration position?

Mr. Chairman, I and the other members of the Committee greatly appreciate your sponsorship of this legislation, which is so important and has been so difficult to devise. We also appreciate the efforts, by the Agency and affected interests, that have gone into developing it.

In my view, it would greatly relieve the members and the public to be assured that the provisions we are considering are fully consistent with the policies of the Administration in this area. I understand that this point was raised at the hearing last week, and that Mr. McMahon assured the Committee that the Agency's support for this bill represented the considered position of the Administration. There still seems to be concern, however, that we have not heard the final word on this subject and that we will continue to be pressed by the C.I.A. and other intelligence agencies for relief from the F.O.I.A. and other statutes providing for the release of government information. I believe the Committee should reach a clear understanding with the Administration in this regard.

Eliminating backlog and expediting processing of requests

Section 2(b) of the bill states that one of its primary objectives is: "(T)o provide relief to the C.I.A. from the burdens of searching and reviewing operational files, *so as to enable this agency to respond to the public's requests for information in a more timely and efficient manner.*" (Emphasis added.)

Mr. Chairman, I believe that in our continuing oversight of this agency we should ensure that this objective is realized.

Importance of legislative oversight

On the subject of legislative oversight, Mr. Chairman, it is extremely important to remember that the organization of the C.I.A. and its procedures for handling records are largely classified. Although occasionally courts may review Agency recordkeeping actions, especially in connection with the F.O.I.A., the basic checks on compliance with legislation safeguarding the public's right to information in this area is through internal executive and Congressional oversight. The Committee should be prepared, in connection with adoption of these amendments, to perform its oversight function vigorously in this regard.

Conclusion; detailed comments for the record

Mr. Chairman, I would like to conclude my statement by once again complimenting you for your central role in devising the carefully drafted provisions before us. It is a pleasure to serve with you on this Committee and to be part of your team, helping to safeguard national security while performing the important duty of legislative oversight in this area. As I mentioned earlier, I also have several technical comments on the amendments which I would like to enter into the record. Thank you.

TECHNICAL COMMENTS OF SENATOR INOUYE ON S. 1324

Terminology: "Special Activity"

The phrase used in the proposed amendments for covert actions, "special activities", is the term used in the old, 1947 National Security Act. There has been a good deal of legal debate, including opinions of CIA counsel, on the meaning of this phrase and the extent to which it authorizes covert actions by the Agency. In view of this uncertainty, it would appear preferable to use a more modern formulation, such as that adopted by Congress in the 1961 Hughes-Ryan amendment to the Foreign Assistance Act and in the 1980 Intelligence Oversight Act—*viz.*, "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence".

Search and review of compromised sensitive collection operations

The proviso in section 701(a) precluding denial of the existence of certain special activities, when they would not be exempt from disclosure under the F.O.I.A., is limited on its face to covert actions. The C.I.A. currently admits for these purposes the existence of two past covert actions—in Guatemala and in connection with the Bay of Pigs invasion in Cuba.

Occasionally, however, other intelligence operations, such as sensitive collection operations, may become compromised to the point where their existence could no longer plausibly be denied by the United States. At this point, it could be beneficial to have search and review of relevant files for potential release under the F.O.I.A. in light of public knowledge of them and legitimate public interest in their characteristics.

Therefore, we may wish to extend this *proviso* to include not only "special activities" but all "significant intelligence activities" which have been compromised to the point defined in the amendments.

Scope of proposed section 701(a)(2) exemption

Section 701(a)(2) of the amendments would establish as a criterion for designation of files for exemption whether they were concerned with "foreign intelligence, counterintelligence, or counterterrorism operations". It is not clear on the face of this language whether covert actions would be included within the scope of foreign intelligence operations, but I have been informed that C.I.A. representatives (chiefly Mr. Meyerfeld) told the Committee staff that they would be. Further, the only mention of such activities in this section comes in the *proviso* further down which addresses the problem of covert actions the existence of which could no longer be denied.

This construction would appear to result in problems in statutory interpretation. It may be better to explicitly include covert actions in section 701(a)(2) in order to make it clear that these activities are subject to the exemption, except to the extent indicated otherwise in the *proviso*.

Senator INOUYE. At the outset I would like to commend you, sir, for offering this measure and in so doing bringing together the different interested parties, especially the CIA and the civil rights community, in coming up with provisions that seem to show some common ground. I hope that something can be done.

However, I do have—as I am certain all of us have—a few questions and hope that these hearings will resolve them. I am sorry I was not here in the beginning, Ms. Lawton, but if I may I will ask some questions and if the questions have already been asked will you just tell me so and I will look over the record.

Last week Mr. McMahon indicated to the committee that the President would have complete authority to admit or deny the existence of covert actions. I believe his statement is important in light of a certain provision in the amendments which would permit the DCI to designate operational files concerned with covert actions except when the existence of such action has been compromised and therefore would be subject to the FOIA.

Do you agree that the President is the only one who can decide whether an action is covert or not?

Ms. LAWTON. Yes, I do, Senator.

Senator INOUYE. Would this determination be subject to judicial review under this measure?

Ms. LAWTON. I know of no way that the determination to proceed with a covert action would be subject to judicial review. Obviously it is subject to reporting to this committee and to its House counterpart, but it would be very difficult it seems to me to find a way that the decision to enter into a covert action and to keep it covert could be gotten into court.

The only way I could visualize it would be a conflict between the intelligence committees of the Congress and the President in which case you tend to have the courts saying that is a political question. We are staying out of it. So I do not see how the courts could get into it.

Senator INOUYE. But it is your view that the President has the sole authority to decide whether an action continues to be covert even if the general perception is that it has been compromised?

Ms. LAWTON. Well, he has the initial authority. Under the rules that establish this committee if I recall them correctly, there is a mechanism for the committee and the Congress to elect to declassify information after notice and an opportunity for the Executive to present its viewpoints and so forth so that there is if I recall the rules correctly provision for the Congress to declassify certain information that has been reported to it and covert action is among the things that are reported to the Congress.

Senator INOUYE. If Congress should take that step and declassify certain actions, would that action now clear this so-called covert action to FOIA search?

Ms. LAWTON. I believe it would, yes.

Senator INOUYE. Notwithstanding the President's insistence that it is still covert. Ms. Lawton, in reading over the bill I do not see anything that would set a time limit on the duration of an exemption granted by the DCI or anyone as far as the designated operational files are concerned.

Similarly the President's Executive order on national security information has eliminated the previous requirement of mandatory review of classification after a specified time period. Do you believe that there should be a limitation on such exemptions?

I believe most European countries, the best known being Great Britain, have a time limit on the duration.

Ms. LAWTON. Even when the Executive order had a mandatory declassification review provision though, Senator, there was authority to exempt from mandatory review certain categories of information. Information received from foreign governments is one of them. Sources and methods was another.

I do not think in practical terms or the type of files we are talking about here that there is any real change because most of those, I think, were exempted from mandatory declassification review.

Senator INOUYE. Should there be a mandatory review after a certain period of time? Not a mandatory declassification, but a review?

Ms. LAWTON. In theory I think it is not a bad idea. In practical terms, given the volume, keeping up with the files that are current, at least in our experience, is more than you can handle. Going back through old files on a periodic basis for general principles is virtually impossible practically, although in theory, a good idea.

Senator INOUYE. Then what you are suggesting is that for time immemorial no one is supposed to go through these files? History may become a bit distorted as a result of that.

Ms. LAWTON. I realize that, and it is not something I am objecting to on a theoretical basis. It is just that it is very difficult to go through on a constant basis a backlog of historic files.

Now the Agency at least has the good fortune to only exist from the 1940's onward and, therefore, it only has that many files. When I think back to the Department which goes back to 1870, the idea of going back

through our files on a periodic basis appalls me as a practical matter.

But there are categories where this is and can be done. The CIA has a history program. The State Department has gone through various files of captured German archives that fell into its possession in a systematic way to make these public for historic purposes.

In discrete areas I think it is distinctly possible to pick out files of historic significance and do a periodic review. I believe that is done. As a total file systemwide prospect, however, I think it is impractical, desirable perhaps, but impractical.

Senator INOUYE. The amendments specifically provide that personal requests for information under FOIA will not be affected. Are you satisfied that these amendments will not limit in any way the right of individuals to request personal information about themselves being held by the CIA?

Ms. LAWTON. Yes, I am. The whole Privacy Act access provision is utterly untouched by this.

Senator INOUYE. So there will be no further restrictions added to that?

Ms. LAWTON. None at all that I am aware of, Senator.

Senator INOUYE. In the past the Office of Security of the Central Intelligence Agency conducted improper investigation of Americans supposedly related to the security of CIA domestic facilities, the so-called Merrimak and Resistance operations. These amendments I gather would provide an exemption for the operational files of the Office of Security.

Are you concerned that this exemption could lead to records of such improper practices not being accessible for search and review?

Ms. LAWTON. Not really, Senator, because of the alternative mechanisms that now exist. First of all, they would still be subject to research and review on a privacy access request by individuals.

Second, you have the entire executive branch and congressional oversight mechanisms with the reports to the Intelligence Oversight Board, the reports to this committee, the Inspector General review. Surely things can go wrong with all the built-in safeguards in the world, but I think the number of safeguards that exist now as compared to the time you are talking about would foreclose any likelihood that this could surface again.

Senator INOUYE. I believe as I walked into the hearing room I heard you respond to Senator Leahy's question by saying that you agreed with the provisions of this bill and you did not wish to have any amendments made thereto?

Ms. LAWTON. That's correct, Senator.

Senator INOUYE. By that am I to assume that this has the blessings of the administration?

Ms. LAWTON. Oh, yes. Yes, it does, Senator.

Senator INOUYE. Your present view is that we should act upon a clean bill with no amendments?

Ms. LAWTON. I never tell the Senate how to legislate, Senator, but we like it the way it is.

Senator LEAHY. Everybody else does. Feel free. [Laughter.]

Never successfully, Senator.

Senator INOUYE. Ms. Lawton, if I may I would like to submit a few other questions for your response.

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

The CHAIRMAN. Thank you. I want to thank you too, Ms. Lawton. That was most helpful.

Ms. LAWTON. Thank you, Senator.

[The questions and answers follow:]

I. DISCRETION TO DESIGNATE OPERATIONAL FILES

The proposed amendments basically permit the Director of Central Intelligence to designate certain specific files as operational files, exempt from search and review under the F.O.I.A. Nothing in the bill itself specifies the scope of this delegation of authority to the DCI. Last week, however, Mr. Meyerfeld of the CIA's legal office stated that he believed the Director would have unreviewable authority under the amendments to designate operational files.

Do you agree that the Director would have complete discretion to designate specific operational files under these amendments?

To what extent would there be judicial review of a determination by the Director that certain files were operational and therefore exempt from document search and review under the F.O.I.A.?

II. ADMISSION OF THE EXISTENCE OF COVERT ACTIONS

The amendments would permit the DCI to designate operational files concerned with covert action, except when the existence of such an action had been compromised and would therefore be subject to review under the F.O.I.A. Last week, Mr. McMahon stated before the Committee that the President would have complete authority to admit or deny the existence of covert actions.

Do you agree that it would be only the President who could decide whether the United States government can no longer deny the existence of a certain covert action?

Would this determination be subject to judicial review based on the facts of the operation and public knowledge of it?

III. TIME LIMIT ON OPERATIONAL EXEMPTION?

The proposed amendments contain no time limit on the duration of an exemption granted by the Director to designated operational files. Similarly, President Reagan's executive order on national security information has eliminated the previous requirement of mandatory review of classification after a specified time period.

Should there be a limitation on such exemptions?

What should it be?

It seems to me that selected declassifications of a historical nature—such as U.S. communications intercepts of Japanese diplomatic and naval messages during the Second World War—have been a significant historical interest for professional historians and the public.

How would you describe the public's interest in the details of historical intelligence operations?

IV. INTELLIGENCE ABUSES

C.I.A. witnesses last week stated that information on "intelligence abuses"—namely illegalities or improprieties committed by intelligence personnel—would ordinarily be contained in non-exempt files of the Director, his Inspector General or General Counsel, or oversight bodies.

Is the Agency satisfied that these provisions will not result in withholding of relevant investigatory information from journalists?

V. PRIVACY ACT REQUESTS

The amendments specifically provide that personal requests for information under the F.O.I.A. and Privacy Act will not be affected.

Are you satisfied that these amendments will not limit in any way the right of individuals to request personal information about themselves being held by the CIA?

VI. UNRECORDED DOCUMENTS

C.I.A. witnesses informed the Committee last week, that there were ways to ensure that certain highly sensitive intelligence reports would not be located only in operations files and therefore not be reviewable under the F.O.I.A. (Such documents would include those in which intelligence sources or methods would be apparent.)

In the Agency have you observed that they are aware of the existence of such documents and their contents even when they are not stored in regular files?

VII. FILES OF THE OFFICE OF SECURITY

In the past, the C.I.A.'s Office of Security conducted improper investigations of Americans, supposedly related to the security of C.I.A. domestic facilities. (These were the so-called Merrimack and Resistance operations.)

The amendments would provide an exemption for the operational files of the Office of Security.

Are you concerned that this exemption could lead to such records of improper practices not being accessible for search and review?

VIII. IS THIS THE ADMINISTRATION POSITION?

There have been a number of efforts over the years to exempt the C.I.A. from the provisions of the F.O.I.A. and similar statutes. Last week, Mr. McMahon spoke on behalf of the Agency in stating his belief that the Agency's support for these amendments represented the Administration's position, and that we should not expect further requests along these lines. Senator Goldwater also described his communication with the President in which the President indicated his support for this approach.

Are you convinced that this bill represents the Administration's definitive approach to resolving this problem?

IX. ELIMINATING BACKLOG AND EXPEDITING REQUESTS

Section 2(b) of the bill states that one of its primary objectives is:

"[T]o provide relief to the C.I.A. from the burdens of searching and reviewing operational files, *so as to enable this agency to respond to the public's requests for information in a more timely and efficient manner.*" (emphasis added)

Will the C.I.A. use this legislation to expedite the process of search and review under the F.O.I.A?

X. REVIEW OF INFORMATION ON COMPROMISED COLLECTION OPERATIONS

Section 701(a) of the amendments precludes denial by the C.I.A. of certain "special activities" (or, covert actions) when they would not be exempt from disclosure under the F.O.I.A. This would occur when the existence of such an action is so well known that the C.I.A. could no longer deny it.

Is there any good reason to limit this clause to covert actions?

Wouldn't historians also have interest in intelligence collection activities which could no longer be denied—such as the U–2 missions of the 1950's?

The CHAIRMAN. Our next witness is Maj. Gen. Richard Larkin, U.S. Army Retired who is president of the Association of Former Intelligence Officers, and I understand that General Larkin has some time constraints so we promise to keep any questions to a minimum.

General, you may fire away.

STATEMENT OF MAJ. GEN. RICHARD LARKIN, PRESIDENT, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS; ACCOMPANIED BY JOHN S. WARNER, LEGAL ADVISER, AFIO; AND WALTER J. PFORZHEIMER, FIRST LEGISLATIVE COUNSEL, CIA

General LARKIN. Good morning, Mr. Chairman and members of the committee, I appreciate the privilege of testifying before you today on S. 1324.

I am here as president of the Association of Former Intelligence Officers, AFIO, some 3,500 veterans of the military intelligence services, the CIA, the FBI, the NSA, the DIA, the State Department, and

other intelligence entities. With me today are AFIO's legal advisor and former General Counsel of CIA, John Warner, and Walter Pforzheimer, CIA's first legislative counsel.

Since my predecessor as president of AFIO, Jack Maury testified before the committee in July 1981 on this matter, the tasks of our intelligence agencies have continued to grow in importance and complexity. The substantial damage already inflicted on our intelligence efforts by FOIA must be repaired and corrected.

You have had ample testimony by the CIA, by NSA, by the FBI, and other intelligence entities that sources of information, agents, and foreign intelligence services have refused to cooperate because of their fears and lack of confidence that our intelligence agencies can keep such relationships truly confidential because of the Freedom of Information Act.

It seems unnecessary for us to detail the effects and burdens placed upon our intelligence agencies by FOIA. It does seem appropriate to quote from Judge Gerhard A. Gessell's opinion when he granted the CIA's motion for summary judgment of dismissal of the FOIA case brought by Philip Agee.

After the Judge had conducted a random in camera review of 8699 documents he said and I quote:

> As far as can be determined this is the first FOIA case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his government's legitimate efforts to ascertain and counteract his effort to subvert the country's foreign intelligence program. 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.

The partial relief for CIA from FOIA provisions afforded by S. 1324 leaves three specific problems which we believe warrant consideration by this committee. No. 1, the time limits for intelligence agencies to respond to requests which when not met convey the authority to file suit have been demonstrated to be unrealistic and should not be in the basic law.

Any person or group including convicted felons and representatives of hostile intelligence services can make a FOIA request and then file suit in U.S. courts. It seems to us to be the ultimate absurdity to accord the head of the KGB or other foreign agents the legal authority to request documents from the CIA and then to file suit in U.S. courts to enforce such a request.

Three, the provision for de novo review by the judiciary added in the 1974 amendment to FOIA was vetoed by President Ford because he considered it to be unconstitutional. A judge who simply disagrees with the experience and expertise of the executive branch as to what is classified is authorized to release such information. This provision is in our view a usurpation of the intelligence responsibility constitutionally vested in the President.

For all the above reasons, AFIO recommends, as it did 2 years ago before this committee, that CIA, NSA, and the FBI be exempted from all of the provisions of the Freedom of Information Act and that the President be authorized to designate other intelligence components as similarly exempt. Such a total exemption leaves available to Americans their rights under the Privacy Act to inquire about files maintained concerning them. Also historians and scholars who are citizens

and permanent resident aliens may request mandatory review for declassification of documents under the provisions of Executive Order 12356.

In view of our understanding of the administration and CIA support of S. 1324 we do not oppose its approval, but we strongly urge that the other entities of the intelligence community be accorded similar treatment as is CIA. In this respect it would appear appropriate for the committee to hear testimony from other parts of the intelligence community to make a judgment on their possible coverage under S. 1324.

I should like to add here, Mr. Chairman, that three other organizations have authorized me to state that they are in full agreement with the views of the Association of Former Intelligence Officers as just expressed. These organizations are: The Society of Former Special Agents of the FBI, the American Security Council, and the National Intelligence Study Center.

I would like to thank you for this opportunity to present the views of the AFIO on this most important matter. My colleagues and I will be glad to attempt to answer any questions.

The CHAIRMAN. Thank you very much, General.

Senator Inouye.

Senator INOUYE. Thank you very much, Mr. Chairman. On item 2, sir, has there been a case where the head of the KGB or a member of the KGB or any foreign agent has requested documents from the CIA and then filed suit in the courts to enforce such a request?

General LARKIN. Not to my knowledge, sir, but the possibility exists.

Senator INOUYE. Does that possibility exist today?

General LARKIN. Yes, sir.

Senator INOUYE. On time limit, what would you consider to be a reasonable time limit for intelligence agencies to respond to requests?

General LARKIN. Sir, I think the most appropriate answer to that question would come from the agencies themselves and it is based now upon an historical record of experience and I think they could probably give you a very accurate and a very realistic time limit.

Senator INOUYE. Apparently the intelligence agencies have no quarrel with the provisions in the measure at this time or the time limits as they exist. Are you aware whether they are concerned?

General LARKIN. I am aware that they are concerned. I am not aware as to whether or not they are sufficiently concerned as to express their views and to make that a part of this particular legislation, sir.

Senator INOUYE. Is it the belief of your organization and all others that judicial review is a usurpation of the intelligence responsibility constitutionally vested in the President?

General LARKIN. It is the view of our association and those that I represent here today. That is correct, sir.

Senator INOUYE. Then in your mind there should be no review whatsoever as to the Director's action.

General LARKIN. As the previous witness testified, Senator, it is a case of whether or not a member of the judiciary has the background and experience to make a determination as to whether or not something is classified or properly classified as opposed to an experienced professional.

Senator INOUYE. What are your thoughts on the procedure that is now available in the Congress to declassify information?

Mr. WARNER. If I may, sir, I don't know the exact procedure but I have read it a number of times. I think it is a reasonable compromise between the dilemma of a President standing on one side and the Congress standing on another, and it is a reasonable compromise. It really becomes a political question at that time.

I think the rules embodied in the legislation, the rules of the committees and the Accountability Act, I think it is a reasonable situation.

Senator INOUYE. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

FOIA is not forcing the CIA to release sensitive intelligence information; is it, General?

General LARKIN. No, sir. I do not believe it is, sir.

Senator LEAHY. Can you give us some specific examples of any harm done to the CIA through FOIA?

General LARKIN. Sir, those examples I think should come from an active member of the CIA. I can give you some personal impressions of my previous service not in the CIA but in the intelligence arena.

Senator LEAHY. Go ahead.

General LARKIN. Where there were indications of a lack of confidence in a source that he would be protected, that is, his particular name would not surface, that his country of origin would not surface, that the case would be handled properly, and it was because of his knowledge of the fact that the Freedom of Information Act did exist.

Senator LEAHY. Do we get this kind of concern, for example, from Great Britain?

General LARKIN. Sir, I think it would be preferable to ask the active agency to answer that. In my particular case I could answer that, but I would rather not answer it in open session.

Senator LEAHY. I understand. A thought occurs to me. I heard somebody testify once from the agency who used Great Britain as an example. I wanted to make sure that the concerns were not coming from anyone of the four or five moles planted by the Soviet Union at the top levels of the British intelligence that have been disclosed in the last year or so.

I would hope that we might tell certain countries that we also have some concerns and problems about what occurs there even if they don't have a FOIA. In fact, after hearing some of the problems that have occurred in other intelligence services I wish they had a FOIA statute so we could look into how badly others got fouled up, without naming any particular country now.

I also would think that perhaps a two-pronged effort on our part might overcome concern that some countries may express to us. One is to give them a real education on what is involved in FOIA, second is to explain to them the advantages they enjoy from the material we share from our vast resources and conversely the disadvantages they might experience if we decided to stop sharing some of those resources, resources which they would never have available to them otherwise.

I certainly would not want to suggest to these countries that intelligence sharing requires a strict quid pro quo, but it is useful to remind them periodically that we do have resources in some areas that they will never have.

Thank you, Mr. Chairman.

The CHAIRMAN. General, please answer this question from your military background. If CIA operational files are exempt from FOIA but operational files of military intelligence and counter intelligence are not, do you think this gives the CIA a greater ability to operate secretly? And if so, is this kind of advantage for CIA over military intelligence and counter intelligence a good idea?

General LARKIN. Sir, I don't think the military agencies look upon the CIA as having an advantage or disadvantage regardless of their operational files, protection or nonprotection, because the CIA is in fact the senior of the services as far as their status in the intelligence community. As you know, the DCI heads all the intelligence community and not just the CIA.

I do not believe that the services, and again I cannot speak for the services, but I do not believe that they would interpret this act as giving the CIA a "undue advantage in the game." I cannot help but feel that the services also need this in certain respects for possibly similar type files.

The CHAIRMAN. It does not cause any problems, then.

General LARKIN. I don't believe so, sir.

The CHAIRMAN. Do you know of any other country in your experience that has any law similar to FOIA?

General LARKIN. No, sir. I do not.

The CHAIRMAN. I think we are the only country in the world.

General LARKIN. I believe we are the only country, sir.

The CHAIRMAN. But other countries are allowed to spy on everybody and their brothers. I can testify to your comments relative to the decreasing lack of confidence. That is one of the first questions I run into wherever I go in this country to talk with intelligence people regardless of whether they are ours or some other country's.

They are growing more and more reluctant to cooperate if you want to put it that way.

General LARKIN. Yes, sir.

The CHAIRMAN. I just have one other question for someone with an interest in history. Do you see any value in historical research and writing on the role of intelligence in American history. For example, there are books about OSS and SIGINT during World War II that have been based on access to declassified operational files?

General LARKIN. Yes, sir. I see tremendous value in that. I see tremendous value in our educational system as well as in our political system; yes, sir.

The CHAIRMAN. I think the recent two books on OSS have been extremely helpful.

General LARKIN. Yes, sir, and those books in fact, sir, are being used in some cases as textbooks by the universities who are teaching intelligence as a subject.

The CHAIRMAN. Yes; do any members of the staff have any questions?

Thank you very much, General. I know you are pressed for time. We appreciate your being with us.

[Prepared statement of Maj. Gen. Richard Larkin follows:]

PREPARED STATEMENT OF MAJ. GEN. RICHARD X. LARKIN, USA (RET.), PRESIDENT, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS

Mr. Chairman and Members of the Committee: I appreciate the privilege of testifying before you today on S. 1324 which amends the National Security Act of 1947, by adding a new Title VII which would afford the Central Intelligence Agency a measure of relief from certain provisions of the Freedom of Information Act. I am here as President of the Association of Former Intelligence Officers (AFIO)—some 3500 veterans of the military intelligence services, the CIA, the FBI, the NSA, the DIA, the State Department, and other intelligence entities. With me today is AFIO's Legal Advisor and former General Counsel of CIA, John S. Warner, and Walter J. Pforzheimer, CIA's first legislative counsel.

Since my predecessor as President of AFIO, John M. Maury, testified before the Committee in July 1981 on this matter the tasks of our intelligence agencies have continued to grow in importance and complexity. The substantial damage already inflicted on our intelligence efforts by FOIA must be repaired and corrected. You have had ample testimony by CIA, NSA, FBI and other intelligence entities that sources of information, agents and foreign intelligence services have refused to cooperate because of their fears and lack of confidence that our intelligence agencies can keep such relationships truly confidential because of the Freedom of Information Act.

It seems unnecessary for us to detail the effects and burdens placed on our intelligence agencies by FOIA. It seems appropriate to quote from Judge Gerhard A. Gesell's opinion in granting CIA's motion for summary judgment of dismissal of the FOIA case brought by Philip Agee. (Agee *v.* CIA, 524 F. Supp. 1290, 17 July 1981). After the Judge conducted a random in camera review of 8,699 CIA documents, he said:

"As far as can be determined this is the first FOIA case where an individual under well-founded suspicion of conduct detrimental to the security of the United States has invoked FOIA to ascertain the direction and effectiveness of his Government's legitimate efforts to ascertain and counteract his effort to subvert the country's foreign intelligence program. It is amazing that a rational security tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."

The partial relief for CIA from FOIA provisions afforded by S. 1324 leaves three specific problems which we believe warrant consideration by this Committee.

1. The time limits for intelligence agencies to respond to requests, which, when not met, convey the authority to file suit, have been demonstrated to be unrealistic and should not be in the law.

2. Any person or group, including convicted felons and representatives of hostile intelligence services can make an FOIA request and then file suit in U.S. Courts. It seems to us the ultimate absurdity to accord the head of the KGB, or other foreign agents, the legal authority to request documents from the CIA and then to file suit in U.S. Courts to enforce such a request.

3. The provision for de novo review by the judiciary, added in the 1974 Amendments to FOIA, was vetoed by President Ford as being unconstitutional. A judge who simply disagrees with the experience and expertise of the Executive Branch as to what is classified is authorized to release such information. This provision is in our view an usurpation of the intelligence responsibility constitutionally vested in the President.

For all the above reasons, AFIO recommends, as it did two years ago before this Committee, that CIA, NSA and the FBI be exempted from all of the provisions of the Freedom of Information Act and that the President be authorized to designate other intelligence components as similarly exempt. Such a total exemption leaves available to Americans their rights under the Privacy Act to inquire about files maintained concerning them. Also, historians and scholars (citizens and permanent resident aliens) may request mandatory review for declassification of documents under the provisions of the Executive Order 12356.

In view of our understanding of Administration and CIA support of S. 1324 we do not oppose its approval, but we strongly urge that the other entities of the intelligence community be accorded similar treatment as is CIA.

It would appear appropriate for the Committee to hear testimony from other parts of the intelligence community to make a judgment on their possible coverage under S. 1324.

I would like to add here that three other organizations have authorized me to state that they are in full agreement with the views of the AFIO as just expressed. These organizations are:

1. Society of Former Special Agents of the FBI, Inc., 24–16 Queens Plaza South Long Island City, N.Y. 11101.

2. American Security Council, 499 South Capitol Street, Washington, D.C. 20003.

3. National Intelligence Study Center, 1015 Eighteenth Street, NW., Washington, D.C. 20036.

I would like to thank you for this opportunity to present the views of the AFIO on this most important matter. My colleagues and I will be glad to attempt to answer any questions.

The CHAIRMAN. Now, we come to the press. I correct myself. The next witness is Mark Lynch testifying on behalf of the American Civil Liberties Union. Mr. Lynch is counsel for the ACLU's division on national security. We welcome you here, and you may proceed as you wish.

STATEMENT OF MARK LYNCH, COUNSEL, DIVISION ON NATIONAL SECURITY, AMERICAN CIVIL LIBERTIES UNION

Mr. LYNCH. Thank you, Mr. Chairman. Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union with respect to this bill, S. 1324. I have a prepared statement which is made available to the committee, and I would appreciate it if that could be made part of the record.

For the purposes of expedition, I will summarize my statement rather than go through that.

The CHAIRMAN. It will be made a part of the record. You may proceed.

Mr. LYNCH. Mr. Chairman, I have been involved in litigation with the Central Intelligence Agency over the Freedom of Information Act for more than 8 years now, and I have drawn three general conclusions from this experience. First of all, a substantial amount of useful, historically useful, journalistically useful, politically useful information is produced under the FOIA by the CIA.

Second, there is a very large body of information dealing with the nuts and bolts of intelligence sources and methods which, due to the exemptions that are available under the act, we never get to see. It is never released. It is invariably withheld, and withholding is invariably sustained by the courts.

Third, the backlog that has developed at the CIA in responding to requests is intolerable. Now, on the basis of these three lessons that I have drawn, I have long thought that there must be a surgical solution available to solve the problems of everyone that is involved in this, that the backlog can be reduced, that the CIA could be relieved of the burden of searching for that kind of information which is never disclosed and that the public's right to access to the sorts of information which is disclosed can be preserved.

Now, this bill and last week's testimony by the representatives of the CIA in my view were a great breakthrough in the beginning of a process that could achieve a balanced and surgical solution to the problems that have developed around the administration of the Freedom of Information Act and the CIA. Indeed, Mr. McMahon, the Deputy Director of Central Intelligence, has recognized the key to any solution, workable solution, in this area.

ful that a great deal of important information like the ULTRA and the CHAOS documents would be lost to public access.

Our second problem is with the question of judicial review, which has been discussed at some length already this morning. I was quite frankly surprised by the testimony of the CIA last week that this bill would result in no judicial review of what files are operational, because there is not really anything in the bill to indicate nonreviewability or to reverse the presumption of reviewability.

But I think that the interpretation that the Agency has provided requires clarification and we would suggest that the best way to do that would be to amend the bill so as to strike the concept of designation and have the bill proceed in a fashion that files that meet the definition of "operational" as determined by this committee and the Congress will be exempt from search and review, rather than to leave that process totally discretionary in the Director.

Now, if that is done—I think there would be judicial review in any event, even if you did strike the designation, but I think striking the designation concept would be the best way to get into this. And if there is going to be judicial review, as in our view there must, of the question of whether a file has been improperly characterized as an operational file, review of that issue will not, I think, require document by document examination of the documents in the disputed file, and I think that is what the Agency is really concerned about. They are afraid that if there is judicial review they are going to be right back to where they are now, having to justify document by document the kinds of information which, as I have said, is invariably exempt under the act anyway.

But I do not think that is going to be necessary. The issue for the court is whether a particular file has been improperly characterized as operational, as operational as defined by this committee in the bill. That would require an inquiry about the nature of the file rather than an inquiry into the particularized contents of the bill.

So I think that we may not be all that far apart and that a resolution of this issue is possible.

But in summary, let me say that judicial review is absolutely essential, because I think that the public simply would not have confidence that the Agency had not succumbed to the temptation to go overboard in the designation of files as operational if there were no judicial review.

The final point I would like to make is that, as I have outlined at some length in my statement, and I do not need to belabor those examples in the summary, but an attitude has developed at the CIA toward processing FOIA requests which is grudging and uncooperative. It perhaps is understandable, given all of the controversy that has surrounded the bill and the burden that the Agency says that it has been subjected to.

But the fact remains that there is a very unfortunate attitude, which leads to attempts to suspend requests, put requests in limbo. There is a generally uncooperative atmosphere which all too often pervades the Agency's processing.

Now, the elimination of the backlog, as the Agency says, will go a long way toward improving the service the requests get. But I think there has to be more and this committee has to require more than mere

That is that there would be no meaningful loss of information currently available and at the same time there would be more expeditious response to requests that are pending at the Agency. Now, how is this accomplished?

It appears to us, and this understanding needs to be verified by the committee and by this process that the committee is undertaking, it appears to us that this bill could have this result in the following ways.

First of all, all gathered intelligence will continue to be subject to the act under the exemptions. However, the sources and methods information with respect to how that intelligence is gathered would be exempted from search and review. This, apparently, will relieve the greatest problems that the CIA has in terms of its processing.

Interests of U.S. persons, that is U.S. citizens and permanent resident aliens, will be respected because first person requests will continue to require a search of all files, including operational files. And covert operations, which can have a great impact on public policy matters, will be accessible if their disclosure is not exempt under the Freedom of Information Act.

This provision would codify the current practice. That is to say, when the CIA can say we can neither confirm or deny our involvement in a covert operation, they do not search. And if the requester wants to challenge that position, you go to court and you litigate over whether the existence of the operation is exempt from disclosure. In fact, we have been involved in a number of litigations on that sort of issue recently.

Now, to assure ourselves that meaningful information will not be lost, we would like to submit to the committee a number of examples of information which we have received in the past under the Freedom of Information Act from the CIA, to make sure that that information will continue to be available under the scheme that is proposed by this bill. We also are anxiously awaiting the CIA's analysis of the impact this bill would have on pending legislation, so we can see the kinds of cases that would be affected by this legislation.

Now, we do have a couple of problems with the bill and points on which we would urge amendment. One area that I am afraid the bill does not deal with satisfactorily is the question of abuses, investigations in improprieties or violations of law in the conduct of intelligence activities.

The way the bill is structured now, to the extent that that kind of information is in compartments of the Agency which are not subject to designation, they would continue to be accessible. For example, if the Inspector General conducts an investigation or the Office of General Counsel conducts an investigation, the information concerning the subject of the investigation in those compartments would continue to be accessible.

However, there have been instances in the past where investigations have been conducted by sending the investigator into the operational components to review the file there. Good examples of this were the initial reports done on Operation CHAOS, which was surveillance of Americans, and MKULTRA, which was a drug-testing program.

Consequently, we believe that the bill should have an additional provision providing that the subject of an investigation will trigger a search of the underlying relevant documents, wherever they may be located in the Agency. If such an amendment is not added, we are fear-

elimination of the backlog. Steps have to be taken, commitments have to be extracted, an intent for vigorous oversight has to be expressed, that will require the Agency, once it is relieved of this burden of dealing with the operational files, that will require the Agency to respond in a more cooperative, prompt, and efficient manner.

It can be done. I point, for example, to the Freedom of Information program at the Defense Department. While there are, of course, always exceptions, the record there has been exemplary. The people that have run the program there are very efficient. They cooperate with requesters and matters are handled in quite a satisfactory fashion. So it is possible.

And we feel it is essential for this committee to address this attitudinal problem as well as the backlog problem itself.

That concludes my summary, Mr. Chairman. I would be happy to answer any questions which members of the committee might have.

[The prepared statement of Mr. Lynch follows:]

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

Mr. Chairman, thank you for your invitation to the American Civil Liberties Union to testify on 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. McMahon 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 nonoperational files. In exceptional circumstances where gathered intelligence is stored in an operational component, it will be indexed in a nonoperational 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 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 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 persons' 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.

The CHAIRMAN. Thank you very much, Mr. Lynch. I want to thank you because I feel you and your organization, which is most important in matters like this, has finally joined the team, so to speak, and we feel more certain of success with your having helped us and backed us. We certainly will take your recommendations.

Senator Inouye.

Senator INOUYE. Thank you very much, Mr. Chairman.

I was quite intrigued by your last comment, on the attitudinal problems. Do you not think that a sense of begrudging, as you put it, may be justified if you are constantly harassed with the so-called Agee type requests?

Mr. LYNCH. Not with respect to any particular request, Mr. Chairman. But I can understand it as a human being, that there is a feeling of besiegement out there, and that that probably has contributed to some extent to the attitudinal problems.

I think also the excessive rhetoric surrounding the attempts to get a total exemption inevitably undermines the attitude of someone who is working on this as a day-to-day process. If you read in the paper that there is a crusade on to get a total exemption, it sort of saps your will to do the pile of work that you have in front of you.

But now that the Agency has backed off that total exemption approach and is supporting a more surgical and balanced approach, hopefully the attitude can change.

I do not want to seem to suggest that this attitudinal problem is a bad faith problem. There may be some examples where there has been some bad faith, some isolated examples, and I am not sure that a whole lot would be gained at this point from expensive inquiry into the causes of this problem.

I think we have in hand a solution that will get us out of this morass. But what I am asking is that the committee make sure that there are management plans and techniques to be put in place for the efficient and cooperative processing of requests.

Senator INOUYE. Your response to Mr. Mayerfeld's suggestion, that the DCI's authority to designate operational files was unreviewable, was to delete the designation feature, was that correct?

Mr. LYNCH. I think that would make it clear, and of course it should be accompanied by appropriate legislative history.

Senator INOUYE. You suggested that the Congress set the standards of what is operational.

Mr. LYNCH. That's right. I think it would be a much better bill, Senator, if the Congress lays out the standards as to what an operational file which will no longer be subject to search and review is, rather than leaving it up to the DCI to do it, because that interposes a level of discretion which can lead to confusion in terms of judicial review,

and that is perhaps what Mr. Mayerfeld was basing his statements on.

Senator INOUYE. But once the Congress establishes the standard, someone must have the authority to determine whether a certain action meets the standard.

Mr. LYNCH. That is right, and that is what we want to see in the bill as a role for the courts.

Senator INOUYE. Who would be that person?

Mr. LYNCH. Well, when there is a dispute—and disputes over the scope of the search in an FOIA case do not arise that often. I would hazard a guess that they do not arise in more than 20 percent of the cases and maybe not even that many. But when there is a dispute over the scope of the search and the requester has some reason to think that there is a file containing responsive documents to his or her request, and that that file has been improperly characterized as an operational file when in fact it doesn't meet the definition set up by the bill, there ought to be a judicial review of that issue. That is what we are aiming for.

Senator INOUYE. Last week Mr. McMahon suggested that the President would have complete authority to determine whether a covert action has been compromised or not. Now, that is an important statement because if an action is no longer covert it would be subject to search. Now, do you believe that this bill provides this complete authority to the President?

Mr. LYNCH. No, I do not think this bill does. I think this bill leaves current law where it is, and certainly if the President acknowledges CIA involvement in a covert operation it can no longer be asserted that the Agency can refuse to confirm or deny its involvement.

Similarly, if the Director of Central Intelligence says that the Agency has been involved in an operation, they can no longer take that position. There is a case pending right now dealing with the CIA's involvement in 1954 in the coup in Guatemala, and I believe that the key statement that led the Agency to conclude that it had to search those files was a statement by former Director of Central Intelligence Turner.

So in past practice the CIA has acknowledged that certainly Presidential statements, statements by the Director of Central Intelligence, in some cases material published by the Congress—a great many things that ordinarily would be in this category had it not been for the report of the Church committee—sometimes those lead to the nonglamorizable category. And then we argue that there are other instances where CIA involvement in a particular operation is so notorious, even though there may not be a high level of acknowledgement, that the Agency cannot take that position.

But the point is, those are all litigating positions and this bill does not deal with that. The bill says that if the existence of the operation is not exempt under the Freedom of Information Act, whatever that may be, we leave that alone. We will continue to litigate those issues as we have in the past. But if the operation is not exempt under the act, then files related to it must be searched. So I think it is a good compromise and it does not attempt to change existing law.

Senator INOUYE. What are your thoughts on the matter of a time limit on the duration files would be exempt from search?

Mr. LYNCH. That is a very interesting idea. It is one that has certainly been brought to the fore by the historians. I tend to deal with

requesters who are after more timely information and perhaps have not thought about that as much as I should. I would be eager to hear what the CIA has to say about what effect some sort of time limit would have on their work load.

I do know from my experience that there are some very old files which are withheld in their entirety because the Agency continues to successfully argue that they are inextricably intertwined with sources and methods. But I also realize that at some point that argument must come to an end.

I frankly do not have any firm view on how to balance the interests of historians in old requests and the interest of the Agency in not having to search for material that will inevitably be withheld. But I am sure there must be a balanced solution to that.

Senator INOUYE. Are you satisfied that this bill will in no way limit the right of an individual to request personal information under FOIA?

Mr. LYNCH. I think it is very clear in that regard that a United States citizen or permanent resident alien who makes a request for documents about themselves would trigger a search of all Agency files, including the operational files.

Senator INOUYE. In the past, the Office of Security is alleged to have conducted improper investigations of Americans, for example the so-called Merrimack and Resistance operations. I believe the bill would provide an exemption for the operational files of the Office of Security. Would that exemption cover records of, say, the so-called Merrimack and Resistance operations?

Mr. LYNCH. I would hope not, Senator, and if it did we would have a lot of trouble, because that is an example of a very important disclosure. I think there are a couple of ways in which the Merrimack files would continue to be exempt under this bill, but this is the kind of thing that we need assurance from the CIA on.

First of all, that was the subject of an investigation, a very extensive investigation by this committee's predecessor, by the Rockefeller Commission, various internal investigations in the CIA, and I would think that particularly if the committee were to add the amendment on investigations that I recommended, the Merrimack files would be subject to search and review in that regard.

Second, the Office of Security provision as I understand it is paragraph (a)(3), which deals with investigations conducted to determine the suitability of potential foreign intelligence, counterintelligence, or counterterrorism sources. My understanding is that the Merrimack and Resistance type operations would not meet that definition, and therefore those files would not be eligible for designation on that ground.

But again, this is my preliminary understanding. These are the kinds of things that we need to be assured by the Agency and by the committee as it develops this bill.

Senator INOUYE. I have been told that your organization and the Central Intelligence Agency worked together and as a result of this long-term negotiation came up with this measure. At this juncture, if the committee should report out this measure as is, would you be satisfied?

Mr. LYNCH. Let me take that in two parts, Senator.

First of all, I think it is probably important to be clear about this on the record, that it is not accurate to characterize the exchange be-

tween the CIA and the ACLU as a long-term negotiation. You have to understand that I and other lawyers for the ACLU have been litigating these cases for a long time. We have gotten to know Mr. Mayerfeld and the other lawyers out there pretty well. We see them down in the courthouse, we have cups of coffee, like lawyers usually do after they get through with cases.

And for a long time we have thought that there has been a possibility for a middle ground. The insistence on a total exemption has made it impossible to go forward on that. But once the Agency got off of that, there were a number of concepts that we had batted around and have batted around for a long time, which the Agency was able to put together into this bill. And it is their bill.

As I said, it is a great step forward. But I think, as I have also said, there are some further adjustments that have to be made. There are further questions that have to be answered, and we would not be satisfied if it were reported out precisely as it is right now. But we are very happy that a process is begun that we hope, with some more work and some more information being put in the public record, we would be able to support this bill.

And we would like to support a bill, because we would like to get rid of this backlog and do something about that.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I was quite interested in the things that you said in answer to Senator Inouye's questions, especially about designated files. If you were here earlier, you may have heard some of the questions I asked Ms. Lawton. I am sure you are aware of the difficulties that I have.

I am still concerned how we can ensure judicial review if the designated file concept is not dropped. If you have further views on that, I would certainly be interested in hearing them.

Mr. LYNCH. Well, the concept of designation as it is in the bill now it seems to me would give the Justice Department an opportunity to argue that the review of an issue on designation was not de novo, but was arbitrary and capricious or some more deferential standard, and I have always been concerned about that.

Apparently from the testimony last week, the CIA thinks that the concept of designation insulates them from review totally. I disagree with that as a matter of interpreting this language, but most of all am very disturbed that now part of the legislative history is that there will be no judicial review, and I think that idea has to be corrected in order for us to support this bill.

So striking the concept of designation, which has the added advantage of making clear that it is the Congress rather than the DCI that is determining what kind of files would be exempt from search and review, combined with appropriate legislative history, would make it clear that this action, like all other actions under the act, are subject to review.

Senator LEAHY. Thank you.

The problem of access to materials concerning abuses and improprieties is an area that bothers most of us. Quite frankly I did not find the Agency's statements on this last week satisfactory. What suggestions can you offer on behalf of the ACLU concerning ways to insure full access to all files relating to investigations of allegations of abuses or impropriety?

Can we do it with clear language in the legislative history that documents contained in operational files relevant to an investigation of an alleged abuse or impropriety cannot benefit from the exemption provided in S. 1324, or do we have to spell it out in the legislation itself?

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

The Agency's testimony last week, as I understand it, is that the investigating components, for example the Inspector General, the Office of General Counsel, will compile all the information about any investigation. Well, maybe that is true in some cases, but we do know of some cases historically, "the Family Jewels" for example, where the Director of Central Intelligence sent his investigators out to the different components and they reviewed files. You know, they reviewed the ULTRA files, they reviewed the CHAOS files.

And what we would like to have made clear is that process of investigation, even where the files are not brought to the investigating component, but when they have been subject to investigation, they will be subject to search and review under this provision.

Senator LEAHY. Did you have a chance to review the discussion I had with Mr. Mayerfeld last week about the difference between a frivolous or a nonfrivolous accusation of impropriety?

Mr. LYNCH. Yes.

Senator LEAHY. Are you satisfied with the Agency's position?

Mr. LYNCH. I think I am afraid I do not remember with sufficient clarity to comment directly. I would like to see the kind of amendment that I have discussed.

Senator LEAHY. Could I ask you to do this? Take a look at that discussion. We can make it available to you. The transcript may already be ready, but if it is not we will get you a synopsis. And then let me ask that question for the record. I would like you to respond.

Mr. LYNCH. Certainly.

Senator LEAHY. Now, I understand you have given some caveats here today to the bill as written. You do not yet support it, but with some changes you could. If the changes you suggested are made, would you then be able to support the bill?

Mr. LYNCH. Yes; and let me further add that, you know, if the journalists or the historians raise legitimate problems that we have not uncovered, those certainly ought to be taken into account. We do not want to arrogate to ourselves the role of total representative of the public interest here.

Senator LEAHY. I understand. But certainly your position will carry some weight, as the chairman has already stated, and what I want to know is just what is necessary to have the ACLU's support of this legislation.

Mr. LYNCH. Well, in general, if it can be substantiated that Mr. McMahon's prediction is correct that this bill—that the CIA is pre-

pared to live with the bill, which will not result in the loss of any meaningful information and will result in the expeditious processing of requests, that obviously is a result which we would welcome and would support and are very happy to work towards perfecting and achieving.

Senator LEAHY. To attain this result you feel would require some of the additions you have discussed?

Mr. LYNCH. That is right. It is not all the way there yet, but it is a great deal further along than the other previous proposals.

Senator LEAHY. Thank you. I hope we can reach that point.

Of course, there will be those who claim that if we finally get to the point where the ACLU and the CIA are totally agreed on the bill, that it is one of two things: Either we have an execllent bill or one or the other of you did not read it.

I am not asking you to respond to that.

Mr. LYNCH. I think I almost know it by heart now.

Senator LEAHY. I am sure you do.

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

The CHAIRMAN. I was going to ask you a question, but it has already been answered, and satisfactorily, about your comments to the uncooperative attitude of the CIA. I think you can understand how an organization that was born out of OSS and born of a desire and need for intelligence would feel when a large number of their staff suddenly is confronted with being eavesdropers, spies, et cetera, on American citizens. And I am glad you responded the way you did.

I have only one question. Are you satisfied that this bill adequately protects the ability of American citizens to use FOIA to seek information about CIA abuses that can be declassified?

Mr. LYNCH. No; I think it needs to go a little further, Mr. Chairman, through the addition of a provision that would make it clear that information regarding the subject of an investigation into impropriety or violation of law should be subject to search and review. I think some sort of amendment along those lines is essential to achieve the result that you have mentioned.

The CHAIRMAN. Would you be willing to submit some language you think would be helpful?

Mr. LYNCH. Certainly, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Lynch. You have done a good job and we thank you for being with us.

Mr. LYNCH. Thank you, sir.

The CHAIRMAN. Now we get to the press: Mr. Steven Dornfeld, national president of the Society of Professional Journalists, Sigma Delta Chi, and Charles Rowe, editor and copublisher of the Free Lance-Star, speaking for the American Newspaper Publishers Association.

Welcome, gentlemen. You may proceed as you care.

STATEMENT OF CHARLES S. ROWE, EDITOR AND COPUBLISHER, THE FREE LANCE-STAR, ON BEHALF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. ROWE. Mr. Chairman, Senator Leahy, the American Newspaper Publishers Association is deeply concerned about the potential impact of S. 1324, the Intelligence Information Act of 1983.

My name is Charles Rowe and I am editor and copublisher of the Free Lance-Star in Fredericksberg, Va. I am testifying today on behalf of the ANPA, a nonprofit trade association with nearly 1,400 member newspapers representing some 90 percent of the daily and Sunday circulation in the United States. Many nondailies are also members.

Mr. Chairman, the bill being considered here today is a result of several years of discussion and debate about the need to provide some relief from the Freedom of Information Act for the Central Intelligence Agency. Throughout this debate, representatives of the newspaper business have not stubbornly rejected nor ignored the CIA's pleas for some relief, but they have stated repeatedly that the CIA has never been forced to turn over to the public any classified information, a fact that still holds true today.

We have also listened carefully to the Agency's claims that this court record belies the vast number of hours and amount of money that went into processing the denied requests that subsequently were upheld by the courts.

Representatives of the newspaper business met in 1982 with CIA Director William Casey and other top CIA officials to attempt to learn more about the unique problems confronting the CIA in its efforts to comply with the FOIA.

Mr. Chairman, this educational process has been a good faith effort to understand, and while we believe the language of S. 1324 is an improvement over previous bills, we still have serious concerns about the practical effects the passage of this legislation might have on the public's access to information about the CIA.

S. 1324 would allow the director of CIA to withhold specific operational files from the search and review requirements of the act. This power would extend only to those operational files located within the offices of the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security of the CIA.

You must realize, Mr. Chairman, that we are relying wholly on the expertise and judgment of this committee and representatives of the CIA regarding the extensiveness of the power being given to the CIA director by S. 1324. We do not know, nor should we, the percentage of CIA files affected by this bill.

We have no knowledge of the ease with which information could be placed in an operational file, thereby exempting it from search and review. Nor do we have knowledge of the ease with which files could be designated operational and be sealed off forever from any public access.

In carefully studying the language of S. 1324, it would appear that this power is broad. For example, any operational files in the three specific offices dealing with foreign intelligence, counterintelligence, or counterterrorism operations would disappear from existence so far as the public or the courts are concerned.

The only oversight of the director's actions would be by this committee and the House Intelligence Committee. While congressional oversight can be effective, it is only as effective as the amount of information that Congress receives from the CIA.

Of primary concern is the elimination of judicial review of the director's decision to designate a file as operational. CIA Deputy

General Counsel Ernest Mayerfeld told this committee last week that S. 1324 leaves "full discretion to the director. Any other interpretation," he said, "would turn this legislation on its head."

As Senator Huddleston pointed out last week at the same hearing, a major principle of the FOIA is that the courts have the right of review. ANPA agrees that this is a major and vital principle of the act. De novo review of CIA decisions under FOIA was made part of the law with the 1974 amendment. This judicial authority put teeth into the law and helped make it an effective tool for the public to try to seek information about CIA functions.

As then Deputy Director Admiral Bobby Inman told this committee in 1981, the Central Intelligence Agency had received virtually no FOIA requests prior to the 1974 amendments. The amendments establishing de novo review and requiring release of reasonably segregable portions of a document led to an explosion in FOIA requests at the CIA, according to Inman.

To strip the law of this principle of de novo review and of any judicial review whatsoever is to return us to pre-FOIA days. It would also return us to the days where the ineffectiveness of the act rendered it basically useless to the public, a uselessness reflected by the absence of requests noted by Admiral Inman.

ANPA cannot support this step backward. ANPA believes it vital that the application of S. 1324 be restricted to the CIA. It would appear that the language of the bill, based on the specificity of the offices and files mentioned, covers only CIA. Additionally, it has been emphasized by CIA officials that the language can only apply to the CIA because of the unique compartmentalized structure of its files.

Our concern is based on repeated testimony in the past by representatives of the Defense Intelligence Agency, the National Security Agency, and other nonintelligence agencies seeking relief from FOIA. An identical "neither confirm nor deny" approach of S. 1324 has been sought in the past by these agencies. There must be an affirmative statement in the bill or in the legislative history about the exclusive application to the CIA of S. 1324.

A primary problem journalists have had in requesting information from the CIA has been the excessive delays in processing. Proponents of S. 1324 claim one of the benefits of passage would be a reduction in the existing backlog of requests. When questioned last week on the specific steps that would be taken by the CIA to clear up this backlog, the response was troublingly vague.

We would be very interested in the specific, definitive steps the CIA will take if this bill is passed in answering those requests for information not contained in operational files. For example, the CIA could administratively determine to confer with requesters by telephone to clarify the request that has been made, thereby eliminating any confusion and speeding the processing time.

The other serious backlog is with CIA lawsuits pending in court. Mr. Mayerfeld testified last week that of the 77 suits before the court, 46 would be affected by S. 1324. Of these, 22 should be dismissed entirely, because they deal only with documents from operational files, and the remaining 24 would largely be dismissed because the majority of documents under question are from designated files.

Specific details about the nature of the information involved in these lawsuits could be beneficial to members of this committee in understanding the type of information that would be affected by the passage of S. 1324.

ANPA believes it vital that any information on alleged abuses by the CIA continue to be subject to the search and review provisions of the current act. CIA officials last week gave oral assurances that records of any internal investigations of nonfrivolous allegations would remain in nondesignated files.

As John McMahon, Deputy Director of the CIA, stated last week:

> Information relevant to the subject matter of the investigation would be subject to research and review in response to an FOIA request, because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this bill.

While these oral statements are reassuring, it is critical that legislative history on this point be crystal clear. Further, there should also be clarification of what is and is not frivolous.

In conclusion, Mr. Chairman, we would like to assure you that no representative of the newspaper business wants to in any way endanger the national security of our Nation or endanger the lives of those people involved in maintaining that security. We are here today because of the serious public policy questions inherent in S. 1324.

We are at something of a disadvantage, because it is a public policy discussion that must take place without the complete airing of information on both sides. We must trust the veracity of the statements by CIA officials that passage of S. 1324 would not result in additional information being withheld by the Agency, but would free up the Agency from the search and review of information that is currently exempted from release.

We also must and will rely on the wisdom and diligence of the congressional oversight process, as do all citizens. We must also raise our heartfelt concern that this committee take into account the vital role that public access has played in the growth and maturation of this country. We believe further refinement of S. 1324 is necessary to insure that the immense power that would be invested in the Director of the CIA with the passage of this bill does not upset the delicate balance of the government's need for secrecy, the public's right to know, and an individual's right to privacy.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very, very much.

[Prepared statement of Charles S. Rowe follows:]

PREPARED STATEMENT OF CHARLES S. ROWE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Newspaper Publishers Association is deeply concerned about the potential impact of S. 1324, the "Intelligence Information Act of 1983."

My name is Charles Rowe and I am editor and co-publisher of The Free Lance-Star in Fredericksburg, Virginia. I am testifying today on behalf of ANPA, a non-profit trade association with nearly 1,400 member newspapers representing some 90 percent of the daily and Sunday circulation in the U.S. Many non-daily newspapers also are members.

Mr. Chairman, the bill being considered here today is the result of several years of discussion and debate about the need to provide some relief from the Freedom of Information Act for the Central Intelligence Agency. Throughout this debate, representatives of the newspaper business have *not* stubbornly rejected nor ignored the CIA's pleas for some relief. While we have stated repeatedly that the CIA never has been forced to turn over to the public any classified information (a fact that still holds true today), we have also listened carefully to the agency's claims that this court record belies the vast number of hours and amount of money that went into processing the denied requests that subsequently were upheld by the courts.

In fact, representatives of the newspaper business met in 1982 with CIA Director William Casey and other top CIA officials to attempt to learn more about the unique problems confronting the CIA in its efforts to comply with the FOIA. Mr. Chairman, this educational process has been a good faith effort to understand. And, while we believe the language of S. 1324 is an improvement over previous bills, (such as S. 1273, the "Intelligence Reform Act of 1981," introduced by Senator Chafee in the 97th Congress) we still have serious concerns about the practical effects the passage of S. 1324 might have on the public's access to information about the CIA.

S. 1324 would allow the Director of the CIA to withhold specific operational files from the search and review requirements of the FOIA. This power would extend only to those operational files located within the offices of the Directorate of Operations, the Directorate for Science and Technology and the Office of Security of the CIA.

You must realize, Mr. Chairman, that we are relying wholly on the expertise and judgment of this committee and representatives of the CIA, regarding the extensiveness of the power being given to the CIA Director by S. 1324. We do not know (nor should we) the percentage of CIA files affected by this bill; we have no knowledge of the ease with which information could be placed in an operational file thereby exempting it from search and review; nor do we have knowledge of the ease with which files could be designated "operational" and be sealed off forever from any public access.

In carefully studying the language of S. 1324, it would appear that this power is broad. For example, any operational files in the three specific offices, dealing with "foreign intelligence, counterintelligence, or counterterrorism operations" would disappear from existence so far as the public or the courts are concerned. The only oversight of the Director's actions would be by this committee and the House Intelligence Committee. While Congressional oversight can be effective, it is only as effective as the amount of information that Congress receives from the CIA.

JUDICIAL REVIEW

Of primary concern is the elimination of judicial review of the Director's decision to designate a file as operational. CIA Deputy General Counsel Ernest Mayerfeld told this committee last week that S. 1324 leaves "full discretion to the Director. Any other interpretation would turn this legislation on its head."

As Senator Huddleston pointed out last week at the same hearing, a "major principle of the FOIA is that the courts have the right of review."

ANPA agrees that this is a major and vital principle of the Act. De novo review of CIA decision under FOIA was made part of the law with the 1974 amendments. This judicial authority put teeth into the law and helped make it an effective tool for the public to try to seek information about CIA functions. As then Deputy Director Admiral Bobby Inman told this committee in 1981 "the Central Intelligence Agency had received virtually no FOIA requests," prior to the 1974 amendments. The amendments establishing de novo review and requiring release of reasonably segregable portions of a document "led to an explosion in FOIA requests" at the CIA, according to Inman. To strip the law of this principle of de novo review, and of any judicial review whatsoever, is to return us to pre-FOIA days. It would also return us to the days where the ineffectiveness of the Act rendered it basically useless to the public—a uselessness reflected by the absence of requests noted by Admiral Inman. ANPA cannot support this step backward.

APPLICABILITY

ANPA believes it vital that the application of S. 1324 be restricted to the CIA. It would appear that the language of the bill, based on the specificity of the offices and files mentioned, covers only the CIA. Additionally, it has been emphasized by

CIA officials that the language can *only* apply to the CIA because of the unique, compartmentalized structure of its files. Our concern is based on repeated testimony in the past by representatives of the Defense Intelligence Agency, the National Security Agency and other non-intelligence agencies, urging relief from FOIA. An identical "neither confirm nor deny" approach of S. 1324 has been sought in the past by these other agencies. There must be an affirmative statement in the bill or in the legislative history about the exclusive application to the CIA of S. 1324.

BACKLOG OF REQUESTS

A primary problem journalists have had in requesting information from the CIA are the excessive delays in processing. Proponents of S. 1324 claim one of the benefits of passage would be a reduction in the existing backlog of requests. When questioned last week on the specific steps that would be taken by the CIA to clear up this backlog, the response was troublingly vague. We would be very interested in the specific, definitive steps the CIA will take, if S. 1324 is passed, in answering those requests for information not contained in operational files.

For example, the CIA administratively could determine to confer with requesters by telephone to clarify the request that has been made, thereby eliminating any confusion and speeding the processing time.

The other serious backlog is with CIA lawsuits pending in court. Mr. Mayerfeld testified last week that of the 77 suits before the court, 46 would be affected by S. 1324. Of these, 22 should be dismissed entirely because they deal only with documents from operational files; and, the remaining 24 would largely be dismissed because the majority of documents under question are from designated files. Specific details about the nature of the information involved in these lawsuits could be beneficial to members of this committee in understanding the type of information that would be affected by the passage of S. 1324.

AGENCY ABUSE

ANPA believes it vital that any information on alleged abuses by the CIA continue to be subject to the search and review provisions of the current Act. CIA officials last week gave oral assurances that records of any internal investigations of non-frivolous allegations would remain in non-designated files.

As John McMahon, deputy director of the CIA stated last week, "Information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this bill."

While these oral statements are reassuring, it is critical that legislative history on this point be crystal clear. Further, there should also be clarification of what is and is not "frivolous."

CONCLUSION

In conclusion, Mr. Chairman, we would like to assure you that no representative of the newspaper business wants to in any way endanger the national security of our nation or endanger the lives of those people involved in maintaining that security. We are here today because of the serious public policy questions inherent in S. 1324. We are at something of a disadvantage because it is a public policy discussion that must take place without the complete airing of information on both sides. We must trust the veracity of the statements by CIA officials that passage of S. 1324 would *not* result in additional information being withheld by the CIA, but would free-up the agency from the search and review of information that is *currently* exempted from release. We also must and will rely on the wisdom and diligence of the Congressional oversight process—as do all citizens.

We must also raise our heartfelt concern that this committee take into account the vital role that public access has played in the growth and maturation of this country. We believe further refinement of S. 1324 is necessary to ensure that the immense power that would be invested in the director of the CIA with the passage of this bill does not upset the delicate balance of the government's need for secrecy, the public's right to know and an individual's right to privacy.

The CHAIRMAN. Now we will hear from Mr. Charles Rowe, editor and copublisher of the Free-Lance Star, speaking for the American Newspaper Publishers Association.

STATEMENT OF STEVEN DORNFELD, NATIONAL PRESIDENT, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ACCOMPANIED BY BRUCE W. SANFORD, COUNSEL, BAKER & HOSTETLER

Mr. DORNFELD. Thank you, Mr. Chairman, you just heard from him. My name is Steven Dornfeld. I am national president of the society of professional journalists, Sigma Delta Chi.

We appreciate the opportunity to appear before your committee this morning and comment on S. 1324. Accompanying me at my right today is Bruce W. Sanford of Baker & Hostetler, the society's first amendment counsel.

Founded in 1909, our society is the largest organization of journalists in the United States, with more than 2,800 members in all branches of the news media and broadcast.

I will attempt to abbreviate my comments this morning, Mr. Chairman, but would appreciate it if my entire statement could be incorporated in the record.

The CHAIRMAN. That will be done.

Mr. DORNFELD. Thank you.

We appear before the committee today, Mr. Chairman, as we have in the past, because of our commitment to the values embodied in the first amendment and the Freedom of Information Act. We share the belief of their architects that all citizens should have access to the information necessary to monitor the activities of their Government and hold it accountable.

At the outset, we recognize that the Central Intelligence Agency has at last abandoned its request of prior years to be totally exempt from the Freedom of Information Act. As Senator Moynihan noted last year, the fact that our secret intelligence service is subject to something called the Freedom of Information Act may sound paradoxical, but actually expresses a great truth, that in a democracy we can have an intelligence service that is both effective and accountable.

Last week's public testimony by the CIA suggest that the Agency seeks this legislation in order to alleviate its administrative workload and enhance its internal security. To the extent that this bill merely alleviates the CIA's administrative burden, our society has no complaints with it. However, if the Agency intends to use this measure to reduce the amount of information being made available to the public, we oppose it. The case for a broader exemption from the act simply has not been made.

Mr. Chairman, as we approach this bill, our society is sympathetic with the purposes of the measure as stated in section 2(b). However, we still have reservations about its effects. In fact, we have so many unanswered questions that we must indulge this morning in the legislative equivalent of the game "Twenty Questions." All our questions come in the context of the Reagan administration's overall information policy, a policy which has consistently been to whittle away at the amount of information the American people receive about their Government.

We fear that this bill could be just another deep pothole on the same one-way street that has already given us the President's March 11 secrecy directive, his retrogressive Executive order on classification of documents, a package of amendments that would dismantle the Freedom of Information Act, and a Justice Department policy intended to discourage FOIA fee waivers.

We also believe, Mr. Chairman, that the Senate seems to be stuck in a rut concerning FOIA. Over the last 3 years, there has been a steady stream of proposals to amend FOIA, but the ones that have been given the green light by the Senate and its committees all travel in the same direction, creating the possibility of a huge roadblock that could restrict the flow of vital information going to the American public.

Yet bills to open up the Government, such as Senator Durenberger's effort to reverse the effect of the President's ill-advised Executive order on classification, have met nothing but a legislative gridlock.

One effect of this proposed bill before us today is plain. It will increase the oversight chores of this committee and its counterpart in the House. Thus, if these committees do not detect future agency overreaching in defining exempt files, they will have to accept the blame for any CIA abuses revealed 8 or 10 years down the road.

Even today, your oversight role requires the committee to obtain a host of answers to questions about S. 1324. For example, would this bill deny information to the public that is now available under FOIA? If the answer is yes, the bill does more than the CIA says it does.

What information does the agency believe this bill entitles them to withhold? Has this committee considered a list of stories based on information obtained under the FOIA, and has the committee asked if this information would still be releasable under S. 1324?

Has this committee analyzed the fate of the lawsuits now pending against the agency under the retroactive feature of this bill? How would information sought in those suits be affected by the bill? Will requests to the CIA from the press receive the expedited treatment promised under the FOIA? Will the CIA shift its personnel to meet its pledge to reduce the reply time to FOIA requests if S. 1324 is enacted?

Does the agency have a specific plan to reduce this backlog that belies the distressingly noncommital answer given last Tuesday? While the agency claims that this bill will significantly reduce its backlog, why is there no oversight provision to insure that this is done? Are there sufficient checks for the public in this bill if the Director of Central Intelligence has total and final authority to decide what is and what is not an operational file?

Under the bill's extraordinarily broad definition of operational file, what is to prevent more and more information from being hidden, including information now releasable under FOIA? Why is there no mention of congressional oversight and how it will work under S. 1324? How can the spirit of FOIA, that the American people are entitled to information about their Government, be fulfilled if this bill does not contain any provision for judicial review of a decision made by the DCI?

Agency officials said in their testimony that judicial review would in their view stand the bill on its head, but does not the lack of review increase the likelihood of abuses by the agency? How will a file receive the designation operational? What criteria will be used? Is there any

review procedure so that information in operational files can be declassified as circumstances permit?

Why does this bill contain no provision allowing public scrutiny of files regarding known abuses by the CIA? Why do the files of a covert operation that is acknowledged, making it an overt operation, remain "operational" under S. 1324?

Under the agency's explanation last week, even acknowledgment of a covert operation such as in Nicaragua by the President might not make the files releasable under FOIA. Should not the CIA information on an issue placed in the public domain by a public official be releasable?

We reporters have a lot of questions, and I only have a few more.

Has the committee received any concrete examples from the agency that FOIA has ever led to the exposure of a source's identity? Has the agency shown that it has lost agents because of its fears about FOIA? Is it possible that these sorts of public statements create self-fulfilling prophesies? In other words, once the agency says FOIA makes possible disclosures of sources and methods, do not agents start thinking that way?

And finally, can a time limit be placed on S. 1324 so that the agency must review files after they are closed a certain number of years down the road and declassify information that can be safely released?

In the final analysis, Mr. Chairman, we well recognize the invaluable service that the CIA performs for the citizens of this country and its need to keep some information secret. But we also believe that the 200-year-old road that this democracy has successfully followed is paved with inviolate ideals, and paramount among them is that our institutions of Government are answerable to the American people.

That ideal crumbles when secrecy for secrecy's sake erodes the responsiveness and accountability of the CIA or any other part of our Government. We look to this committee to assure that that does not happen.

I thank you.

[The prepared statement of Mr. Dornfeld follows:]

PREPARED STATEMENT OF STEVEN DORNFELD, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Thank you Mr. Chairman and members of the Committee for providing us this opportunity to comment on S. 1324, the Intelligence Information Act of 1983.

My name is Steven Dornfeld and I am here today as National President of the Society of Professional Journalists, Sigma Delta Chi. Accompanying me is Bruce W. Sanford of Baker & Hostetler, the Society's First Amendment counsel.

I have been a working reporter for the past 14 years and a national officer of the Society since 1973. Formed in 1909, the Society is the largest organization of journalists in the United States, with more than 28,000 members in all branches of the news media, print and broadcast.

We appear before this Committee today, Mr. Chairman, as we have in the past, because of our interest in the Government's information policies. That interest stems only secondarily from professional self-interest. As the Chairman knows, journalists in this city do not need official governmental sources of information when there are always plenty of people ready and willing to leak unofficial information. (Why, sometimes, those folks even dispense classified information in pursuit of political advantage.) Thus, the Society of Professional Journalists comes here today not so much on its members' behalf, as on the public's behalf. It is, after all, the public that truly benefits from access to the sheer authenticity of official Government records as opposed to people's interpretations of those records.

At the outset, we recognize that the Central Intelligence Agency ("CIA") has at last abandoned its request of prior years to be totally exempt from the Freedom of Information Act ("FOIA"). As Senator Moynihan noted last year, the fact that our secret intelligence service is subject to something called the FOIA may sound paradoxical, but actually it expresses a great truth—and that makes our nation and our intelligence service different and stronger than any other on earth.

Last week's public testimony by the CIA suggests that the Agency seeks this legislation in order to alleviate its administrative work and enhance its internal security. To the extent that this proposed bill merely alleviates administrative burden without decreasing the kind of information presently available under the FOIA, the Society does not oppose the bill. To the extent that the CIA harbors deeper aspirations for this bill we oppose it since the case for a broader exemption from the Act has simply not been made.

Mr. Chairman, our position here today should explode the myth that the press always opposes the CIA's legislative requests. Obviously, while trying to approach this bill reasonably, the Society still has reservations about its effects. In fact, we have so many unanswered questions that we must indulge this morning in a legislative equivalent of the game "Twenty Questions." And all our questions come in the context of the Reagan Administration's overall information policy, a policy which has been constantly whittling away the amount of information the American people receive about their government. Any cynicism journalists have about the true intent of S. 1324 derives from a fear that this bill is just another deep pothole on the same one-way street that has already given us the President's March 11 directive on national security information, last year's executive order on classification, the Justice Department's policy on fee waivers and a retrogressive package of Freedom of Information Act amendments.

We also believe, Mr. Chairman, that the Senate is stuck in a rut concerning the FOIA. There has been a steady flow of FOIA amendments over the last three years. But all the ones given the green light by the Senate travel in the same direction, potentially causing a huge roadblock tying up the traffic in information about the government going to the American public. The Senate has put in motion bills by the CIA, the FBI, and the Department of Justice to expand their exemptions. Yet bills to open up the government, like Senator Durenberger's effort to reverse President Reagan's order on classification, have met nothing but legislative gridlock.

One effect of this proposed bill is plain: it will increase the oversight chores of this Select Committee. Thus, if the Committee does not detect future agency overreaching in defining exempt files, the blame for not preventing agency abuses will be laid directly at its door. Even today, the oversight role requires the Committee obtaining answers to a bushel basket of questions about S. 1324.

Would this bill deny information to the public that is now available under the FOIA? If the answer is "yes,"the bill is more than the CIA says it is. What information does the Agency believe this bill entitles them to withhold? Has this Committee presented the Agency with a list of stories based on information obtained under the FOIA and asked if the information would still be released under S. 1324? Has this Committee analyzed the fate of the law suits pending against the Agency under the retroactive feature of this bill? How would the information sought in those suits be affected?

Will requests to the CIA from the press receive the expedited treatment promised under the FOIA?

How will the CIA shift its personnel to meet its pledge to reduce its reply time to FOIA requests if S. 1324 is enacted? Does the Agency have a specific plan to reduce this backlog that belies the distressingly noncommittal answer given last Tuesday? While the Agency claims this bill will significantly reduce its workload, why is there no oversight provision to ensure this is done? Has the Committee considered a sanction if the CIA fails to reduce its response time?

Are there sufficient checks for the public in this bill if the Director of the Central Intelligence Agency ("DCI") has total and final authority to decide what is and is not an "operational file"? Under the bill's extraordinary broad definition of "operational file," what is to prevent more and more information from being hidden, including information now releasable under the FOIA? Why is there no mention of Congressional oversight and how it will work in S. 1324?

How can the "spirit" of the FOIA—that the American people are entitled to information about their government—be fulfilled if this bill does not contain any provision for judicial review of a decision by the DCI? Agency officials said in their testimony that judicial review would, in their view, "stand the bill on its head." But doesn't lack of review increase the likelihood of abuses by the Agency?

How will a file receive the designation "operational"? What criteria will be used? Is there any review procedure so that information in operational files can be reclassified as circumstances permit? None of this has been explored publicly.

Why does this bill contain no provision allowing public scrutiny of files regarding known abuses by the CIA? The only response Mr. McMahon gave last Tuesday was a well-crafted statement that the report of an investigation by the CIA's Inspector General would be placed in non-classified files. Such a report can be a poor excuse for an independent investigation of abuse. And why is there no provision for Congressional oversight in such an instance?

Why do the files of a covert operation that is acknowledged, making it an overt operation, remain "operational" under S. 1324? Under the Agency's explanation of last Tuesday, even acknowledgement of a covert operation, like Nicaragua, by a President might not make the files releasable under the FOIA. Shouldn't some CIA information on an issue placed in the public domain by a public official be releasable?

Has this Committee received concrete examples from the Agency that the FOIA has ever led to the exposure of a source's identity? Has the Agency shown that it has lost agents because of fears about the FOIA? Is it possible that these sorts of public statements create self-fulfilling prophecies? In other words, once the Agency says the FOIA makes possible the disclosure of sources and methods, don't agents start thinking that way?

Can a time limit be placed in S. 1324 so that the Agency must review files after they are closed a certain number of years and reclassify information which can be safely released?

In the final analysis, Mr. Chairman, we well realize the invaluable service the CIA performs for the citizens of the United States, and its need to keep some information secret. And we also believe that the 200-year-old road this democracy has so successfully followed is paved with inviolate ideals, and paramount among them is that all institutions of government are answerable to the American people. That ideal crumbles when the need for secrecy for secrecy's sake erodes the responsiveness and accountability of the CIA or any other part of government. We look to this Committee to insure that does not happen.

The CHAIRMAN. Thank you very much, Mr. Dornfeld. We will now have some questions. Senator Inouye?

Senator INOUYE. I believe you have just testified that the architects of this Republic tried to make certain that all necessary information be made available to the public. And, as we all know, the major institution responsible for making information available to the public would be the people in your profession.

Just a question of what is necessary. During the early weeks of World War II, a major newspaper in Chicago got hold of information that suggested that we had broken the Japanese code. Do you think that matter should have been on the front page? Was that necessary information?

Mr. DORNFELD. Senator, if I had been in that position, I suspect I probably would have decided not to publish. On the other hand, there have been occasions in which editors have obtained information and decided for security reasons, trying to act in the best interests of the American people, not to publish that information, and those decisions probably were in error.

One thinks of the New York Times decision not to publish the Bay of Pigs invasion plans. How much anguish would that have saved if the Times had gone ahead and published?

I think our democracy is founded on a belief that the press is one of the checks and balances that operates in our system. And that those decisions about what information the public ought to have does not rest just in a government agency, but rather, there are a multiplicity of sources, and journalists are making those decisions as well as government officials.

Senator INOUYE. What are your thoughts on the suggestion made by the ACLU on judicial review? It was suggested that the designation authority be deleted, and that Congress set the standards for what is operational, and provide for judicial review. Would that be satisfactory to you, sir?

Mr. DORNFELD. Senator, I am not sure I am in a position to commit ourselves to supporting this suggestion until we see some language. I think our concerns would be greatly alleviated if there were standards in the bill written by Congress, if Congress decided which information should be designated as operational, and if there were provisions for judicial review. I think we would be much more comfortable with that.

Mr. Rowe might wish to coment on that.

Mr. ROWE. I believe the proposal set forth today by Mr. Lynch has some possibilities. I myself am not a lawyer, and would not like to give a definitive judgment, but I believe that Mr. Lynch and his associates in working with committee staff and perhaps CIA legal officials could come up with some language that would make that aspect of the bill much more acceptable.

Senator INOUYE. Do you believe that this measure will restrict your activities in investigating intelligence abuses?

Mr. ROWE. I have got concerns about that, Senator. Unfortunately, trying to define some of the language in this bill and wend your way through it sometimes leads me to believe I am in sort of a maze trying to figure when I am going to get to a conclusion or not get to a conclusion. If in the legislative history, even if the language of the bill is not changed, but in the history, we can provide some type of assurance that abuses of the intelligence process would be subject to search and review, I would feel much better about it.

Senator INOUYE. Do you believe the President should have the sole authority to decide whether an operation is covert or not?

Mr. ROWE. I am a great believer in the check and balance system. I would think that if it is possible for a court—for there to be judicial review of the arbitrariness of such a designation, I would be much happier, I think.

Senator INOUYE. Can you think of any case in the past where newsworthy information was obtained from the CIA operational files which would be denied under this bill?

Mr. DORNFELD. I think we are somewhat handicapped, Senator, in that we do not know exactly what constitutes CIA operational files or nonoperational files. These distinctions are not spelled out in the legislation, and I am not sure if they are spelled out in any other place. It seems this whole bill rests on terms of art that are employed over at Langley, and I am not sure they are not subject to change on a daily basis depending upon what best fits the CIA's purposes.

Senator INOUYE. Do you have any suggested legislative language that can be studied by this committee that would in effect cure some of your concerns?

Mr. DORNFELD. I do not know that we have any language, Senator, but I think that the road you started traveling down with Mr. Lynch might prove fruitful in trying to write some standards and some definitions into the legislation. I am not sure what operational files means. I am not sure what foreign intelligence and counterintelligence and counterterrorism are. To me, they sound like words that

might apply to almost any enterprise in which the CIA might choose to engage.

Senator INOUYE. Then, am I correct to assume from your responses that you feel that this measure is a step backward?

Mr. DORNFELD. We are comforted that it is a major step forward on the part of the CIA. It is also a major step from Director Casey's speech in August of last year before the American Legion, where he suggested that he could not see how the CIA could live with anything less than a total exemption from the FOIA. So, we are comforted that the CIA has moved a fair amount in just the span of 6 or 7 months. But we still have major concerns with this piece of legislation.

Mr. ROWE. Might I add, Senator, that my organization does not feel that this is a step backward. We do think that this committee, through its careful attention to the language of the bill, can make some further improvements, but I believe that we will be better off with some of the changes that this bill would make.

Senator INOUYE. My final question. From your experience under the FOIA, would you give the CIA good grades for cooperating?

Mr. ROWE. I myself do not speak from personal experience. People that I have talked with generally speak of a reluctance that they encounter at CIA as opposed to, let's say, at the Pentagon, where they find cooperation much more freely given. Steve, would you have a comment?

Mr. DORNFELD. I have the same impression. We are well aware of the backlog at the CIA, and it is frequently cited as a reason why requests are not responded to very quickly. If they are being responded to even in 2 years, as some of the earlier testimony suggested, I guess I would be surprised. I know that a reporter in my own bureau needed 3 years to get a response to a request that he had for information that was largely historical in nature.

Senator INOUYE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I just have a couple of questions of followup on what Senator Inouye was saying earlier. The ACLU has talked about some changes for judicial review we ought to make which may satisfy them, and so on. Could you provide for the record the views of your organization regarding the ACLU proposals? Mr. Lynch laid out several of them here.

If you would like specifics on how I see those proposals, I would be glad also to provide that for you. I realize that some of these proposals you heard this morning in testimony and some ideas came as a result of questions asked by either myself or others. We would not expect you to be able to take a position, or provide your organization's position today but I think it would be very helpful to us on the committee to have it.

To the extent that you are able to take a position, we would welcome having that.

Mr. DORNFELD. Surely.

Mr. ROWE. We would be happy to provide it.

Senator LEAHY. I realize this is an awfully general question, but what does the public have to gain by release of this kind of information under FOIA? Does the public gain, or do only groups hostile to the U.S. gain? We hear you talk about the speech Mr. Casey gave to the American Legion last year. The impression almost was that the KGB might gain by FOIA as applied to the CIA, but the American people, in fact, the American people lose. Is that really your view of FOIA and the CIA?

Mr. ROWE. I realize that CIA and intelligence agencies have a different problem with the act than many administrative agencies, but through all my years in this business, I have come to believe more and more firmly in the ability of the American people to govern themselves given the proper information and knowledge. The more information they need to govern themselves is restricted, the greater the chances that this democracy is going to not work as well as it should, and for that reason I believe in any area that the maximum information that can be given to the people will facilitate the operations of a democracy which are going to be imperfect at best. But they can be improved on if people have the fullest possible information.

Mr. DORNFELD. I think FOIA has been helpful in providing some of the information that the American people have been given in the last 10 or 12 years concerning CIA abuses. And it has been partially true that through those revelations, we have been able to demand a little higher standard from the CIA, and more accountability from the CIA. I think it is a very important tool, and that act, and your committee, and its counterpart in the House, are about the only tools that we have available to insure that the agency is accountable.

Senator LEAHY. You know, Vermont is probably as conservative a State as any in the Nation, certainly as cautious a State as any. One of it's advantages, though, is it is a small State, and I am able to get home there virtually every weekend. I was up there this week, and will be back up again on Friday, if, God willing, we get out of this place. I love Washington, of course, but contemplating the idea of spending the first week or so of July in Washington or in Vermont, I find my constitutents beckon.

I might say that they harken to—or echo—what you are saying here. They have a great faith in our Government and our leaders in both parties, but they also would like to have an idea that they know what is going on, too. They have faith in us just so far, but they want to be able to make——

The CHAIRMAN. Would the Senator yield for just a second?

Senator LEAHY. Certainly.

The CHAIRMAN. I am terribly sorry, but I have to go to a funeral. Would you take over my job?

Senator LEAHY. You rascal. I was just going to leave, too.

The CHAIRMAN. I hate to leave.

Senator LEAHY. Could I go to the funeral with you, Mr. Chairman?

The CHAIRMAN. No; I think God would be happier if you stayed here. [General laughter.]

Senator LEAHY. And if God would not be happier, the chairman would. The chairman outranks God in this committee, let me tell you.

Basically what I am saying is that I think there is a feeling around the country that our Government is our Government, whether it makes mistakes or not. It is the one Government that our people really want and should want. Even with all of its mistakes, it is better than anything else. But we also want to know when those mistakes are made, and I think we should. I think the thing that keeps us from making

the same mistakes over and over again is that the public does know about it.

I would like you to provide, if you could, for the record some specific examples of important information that has been released which you feel relates to America's understanding of the intelligence function.

Mr. DORNFELD. Fine. We would be more than happy to.

Senator LEAHY [presiding]. Until they actually stop and think about it, I doubt people realize that some of the most significant legislation and some of the most significant and reforms in this Government under both Republican and Democratic administrations has come about as a result of information first published in the press, not first stated in the halls of Congress or on the floor of the House of Representatives or the U.S. Senate, but the front pages of some of our newspapers.

That has galvanized opinion—as it should in a democracy—that democracy has acted and invariably we come out as a better Government as a result of that. I do not mean to get on a soap box here this morning, but I think sometimes here in Washington we forget that those of us who are here are simply other members of the whole country.

I mean, the Government is here to represent all of us. We happen to be just the ones who are fortunate enough to represent our own people from back home at a given time whether it is a short or long period, whatever it might be.

But it is the people themselves who make these changes when they express their opinions through us. I think that we have to remind ourselves oftentimes that public opinion is formed in the first instance not by elected leaders but by a free press, and that is the way it should be.

Mr. Chairman, Senator Goldwater informed me that God wanted either you or me to stay here. I have to leave so I am going to finally turn it over to you.

Senator DURENBERGER [presiding]. All right. Thank you very much, Pat.

I had five penetrating questions for Mr. Dornfeld who usually covers me here for the St. Paul papers. Three of them have already been answered. The other two I will submit in writing and probably submit to both Mr. Rowe and Mr. Dornfeld because it would help my understanding of the problem.

I thank you for your testimony and call upon the next panel which is two persons: John Norton Moore, Director of the Center for Law and National Security, University of Virginia Law School, and chairman of the ABA Standing Committee on Law and National Security; and John Shenefield, member of the ABA Standing Committee on Law and National Security.

Mr. Moore, welcome. You may proceed.

STATEMENT OF JOHN NORTON MOORE, CHAIRMAN, ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

Mr. MOORE. Thank you, Mr. Chairman. With your permission I would like to place my prepared remarks in the record and to summarize orally two points only.

Senator DURENBERGER. The prepared remarks of all the witnesses without objection will be made part of the record. You may proceed to summarize your comments.

Mr. MOORE. Mr. Chairman, the first point is that it is a particular pleasure to be able to testify in favor of prompt passage of such a well drated bill that in my judgment should be noncontroversial.

As the Chairman of the committee has indicated, the principal mechanism of this bill is one to provide relief to the Central Intelligence Agency—and by its terms the Central Intelligence Agency alone—from the burdens of searching and reviewing operational files as opposed to product files. Since that is an area that is particularly sensitive with respect to the protection of sources and methods, it is an area that does provide some relief to the Central Intelligence Agency from an accute potential for misperception of the possibility of public release of information concerning sources or methods.

In addition, Mr. Chairman, this bill has the happy feature that since it would be a set of files that are not going to be made public since they are the most sensitive and are going to remain classified and be exempt under the real world disclosure features of the Freedom of Information Act, that we are not by this bill curtailing any information that would otherwise be made available to the public under the Freedom of Information Act.

In addition, Mr. Chairman, we would in fact be providing the Agency with an opportunity to relieve some of the backlog and to in fact respond somewhat more promptly to FOIA requests. As a result, I would certainly support this bill which it seems to me meets one of the acute problems—at least in part—of the Central Intelligence Agency yet at the same time has virtually no cost on the other side of the balancing equation and indeed ought to enable more rapid release of FOIA requests.

Mr. Chairman, I would like to turn now to the second remark which is a very general one. It is simply to advert to some of the ways in which we normally perceive the balancing situation in applicability of FOIA to the intelligence community and to suggest a broader framework. In the conventional wisdom we talk as though the balance is a series of costs to our intelligence capabilities on the one hand versus a series of benefits to a democratic society and an informed citizenry on the other.

Mr. Chairman, it seems to me that those parts of the equation are present and have been adequately explored but that the equation is more complex than that and that we should remind ourselves that in fact there are a variety of important benefits to a democratic society of a strong intelligence capability and on the other side of the equation that there may be at least some cost to an informed citizenry by a procedure which encourages partial release of bits and pieces of information about the intelligence community in settings in which the community is necessarily prevented from discussing full content

First let us look briefly at the benefits to a democratic society side of the equation. I do not have to remind this committee that strong intelligence is absolutely essential for the verification of arms control agreements. Indeed, as Congress itself in the Arms Control Act of 1977 has pointed out, verification is essential for any meaningful agree-

ments and certainly a strong intelligence capability is essential for background information necessary for verification.

The ability of the United States to act internationally in the protection of human rights is benefited strongly by an intelligence capability that enables us to know adequately where we may usefully take action to protect such human rights.

An intelligence capability is essential in aiding democratic societies in protecting themselves against systematic campaigns of disinformation waged abroad against them by a variety of totalitarian governments. And it may be essential in protecting us against the random or organized terror, either in terrorist settings or in actions organized by nations in violations of the U.N. Charter—such actions as the attack on the pope, for example, that we have seen in the last few years and the invasion of Afghanistan.

Now on the other side of the equation, though it is clear that some releases of public information are going to be useful for an informed citizenry—and I must say I certainly endorse effective scholarship in this area and as a scholar would like to strongly support that, at the same time Mr. Chairman, inherently in dealing with intelligence information the only fully informed oversight is the President and the checks provided by law and the Congress of the United States acting through this committee and the House Select Committee and there is some risk of misinformation in an effort at partial release in a context that must inherently remain secret.

We deal in the area of intelligence information in an area in which inherently we are not going to be releasing the central core of information concerning operations and ways of obtaining information. These areas are, and are going to be, under any version of FOIA, exempt from disclosure.

As a result, in discussing intelligence matters more often than not there will be a major portion of the context that will not be in the public domain. That is we deal inherently in most intelligence settings in a setting in which the intelligence community, unlike the Department of Agriculture, when an allegation is made concerning agricultural policy, is not able to respond in dealing effectively by reporting to allegations publicly on the record in their full context.

We are dealing in a context in which frequently the intelligence community is responding to activities of other nations or groups that are themselves maintained covertly or that are accompanied with disinformation campaigns or that are generally denied. In those settings it becomes extremely difficult to in fact have a full and informed public debate.

Now this is not to suggest that somehow in a democratic society we will not have debate on intelligence issues. We are certainly going to have that. It is simply to remind us that in addition to any benefits on the public release side from applying FOIA to the intelligence community there may indeed be some realistic cost from the potential for misinformation on the public release side with respect to bits and pieces taken out of context concerning intelligence activities.

Thank you, Mr. Chairman.

[The prepared statement of John Norton Moore follows:]

PREPARED STATEMENT OF JOHN NORTON MOORE[1]

Mr. Chairman, it is an honor and a pleasure to appear before this Committee in support of S. 1324, a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency. This bill is an important step in strengthening our Nation's intelligence capabilities.

One of the great strengths of our Nation is its tradition of openness in government and accountability to its citizens. It has long been evident, however, that the Freedom of Information Act, an act of government-wide general applicability intended to foster this tradition, does not achieve an appropriate balance when applied to the intelligence community.

A strong intelligence capability is essential for the protection of democratic value and human freedoms in a world sadly marred by continuing war, terrorism, disinformation and totalitarian threats to human liberty. More specifically a strong national intelligence capability is essential, among other reasons, for:

Maintenance of strategic stability and vertification of arms control agreements;

Defense against threats of the use of force in violation of the Charter of the United Nations;

Protection against terrorism and campaigns of organized violence;

Protection against efforts to spread disinformation and undermine democratic institutions and human rights; and

Efforts at maintenance of world order, the role of law in international relations, and conflict management among nations.

These are requirements essential to the survival of our democratic institutions in the complex and difficult world in which we live. In the public debate surrounding intelligence activities it can easily be overlooked that our Nation maintains an intelligence capability because such a capability is essential for peace, strategic stability, and the survival of democratic values. For example, without a reliable and effective intelligence effort meaningful arms control agreement would be impossible. Moreover, in meeting these national security and foreign policy requirements with limited budget resources, it is especially important to have good foreign intelligence to ensure wise allocation of such resources. Although we may wish it not so, effective intelligence capable of meeting those requirements inescapably requires secrecy.

The Freedom of Information Act (FOIA) was not in its genesis a measure aimed at intelligence oversight. Rather, it grew out of reforms in controlling administrative actions generally and was developed to apply across the Executive branch. Indeed, it was significantly toughened by amendments in 1974 to more effectively ensure public access to agency information in general. But in seeking to apply to intelligence agencies depending for their effectiveness on secrecy a FOIA tailored for government-wide maximum access we have created serious problems for such agencies.[2] These problems, which include the following, are well known to this Committee:

A significant chilling effect on individual and inter-service cooperation with our national intelligence effort based on perceptions or misperceptions of the effect of FOIA in breaching secrecy;

Enhanced risk to unique compartmented security of intelligence agencies as both FOIA requests and searches and personnel associated with such searches increase;

[1] John Norton Moore is Walter L. Brown, Professor of Law and Director of the Center for Law and National Security of the University of Virginia. He is Chairman of the American Bar Association Standing Committee on Law and National Security, Vice Chairman of the Section of International Law of the American Bar Association, and a member of the Consortium on Intelligence. Formerly he served as Counselor on International Law to the Department of State, Chairman of the National Security Council Interagency Task Force on Law of the Sea, and Deputy Special Representative of the President for the Law of the Sea Conference with rank of Ambassador. The views expressed are the personal views of Professor Moore and do not necessarily reflect the views of any group with which he is or has been associated.

[2] If by some happy accident a Freedom of Information Act tailored for government-wide applicability had struck a perfect balance between access and the needs of secrecy in the intelligence community it would suggest that the balance was overly restrictive for all other parts of government not sharing the extreme sensitivity of that community. The reality, however, seems to be the opposite. That is, FOIA was designed—and then specifically strengthened—for maximum public access in dealing with agencies less sensitive than the intelligence community. In that circumstance, not surprisingly, FOIA has not struck an appropriate balance for applicability to the intelligence community. There simply *is* a difference between the Department of Agriculture and the Central Intelligence Agency. One obvious difference is the degree of sensitivity in operations for gathering information. A less obvious but quite important additional difference is the potential to respond to out of context or erroneous allegations by providing full information and public rebuttal. This latter potential is frequently lacking in intelligence matters.

Diversion of limited human resources of skilled intelligence personnel to FOIA requests and litigation. Unlike other agencies dealing with less sensitive issues, a compromise of intelligence sources or methods can be extraordinarily harmful and the consequent stakes require careful attention to FOIA requests by line professionals with resultant diversion of effort of such professionals. (Indeed under current FOIA doctrine each request may require a line by line review by main component professionals of hundreds or thousands of documents and then for adequate security a double check.)

The risks of mistaken release, judicial overruling of intelligence professionals, or compromise of security during the litigation process; risks that increase as the volume of FOIA requests and litigation increases,[3] and

The difficulty in coping with a skilled and determined hostile intelligence effort able to use FOIA government-wide to assemble bits and pieces of a broader mosaic not necessarily evident in responding to individual requests (this is usually thought of as a "mosaic problem" but is in addition just as meaningfully a problem of potential differential expertise and focus between requester and responder).

In my judgment these problems are serious and are likely to become more acute as FOIA requests and litigation mount.[4]

[3] De novo judicial review of government national security classifications has become a widespread practice under FOIA. The September 1982 Edition of the Department of Justice Case List, at page 225, shows 166 decisions in cases involving classified national security information, most of them since 1974 when de novo review was required. This total only includes cases with opinions, not those disposed of just with orders, those still pending, or those terminated prior to decision. In about a dozen cases, federal courts have rejected national security classifications, the most recent including *Nuclear Control Institute* v. *NRC*, Civil No. 82–1476, D.D.C., May 20, 1983, and *McGehee* v. *CIA*, No. 82–1096, D.C. Cir., Jan. 4, 1983. While these rulings against classification usually did not result in the compelled release of a classified document, due to a later change of position by either party, a later decision on appeal or on remand, or withholding sustained under a different exemption, it is clear that the courts now undertake *de novo* review of classified national security documents vigorously and that such review is frequently sought.

[4] For a fuller discussion of these problems see, *e.g.*, "Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities," *Hearing before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Congress, 1st Session* (April 5, 1979); "Freedom of Information Act," *Hearings before the Subcommittee on the Judiciary, United States Senate, 97th Congress, 1st Session*, on S. 587, S. 1235, S. 1247, S. 1730 and S. 1751 (July 15, 22, 31, Sept. 24, Oct. 15, Nov. 12 and Dec. 9, 1981); "To Restore the Balance: Freedom of Information and National Security," No. 213 *Heritage Foundation Backgrounder* (Sept. 23, 1982); *Law, Intelligence and National Security Workshop* (sponsored by the American Bar Association Standing Committee on Law and National Security, Dec. 11–12, 1979); Cole, *The Freedom of Information Act and the Central Intelligence Agency's Paper Chase: A Need for Congressional Action to Maintain Essential Secrecy for Intelligence File While Preserving the Public's Right to Know*, 58 *Notre Dame L. Rev.* 350 (1982); *Report with Recommendations of the Section of Administrative Law of the American Bar Association to the House of Delegates* (Dec. 1982) (among other issue, this report focuses on the important need for relief in the standard for judicial review of intelligence agency classification decisions); *Report with Recommendations on the Freedom of Information Act of the American Bar Association Criminal Justice Section* (June 1983); "Recommending FOIA Amendments as Desirable for the National Security," *Report to the American Bar Association Standing Committee on Law and National Security of the Committee Task Force on Freedom of Information Changes* (Dec. 16, 1982). See particularly the testimony of William J. Casey, Admiral B. R. Inman and Frank C. Carlucci respectively on Sept. 24, 1981 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, Feb. 20, 1980 before the Subcommittee on Government Information and Individual Rights of the House Government Operations Committee, and July 21, 1981 before the Senate Select Committee on Intelligence.

In addition to these policy problems in applicability of FOIA to the intelligence community there is also a lurking constitutional issue concerning potential interference with executive privilege and specific instances possible interference with areas of Presidential authority. It should be recalled that President Ford vetoed the 1974 amendments to FOIA based in large part on constitutional concerns relating to separation of powers in the national security area. See, for example, with respect to the underlying constitutional issue John Jay writing in *The Federalist* in 1788: "There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtless are many of both decriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a larger popular assembly. The convention have [sic] done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intellligence in such manner as prudence may suggest." [John Jay, in *The Federalist*, ed. Jacob E. Cooke (Middleton, Conn. Wesleyan Univ. Press 1961), at 434–35.]

And the Supreme Court writing in *United States* v. *Curtiss-Wright Export Corp.*: "[The president] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. [299 U.S. 304, 320 (1936)]

And more recently in its opinion in *United States* v. *Nixon* the Supreme Court said it would accord to the President "the utmost deference" in intelligence matters. *United States* v. *Nixon*, 418 U.S. 683, 706, 707, 711 and 712 n.19 (1974).

Although these problems are generally understood there is another and in a sense even more pervasive problem in seeking to hold agencies engaged in secret operations to accountability through public release of bits and pieces of such operations. Effective public accountability requires that the full context of circumstances surrounding a policy be known. By the nature of effective intelligence, however, the intelligence community is generally not able to make known the full circumstances surrounding an out of context allegation or bit of information. To encourage public access to what must of necessity be only bits and pieces of information, then, may hold real risks for genuinely informed public debate about such issues. In some cases such partial release may in fact contribute to public misinformation. And to talk of public accountability as a reason for public access to the process of intelligence when it is conceded on all sides that properly classified information will not be made available—that is, that the core of intelligence methods and operations cannot be publicly available—is to stretch the normal sense of the term. The reality since the time of the Continental Congress has been that the appropriate mechanisms for oversight of the intelligence community are the special mechanisms of the Executive and Legislative branches of the government that are directly responsible to the democratically elected President and members of Congress.

This Select Committee and the careful oversight mechanisms established by law for control of the intelligence community (including the President and the National Security Council, the President's Intelligence Oversight Board, the Attorney General, the structure of Executive orders and laws governing intelligence operations, internal agency oversight and inspectors general, and the carefull process of Congressional scrutiny through appropriations, reporting requirements and authorization measures) are the appropriate mechanisms for intelligence oversight.[5] This is not to suggest that intelligence methods and objectives will alone escape public debate in a democratic society but rather to remind us that fully informed oversight of such activities will only be provided by the appropriate Presidential and Congressional oversight mechanisms that are in fact fully informed.

Although the American Bar Association has not adopted an Association position on these issues, the Standing Committee on Law and National Security has for some time sponsored a Working Group on National Security and the Freedom of Information Act chaired by Robert Saloschin under the general direction of John Shenefield as Chairman of the Committee's Task Force on the Justice System and National Security. The work of this group has fully reflected awareness of the special problems presented in applicability to the intelligence community of a FOIA intended for government-wide application and the need for appropriate relief for that community.[6]

Mr. Chairman, with these general remarks as background, I strongly support prompt passage of S. 1324 now being considered by this Committee. The principal mechanism of this bill, to provide relief to the Central Intelligence Agency from the burdens of searching and reviewing operational files, as opposed to product files, should alleviate some of the more acute problems associated with applicability of FOIA to the Agency.[7] Operational files, in dealing with sources and methods, are particularly sensitive and any perception or misperception as to their public availability has an acute chilling effect on sources. At the same time since these files have not in practice been subject to public release under FOIA their exclusion from the burdens of searching and reviewing will not diminish any public information now available under FOIA. And the release of Agency resources from the needless search and review of operational files should enable more timely response to requests concerning product files.[8]

[5] Much of this strengthening in mechanisms for oversight of the intelligence community, including establishment of the Senate and House Select Committees on Intelligence and the President's Intelligence Oversight Board, has occurred after enactment of FOIA.

[6] There are also other entities within the ABA which are concerned with these problems and have been studying the matter. In fact, resolutions dealing with proposed amendments to the Freedom of Information Act will be the subject of debate in the ABA House of Delegates in August, after which I am sure the Association would be glad to report back to you any formal position it may take on these matters.

[7] This bill if enacted would constitute a statute within the meaning of FOIA exemption three. Indeed, if it did not, there would be no purpose in enacting it.

[8] This bill would also properly restrict the ability of nonresident aliens to make "first-person" requests for information concerning themselves under the Freedom of Information Act. FOIA was designed principally to promote an informed citizenry. Moreover, it has always been a particular anomaly under FOIA that United States citizens as taxpayers must subsidize such foreign requests.

Mr. Chairman, and members of the Committee, in S. 1324 the Committee would seem to be in the enviable position of having legislation that would significantly meet some of the problems associated with applicability of the necessarily more generalized government-wide FOIA to the Central Intelligence Agency without curtailing the real world information flow of the Act. This bill is likely to be —and should be—supported by persons of all political persuasions.

Finally, Mr. Chairman, let me state that although I support S. 1324 I believe that ultimately the only satisfactory solution to this problem is a more general exclusion for the intelligence community from the requirements of FOIA. No other Nation in the world subjects its intelligence community to the perception or misperception of public disclosure on demand. And in my judgment the public benefit of FOIA applicability to the intelligence community—and there will always be some—is outweighed by the risks to democratic institutions through weakened intelligence and the risk of public misinformation inherent in necessarily incomplete disclosures about intelligence activities.

Senator DURENBERGER. Thank you very much, Mr. Moore. John Shenefield, welcome.

May I make a point before you start? I believe it is my understanding, and you can correct me if I err here, that while I identified your earlier identities associated with the ABA in particular, I guess, it is my understanding that you are both testifying today as to your personal views on the legislation. Am I correct?

Mr. MOORE. That is correct, Mr. Chairman. My testimony and that of John Shenefield is completely in our personal capacity.

Senator DURENBERGER. Thank you very much.

STATEMENT OF JOHN SHENEFIELD, MEMBER, ABA STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

Mr. SHENEFIELD. Mr. Chairman, on the assumption the prepared statement will be included in the record, let me simply say three brief things. First, I support S. 1324 virtually without reservation for five reasons: It will result in no lessening of the amount of information hitherto available; it aborts the risk of human error that may result in the fatal compromise of highly sensitive intelligence operations; it avoids the dedication of elaborate resources to what is essentially a futile task of reviewing documents that can in the end never be released in any event and thus frees up intelligence professionals to do something else; fourth, it inevitably will reduce the backlog in the litigation over the backlog, and that is a benefit; and finally, it will reduce the reluctance to cooperate of those abroad who simply do not understand our general predisposition in favor of disclosure.

The second point is that four concerns have been raised this morning, and I would like to address each of them briefly. As to judicial review the bill is silent. I think a fair interpretation of the language would allow one to conclude that judicial review is not as a practical matter available in the typical case.

To my way of thinking, that is appropriate. The problems that are raised as reasons for having judicial review seem to me more properly taken care of in the oversight process.

Indeed, it is difficult to see how meaningful judicial review can be achieved in this area. For the sake of the historical record, I remind the committee that the Carter administration's recommendation in this area not only called for a certification process such as is called for here or a designation process, but the recommendation included language that would explicitly preclude judicial review.

If, however, in the wisdom of the committee and the Congress some sort of judicial review is thought to be essential, then it ought to be quite clear that the standard is one of exceeding deference to the judgment of the CIA in this area. I would propose a standard of nonfrivolousness or in the absence of evidence of lack of integrity, abuse or corruption, or at the very least an arbitrary and capricious standard. It does seem to me that de novo review in this area is absolutely inappropriate.

As to the question of abuse or illegality, once again this seems to me to be more properly the subject of oversight. There is this committee. There is its House counterpart. There are the internal Central Intelligence Agency controls.

There is the Intelligence Oversight Board in connection with illegality. There is the Attorney General in connection with actions which may be unlawful. It seems to me where abuse or illegality is at issue, oversight and not disclosure is the appropriate mechanism.

Next, so far as backlog is concerned, there seems to be very little reason to put anything explicitly in the act. If I were sitting as chairman of this committee, it seems to me the oversight and authorization process requiring explicit dedication of resources laying down standards expected to be adhered to would be a more than adequate way to deal with the problem.

Finally, this bill does not deal with other agencies of the intelligence community, and it is entirely supportable on that basis. If other agencies come to this committee asking for some similar kind of treatment, it would seem to me that they ought to be taken up on a case-by-case basis.

In short, Mr. Chairman, I support S. 1324 and do so wholeheartedly because I believe that in this narrow instance the exception to our general rule of access to information is thoroughly justifiable. Here the balance in favor of secrecy overwhelms what is the theoretical benefit of access to sensitive information that can never in the end be released. I have the firm belief that in this small area secrecy must be preserved so that we do not unnecessarily jeopardize the security of the democratic institutions that make the FOIA in general of such importance.

It seems to me that our Nation which has gained so much strength from the debate of an informed citizenry can in this instance protect that strength most effectively by imposing the discipline of secrecy on the operational files of the Central Intelligence Agency.

Thank you, Mr. Chairman.

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

PREPARED STATEMENT OF JOHN H. SHENEFIELD

Mr. Chairman and Members of the Committee: It is an honor to appear here today in support of S. 1324, a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

This bill addresses a problem caused by the intersection—some would say the collision—of two powerful postulates on which our system of government is based. First, our society is organized as a democracy in which the most fundamental decisions are made by our citizenry at the ballot box. To that extent the fate of the Republic is in the hands of voters who we hope will be endowed with the wisdom of educated choice that can come only from the availability of information. But second, and cutting across the need for freely available information, is the fact of life that secrecy is essential to our national security in those

narrow areas in which the dangers caused by disclosure outweigh the benefits. The application of the Freedom of Information Act to our intelligence community is the best possible example of one fundamental goal in uneasy tension with another. The task of S. 1324 is to address the problems that have been caused by that tension, and to adjust the competing values.

An informed citizenry is one of our society's highest ideals. The First Amendment to the Constitution is eloquent testimony to the importance we as a Nation place on freedom of expression as a prerequisite to the emergence of the truth. Our founding fathers were confident that truth, if given a chance, would prevail in the marketplace of ideas. Much of our public policy is dedicated to ensuring that the competition in the marketplace of ideas is fair and unfettered. Education policy, communications policy, political campaign and contribution laws, the law of libel, and patent policy are only a few examples of decisions by our society to emphasize the importance of making information available, in contrast to other competing values. To these ends, we have always valued a free press, unruly as at times it may be; a diverse academic community, as searching and persistent as it should be; and an inquiring citizenry, as awkward as that can be—all dedicated to ferreting out and publishing facts, even when they embarrass or are uncomfortable or may cause inconvenience, even injury. We have insisted on erring on the side of disclosure.

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

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

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

Extraordinary steps are in fact taken to protect such information Classification standards, while recognizing the importance of an informed public, nevertheless permit withholding of information in those areas where disclosure could reasonably be expected to cause damage to the national security (E.O. 12356). The organization of the sensitive files in the intelligence community is compartmented so that only those persons with a need to know have access and it is accordingly much more difficult for any individual to have knowledge of facts for which he has no such need to know.

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

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

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

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

As this problem has become evident in recent years, there has been a series of efforts to deal with it. Differences that exist now concern only the mode of solution. What is clear is that there is a broad consensus that some solution is very much in order. The standard that is now generally agreed upon is that exemption from the Freedom of Information Act should cover only information that release of which is virtually never appropriate and that it is essential to safeguard for the efficient functioning of our intelligence community. The complete removal of a category of information from the Act should be as narrowly defined as is possible.

In support of S. 1324 as an effective solution that meets this standard, we can say several things. First, it will result in virtually no lessening of the amount of information that has hitherto been available from the intelligence community. Second, it avoids the risk of human error that may result in the fatal compromise of highly sensitive intelligence operations. Third, it avoids the dedication of elaborate resources to the essentially futile task of reviewing documents that can in the end never be released in any event, and thus frees up intelligence professionals to do the task for which they are best suited. Fourth, it inevitably will reduce the backlog and the litigation over the backlog, so that requests that can be responded to will be addressed in a more timely fashion. And finally, it will reduce the reluctance to cooperate of those abroad who do not fully understand our general system of disclosure of information, and thus it will enhance the effectiveness of our intelligence capability.

S. 1324 is a modest compromise that safeguards the essential central operational files of our intelligence capability at the CIA. It is carefully crafted to avoid an unnecessarily broad exemption from the Act and its underlying policy.

It preserves access to finished intelligence, information concerning authoritatively acknowledged special activities, studies of intelligence prepared for training purposes, and even raw intelligence supplied to policy-makers in its original form to assist in policy decisions. It avoids closing off access to information concerning illegal or improper intelligence activities. S. 1324 is an astute bend of practical effectiveness that avoids violating an important policy preference in favor of informed public debate.

In short, I support S. 1324 and do so wholeheartedly. I do so because I believe that in this narrow instance, an exception to our general rule of access to information about our government is thoroughly justifiable. I do so because here the balance in favor of secrecy overwhelms the theoretical benefit of access to sensitive information that can never in the end be released. I do so in the firm belief that in this small area, secrecy must be preserved, so that we do not unnecessarily jeopardize the security of our democratic institutions that make this entire issue of such importance. This Nation, which gains so much strength from the debate of an informed citizenry, can in this instance protect that strength most effectively by imposing the discipline of secrecy on the operational files of the Central Intelligence Agency. S. 1324 successfully mediates that policy tension and deserves speedy enactment.

BIOGRAPHICAL STATEMENT OF JOHN H. SHENEFIELD

John H. Shenefield was the Associate Attorney General of the United States from 1979 until 1981, and in that capacity presided over the development of recommendations for the amendment of the Freedom of Information Act. Prior to that time, he had been Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. He is currently a member of the American Bar Association Standing Committe on Law and National Security and head of its Task Force on the Justice System and National Security. He is also Chairman-designate of the International Trade Committee of the American Bar Association Section of Antitrust Law. He currently practices law as a member of the firm of Milbank, Tweed, Hadley & McCloy.

Senator DURENBERGER. Thank you very much. I just want to make one comment on the oversight process. Whether you get your oversight from the rights of the public, from responsible internal oversight which, in my experience here in 4½ years, we certainly have and it has worked well, I believe, in most cases, through two administrations: or from this committee is a matter we will always debate, I am sure.

I have the least amount of faith in the oversight that comes from those before whom you are testifying today because by the time a matter reaches our attention, it probably has reached everyone else's in the world. So I have a concern about always, and I think this is our problem in each of these cases, trying to find a delicate and appropriate balance which is always founded on some trust, whether the public trust in all of us or a trust that we have to have in each other in this process.

It is an ongoing and a difficult process, and one where one violation blows the whole system, one that in a political sense mandates in some cases inappropriate measures to counter the particular violation. So I think it is appropriate for you to make the observations you have with the background that I know you have, and I appreciate that.

I have just one question since you commented on judicial review, and maybe both of you are knowledgeable on the subject. Can you tell us where in the past judicial review has failed in FOIA cases, particularly regarding the issue of secrecy that relates to operational files?

Mr. SHENEFIELD. There have been situations, Mr. Chairman, in which judicial review has at least in the early instances risked disclosure of information that responsible officials at the Central Intelligence Agency had thought should not be disclosed. The recent *McGee* case would be be an example of a judge telling the CIA that it may not have done its job particularly well and that at least the lower court should go back again and look at a particular set of decisions.

In addition to that there was an opinion by Judge Gesell that finally was mooted out before the Supreme Court stage in which the same sort of situation occurred. The Judge was in the position of telling the Central Intelligence Agency that it ought to do its FOIA job better, or do it again.

Now it seems to me, quite apart from the constitutional question, that that may well be appropriate—though I would not favor it—in cases where information is subject to the act. Here we are talking about a process which by definition is outside the act, that is to say, a designation of certain files thought not to be appropriate even for search and review under the act.

It seems to me to go that step and ask for at least de novo judicial review is virtually unthinkable.

Senator DURENBERGER. Do you want to add any comment to that?

Mr. MOORE. I would like to comment on that if I could. It seems to me that the test of the workability of judicial review here is not solely the question of how many times the intelligence community has been upheld or overturned on appeal. One could in fact count the cases either way as either evidence of success of judicial review if it were a large number because of the importance of having it, or the failure of judicial review if it were a small number by indicating that in those particular settings why do we have the system in the first place if the intelligence community is never overturned.

Rather the real cost of judicial review is one of the perceptions or misperceptions that we are creating with respect to the potential to operate within the intelligence community and maintain the secrecy of actions. That is, it is highly likely that if persons in the field do believe there is a potential for judicial review in which their actions might be made public over the objections of someone in the intelligence community that it is going to have a chilling effect on intelligence.

Mr Chairman, aside from the general principle, I might focus specifically on the language of this bill on judicial review since this seems to be a rather central point. There are really two questions here. One is what ought to be the law on reviewability of this question and second, what is the most likely interpretation of the language that we have in this particular bill.

I have no difficulty in saying what the law ought to be in this case is no reviewability whatsoever. This is an area that you will recall is an amendment of the National Security Act in which we grant discretion to the head of the Central Intelligence Agency for the protection of sources and methods. This is absolutely the most sensitive area of classified information that we have, and if there is any area that it seems to me is not appropriate for basic judicial review it is precisely this kind of area.

With respect to the precise interpretation of the language of this bill, I think there are a number of possibilities. One, it is entirely possible as an interpretation here that a court might hold that the amendment of this Act in the context of something appearing in the 1974

National Security Act would in fact be a displacement of any review standards under FOIA in this particular case and that there would be no revaluating here. There is an analogous setting an ongoing debate between a number of courts with respect to Internal Revenue Service provisions as to whether since they were later in time certain of them have displaced FOIA provisions on judicial review.

Whatever the result of any question of displacement with respect to this act on judicial review, and I personally would regard that as an appropriate and good decision to make clear that there was no such reviewability, the normative standard in this particular case that would be applied under the FOIA reviewability (b)(3) exemption is clearly the question of: Is the material exempt under a statute that otherwise exempts these materials?

In that context I have no doubt that this bill with its language as it appears of the discretion and the designation by the director of Central Intelligence would in fact be nonreviewable. Indeed, even without that language it would seem to me that the best interpretation of this would be that there would be no reviewability and should be no reviewability of such designations in such a routine area entrusted by statute to the Director of the Central Intelligence Agency.

Senator DURENBERGER. Thank you both very much for your testimony. We appreciate it a great deal. I regret more of our colleagues were not here to hear it.

Our next witness is Dr. Anna Nelson. Before you start your testimony, Dr. Nelson, I have to find out whether my body is needed in a markup here. I am sure you are anxious to finish. Do you have just 4 minutes you could lend me so I can go have my body committed to report out the Clean Water Act? I will be right back.

[A brief recess was taken.]

Senator DURENBERGER. I am sorry. Before we start I am going to make part of the record, without objection, the statement that Senator Biden had asked to be made part of the record.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR BIDEN

The issue of how CIA should be covered under the Freedom of Information Act has been with the Intelligence Committee almost from its first day. It occupied the Committee along with the original Intelligence Community charter bills that would have provided statutory frameworks for the activities of U.S. intelligence agencies. Like many of the intelligence charter issues, that of the appropriate responsibilities for CIA under FOIA typifies the problems that we face when deciding on what authorities and prerogatives to allow for secret intelligence activities in a democratic and free society.

While fully accepting the value of secret intelligence activities, many Americans have argued that they must co-exist with diligent Congressional oversight to ensure that representatives of the American people, at least, are aware of the nature of these activities. Many Americans have further argued that some of these activities of the intelligence agencies must be subjected to periodic and appropriate public scrutiny that can be effected only through the access to intelligence information that the Freedom of Information Act provides. I have been a strong proponent of both these arguments—for comprehensive Congressional oversight and for FOIA—in discussions of the democratic context in which the intelligence agencies must operate.

However, I have also been sympathetic to the concerns of the intelligence agencies about the labor and security burdens that FOIA has placed on them. The intelligence agencies' experience of spending hundreds of hours on reviewing highly sensitive documents that anyone with the least familiarity with intelligence operations and techniques knows will never see the light of day can only have been frustrating. I commend the agencies for their conscientious compliance with the FOIA. The record of Federal courts supporting the actions of the CIA in response to FOIA requests is proof, I think, of how seriously CIA has taken its responsibilities in spite of its highly valid concerns about the effect of the Act on its primary business—that of collecting and analyzing intelligence.

On the other hand, it has seemed to me on occasion that the Intelligence Community has, at times, overstated some of its criticisms against FOIA. Descriptions of the security problems posed by FOIA is an example of this sort of overstatement. I have no doubt that several foreign governments and possible individual sources of assistance have been reluctant to cooperate fully with the CIA because of their understanding or misunderstanding of the way in which the Freedom of Information Act operates.

However, far outweighing the FOIA in accounting for such reluctance to cooperate must be the reputation that this and previous Administrations have acquired for not being able to protect secrets that provisions in the FOIA regarding classified information have protected. We on the Intelligence Committee often receive information with warnings to protect it because disclosure could result in the exposure of intelligence sources. Such disclosure could also result in the loss of individual lives. Time after time, we have seen such information arrayed on the front pages of American newspapers within days of—if not before—its receipt by the Committee. These sorts of actual and repeated disclosures of information would be a dramatic and persuasive deterrent to an individual or a foreign government who was thinking of cooperating with the CIA. These serious compromises probably far outweigh any hypothetical speculation in which possible cooperating individuals might engage about the FOIA.

In addition, S. 1324 has the misfortune of appearing during a period when a range of actions regarding the availability of government information have made many Americans dubious about any proposals which might restrict access to information. Executive Order 12356, of last April, and the President's March 1983 "Directive on Safeguarding National Security Information" are two quite obvious examples of this trend toward restricting the public's access to information. It is an ironic but established fact that this Administration with its scorn for the values of Government and the people who work in it has consistently tried to limit access of the American people to information about the working of government. Fortunately, S. 1324 is a refreshing change from these broad attempts to reduce the availability of government information. It recommends quite specific and narrow changes in response to identified problems. It expresses a spirit of moderation and compromise. It is based on concrete experience. It appears to have the support of a spectrum of political outlooks. It appears to be, in short, a reasonable solution to the problem of CIA's spending the time and talents of experienced intelligence officers on the review of mountains of documents that have virtually no chance of being disclosed under the Freedom of Information Act.

There are several important issues raised by S. 1324 that these hearings can address. High among them is that information on many of the intelligence activities most in need of public scrutiny would probably be the sort that would be contained in operational files and therefore excluded.

I have no reason to doubt the integrity of U.S. intelligence officers but if there are in the future improper, illegal, or wasteful intelligence activities, I doubt that they will be perpetrated by analysts. They will occur in the course of operations.

It is important that information on these sorts of operations that are often of great interest from the point of view of public policy, individual accountability, and history continue to be accessible to the American public.

Secondly, it is essential that this Committee fully explore possible procedures for evaluating whether operational files that have been exempted by the DCI from the FOIA have been accurately and appropriately designated. Some sort of judicial review is one possible procedure. There are others worth considering.

I think that today's witnesses can make an important contribution in helping us find a solution to these particular points.

Senator DURENBERGER. I will also make part of the record a letter that would be of interest to you, Dr. Nelson, relative to information available to historians, from John Stein, Deputy Director of Operations for the Central Intellligence Agency.

[Letter follows:]

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., June 28, 1983.

HON. BARRY GOLDWATER,
Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: One further point that I would like to add to my testimony last week regarding the proposed FOIA legislation concerns the OSS files. This has to do with whether information in those files would be available to historians and others who could properly benefit from that information. I want to assure you that I do not intend to ask the Director to designate OSS files as falling in the category of files which would be exempt under the new Bill. The OSS files would therefore continue to be subject to search, with the information of historical value available to requesters. I trust that this will clarify the subject should the matter be raised in the Committee's hearings.

Sincerely,

JOHN H. STEIN,
Deputy Director for Operations.

Senator DURENBERGER. We welcome Dr. Anna Nelson, professor of history at George Washington University, testifying today on behalf of the National Coordinating Committee for the Promotion of History.

STATEMENT OF DR. ANNA K. NELSON, DEPARTMENT OF HISTORY, GEORGE WASHINGTON UNIVERSITY, NATIONAL COORDINATING COMMITTEE FOR THE PROMOTION OF HISTORY

Ms. NELSON. I am here today specifically representing over 20,000 historians who are members of the Organization of American Historians [OAH] and the American Historical Association [AHA], the two largest associations that support the National Coordinating Committee.

We appreciate your invitation to appear before this committee to discuss S. 1324. We also recognize the necessity to protect sources and methods utilized in intelligence operations and find it reassuring that the CIA now recognizes the need to ensure this protection within the Freedom of Information Act.

However, certain aspects of this bill are very troubling to historians whose perspective on information and documents often differs from that of journalists, lawyers or other users of information. Today we would like to discuss some of our reservations and point to aspects of S. 1324 that would not only have an impact on the work of historians but upon the knowledge and understanding of American foreign policy by future generations of Americans.

First we would like to examine the ramifications of any legislation that exempts an entire category of files from search and review. As we understand it this bill exempts neither certain information nor certain file folders but rather a very broadly defined category of files; that is, all the files from the Director of Operational Activities, that sort of thing.

The CIA states that these files only contain information on the sources and methods of intelligence operations. Obviously we have no information on the CIA file system. Ms. Lawton did not seem to have any information this morning, but those of us who have spent hours in the National Archives, the Federal records centers or Presidential libraries know that operational files of Government agencies usually go far beyond sources and methods. Traditionally they include the policy guidelines and the planning process of such operational activities. They are, in fact, the heart of governmental decisionmaking. Indeed, an indirect definition of operational files is in this bill. In section 2(a)(10) we are told that the exclusion of operational files will "leave files containing information gathered through intelligence operations accessible to requestors." If the exemption of operational files will leave access only to those containing intelligence information then it is clear that these operational files must contain the information vital to an understanding of policy and planning.

In addition, if an entire category of files is exempt from search and review there will surely be a continual temptation on the part of officials to place ever increasing numbers of documents in file cabinets marked operational, including those that might be merely embarrassing. Broadly defined, is there any file of a Government agency that does not deal with "operations?"

Next, we would like to point out that under S. 1324 these operational files will be exempt from the Freedom of Information Act forever. The time is long past when the history of American foreign policy can be written from the files of the State Department. The very passage of the National Security Act in 1947 was a recognition that foreign policy decisions require the combined efforts of diplomats, strategists, and experts in what was then called "psychological warfare." Therefore, historical knowledge of our foreign policy must now come from the documents of the State Department, the Defense Department, the White House, and even the CIA.

With some exceptions historians of what is now called national security policy seek documentation from a period 20 to 35 years ago, a period that coincides with access to some documents in the Presidential libraries, the National Archives and the historical series of the Senate Foreign Relations Committee. In regard to what Ms. Lawton said this morning, I would like to say that there has been a great deal of systematic review within agencies. This review does not involve all the files in an agency if they are in accord with the Federal Records Act. Only those files which have been judged historically important and, therefore, of permanent value are reviewed. That is the only records that have become part of the Nation's archives are subject to systematic review. That is a much smaller body and, therefore, makes it much easier to do this sort of declassification.

Experience has shown that information requiring absolute secrecy at the time of its origin can be open to the public after passage of time with absolutely no harm to national security. Recent publications of the Senate Foreign Relations Committee's historical series is certainly a case in point. Testimony given in executive sessions behind closed doors and even off the record could now be published without harm to either individuals or national security. Unfortunately, S. 1324 fails to recognize this fact. Under this bill the files of 1953, for example, will be every bit as inaccessible as the files of 1983. There is no cut off date for the exemption of these files. Since CIA files have never been sent to the National Archives and since they are quite unlikely to be sent in the foreseeable future, information on foreign policy guidelines or planning in which the CIA participated will continue to be available only under the Freedom of Information Act. Thus, a plan for eventual access to these documents is absolutely essential.

Third, we would like to point out that S. 1324 is ambiguous about the fate of another category of documents that is absolutely crucial to understanding contemporary American policy. It is unclear under the blanket exemption of S. 1324 that historians would gain access to information that originated in operational files but can also be found outside the confines of the CIA's. The Federal Government classifies information, but historians use documents, and often documents containing information that originated in the CIA are found in other files. For example, National Security Council documents circulate to the State Department, the Defense Department, and the CIA among other agencies.

Many NSC documents are in Presidential libraries. Currently before an NSC document can be declassified, this document must be cleared by each participating member of the National Security Council. Now under S. 1324 if a historian were to request the declassification of an NSC document that was filed in the operational files of the CIA, would this document automatically remain classified because it was deemed operational? We do not know. Clearly this kind of question should be clarified since the supporters of S. 1324 probably had no intention of closing off this category of documents.

To conclude, then, in order to clarify provisions in S. 1324, we recommend the following changes. First, the definition of operational files should be narrowed. The CIA should be allowed to exempt only those specific files that include information on the sources and methods of intelligence gathering.

Second, statutory provision should be made for the search and review of all files after a specified lapse of time; 25 or 30 years would conform to current declassification procedures in most agencies.

Third, the exemption from search and review should be limited only to those documents or information that can be found in no other Government agency or organization.

We believe these recommendations would support the efforts of the CIA to protect their most sensitive records without depriving history of important documentation.

Mr. Chairman, 1983 marks the 200th anniversary of the signing of the Treaty of Paris. Clandestine operations, spies, secret diplomacy have always been as much a part of our diplomacy as any other great nation of the world. We have had great foreign policy successes and monumental failures, like other nations of the world. But we differ from many other nations in that we have always been able to face up to all facets of our past.

Fundamental to our democratic society is the fact that we have traditionally allowed and often encouraged a thorough examination of past policies, successful and unsuccessful, in order to enrich our knowledge of the present and the future. In the final analysis, our understanding of our past can only come through access to the documentary record. It is an example of our open society that the State Department records in the National Archives include some 19th century records labeled "Expenses, Secret Agents." It enriches the knowledge of our own time that the most recently published volumes of documents from the State Department include candid discussions in the NSC of 30 years ago over intervention in Indochina. As foreign policy becomes subsumed by national security policy, the records of the CIA will become even more essential to future generations of Americans seeking an understanding of American history.

In considering S. 1324, we hope this committee and others in Congress will be extremely cautious in curtailing access to historical sources in such a decisive manner.

Thank you.

Senator DURENBERGER. Thank you, Dr. Nelson.

I appreciated the scope of the testimony. I would say that at least one or more of your concerns about access have been our concerns, and we have been satisfied that while they were appropriate as concerns, they no longer are concerns to us, and part of the record of this hearing will indicate that, because we have received some assurances from the Agency in that regard.

But I found your testimony very helpful, and obviously, if you were here at the beginning, when I had some time to make an opening statement, I had deep concerns about the value to all of us of the profession that you represent here today, and you can be confident and your colleagues can be confident that we will make sure that your testimony and the questions that you raise are circulated among all the members of this committee prior to a markup on this legislation.

Let me thank you again for your willingness to stick it out to the end.

Ms. NELSON. It would be extremely helpful for us if we could perhaps see the information the CIA has given to the committee.

Senator DURENBERGER. We will see if that is possible, because it does not help to have anybody in doubt about what it is we are doing and why we are doing it and what you can expect when we move to mark up this legislation.

Thank you very much, Doctor.

The hearing is adjourned.

[Whereupon, at 12:51 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Letter to Senator Goldwater from Samuel R. Gammon, executive director, American Historical Association follows:]

AMERICAN HISTORICAL ASSOCIATION,
Washington, D.C., June 24, 1983.

HON. BARRY M. GOLDWATER,
Chair, Select Committee on Intelligence, Senate Russell Office Building, Washington, D.C.

Mr. CHAIRMAN: I am writing to express the views of the American Historical Association concerning S. 1324, upon which your committee will hold hearings next Wednesday. Even though we will be represented at the hearing by Dr. Anna Nelson, appearing for us and the Organization of American Historians, we should like to present our views more fully. You may recall from my testimony before your committee a year and a half ago that I have served overseas as a career Foreign Service Officer and worked closely with CIA stations in a number of countries.

As historians we accept entirely the importance of protecting sensitive CIA information on operations and methods as long as necessary both for the security of our country and the security of the persons involved in sensitive intelligence operations. However, we have two problems with S. 1324 as it now stands.

The first problem is that there is no terminal date for the protection of operational files; material so labelled could be denied to history in perpetuity. You will recall that in my 1981 testimony I mentioned the "sensitive" fact that nearly a century and a half ago Daniel Webster for a time took a covert retainer fee from the British Foreign Ministry! While that was undoubtedly sensitive at the time and for many years afterwards from the British intelligence point of view, it certainly ceased to be so a generation after Webster's death. Accord-

ingly we strongly urge that any legislation exempting CIA's operational files from FOIA have a fifty-year limitation imposed. Consider only that had we had an effective CIA in 1933, its operations in Italy and Germany against Hitler and Mussolini would hardly merit protection beyond 1983.

Our other concern is even more fundamental. The existence of any FOIA-proof "sanctuary" in a blanket exemption of files labelled operational will present a high degree of temptation to senior CIA bureaucrats. As a former senior State Department bureaucrat I can well recall other subterfuges my colleagues and I employed to shelter embarrassing or sensitive material from the early Freedom of Information Act. For this reason we seriously doubt that a blanket exemption of a part of CIA's records is the most effective way to protect sensitive CIA operational, methodological and personnel information on national security grounds. We therefore believe that the classification system for national security information, as established by Executive Orders, remains the surest way to achieve that protection. Operational information is and should be classified and denied any dissemination so long as it remains sensitive. We do not perceive the need to design a whole—and duplicative—system of protection of a portion of CIA's undoubtedly sensitive national security information.

I respectfully request that this letter be made part of the record of the Committee's hearing of June 28, 1983 concerning S. 1324.

Sincerely,

SAMUEL R. GAMMON,
Ambassador (Retired), Executive Director.

S. 1324—INTELLIGENCE INFORMATION ACT OF 1983—MARKUP

TUESDAY, OCTOBER 4, 1983

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 2:39 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater (presiding), Chafee, Lugar, Durenberger, Roth, Cohen, Huddleston, Biden, Leahy, and Bentsen.

Also present: Robert Simmons, staff director; Victoria Toensing, majority counsel; Peter Sullivan, minority counsel; Dorthea Roberson, clerk of the committee; Michael Mattingly, Larry Kettlewell, Edward Levine, Glenda Hildreth, Lot Cooke, Sam Bouchard, John Elliff, Keith Hall, Joseph Mayer, Eric Newsom, Charles Andreae, Stephen Ward, Thomas Connolly, and James Dykstra, staff members.

PROCEEDINGS

The CHAIRMAN. The meeting will come to order.

Although we do not have a quorum present, I think Senators Huddleston, Durenberger, and Leahy have some comments to make.

We are here today to mark up S. 1324, a bill amending the National Security Act of 1947. This legislation would relieve the CIA from searching and reviewing certain operational files under the Freedom of Information Act. This relief will enable the Agency to become more efficient so that other FOIA requests may be answered speedily.

S. 1324 was introduced by me on May 18 of this year. Senator Thurmond, Judiciary Committee chairman, cosponsored. Since that time, various Senators and interest groups have expressed their views on the bill. On June 21 and 28 we held open hearings on this legislation. The Central Intelligence Agency, American Bar Association, American Civil Liberties Union, Association of Former Intelligence Officers, newspaper publishers, historians, and journalists were all here to provide comment. And we listened. And then we went back and discussed some more how we could address all these interests. And I think we did a pretty good job, even if I do say so myself.

I particularly want to thank Senators Durenberger, Leahy, and Huddleston for participating in these discussions, which were very successful because everyone went away with most of what they needed. Reaching agreement on this bill is a good example of how our democratic process should work. Everyone gave a little and in the long run got a lot more in return.

The CIA is getting relief from the almost impossible burden the FOIA has placed on it, burdens which I do not think Congress really contemplated when it passed the 1974 amendments.

Presently, FOIA mandates that if someone requests all the information on a cerain subject, all the files have to be located. In an intelligence agency, most of the information is classified. But that does not end the agency's job. An experienced person must go through stacks and stacks of these papers—sometimes they are many feet tall—to justify why almost every single sentence should not be released. If this is not done well, a court could order the information released.

However, very little information, if any, is ever released from operational files when the requestor seeks information concerning the sources and methods used to collect intelligence. Even then, the information released is usually fragmented.

Also, there is always the risk that there will be a mistaken disclosure or that some court may order the release of information which could reveal a source's identity or a liaison relationship. That is why only these most sensitive operational files would be exempt from search and review under the provisions of the bill.

The FOIA requestors will get something in return. They are going to get better service. I have talked with the CIA and they have agreed not to reduce the budgetary and personnel allocation for FOIA processing for 2 years immediately following passage of this bill. This means that to the extent that resources are freed up as a result of S. 1324, the Agency will utilize those resources for FOIA processing.

Senator Inouye could not be with us today, but he does have a prepared statement that he would like to have inserted in the record at this point, and without objection, we will do so.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF VIEWS BY SENATOR DANIEL K. INOUYE

S. 1324, as amended by the Intelligence Committee prior to its approval, is designed to provide limited relief to the Central Intelligence Agency from the administrative burdens and security risks associated with processing public requests for documents under the Freedom of Information Act while preserving potential public access to such records as are legitimately subjects of public concern. I made a statement during the public hearings on this bill, accompanied by a written submission, in which I commended the intent of the bill while enumerating several concerns with its specific provisions. These concerns, which became more focused as work proceeded on this bill, were primarily the following: the nature of agency decisions to designate certain files as operational and exempt from search and review in response to requests under the FOIA; judicial review of such actions under the provisions of the bill, specifically the designation and maintenance of files as exempt operational files; continued access to files containing evidence of abuses or improprieties by intelligence personnel acting in their official capacity; the potential for release of historically significant intelligence information, after a reasonable period time; identification and review of intelligence reports located in operational files; and the circumstances under which covert action could no longer be denied by the U.S. government, such that relevant files would have to be reviewed. I would like to address my understanding of how each of these issues has been resolved as a result of the Committee's action approving this bill.

I. DESIGNATION OF OPERATIONAL FILES

Two changes have been made to S. 1324 as introduced which delineate better the nature and location of files which can be designated as operational and the procedure by which such decisions may be made. First, section 701 of the amendments has been reorganized to make it clear that it is only certain types of files located in specific offices of the CIA which are subject to designation under the Act. These are the files of the Directorate of Science and Technology which document scientific and technical means for collecting intelligence; files of the Directorate of Operations which document intelligence operations or relations with foreign governments; and files of the Office of Security which document background investigations conducted to determine the suitability of potential human sources.

Second, the new subsection 701(d)(1) has been added which requires the Director of Central Intelligence (DCI) to implement his authority to designate files as operational by promulgating regulations. These regulations must require the officials responsible in the first instance for designation and maintenance of operational files to: specifically identify the categories of files in their offices which are recommended for designation; explain the basis of these recommendations; and set forth procedures consistent with the statutory criteria of subsection 701(a), cited above, to govern the inclusion of specific documents in files recommended for designation. The DCI must approve these submissions in writing.

These provisions are a significant improvement to the terms of this subsection, relating to the designation of operational files. Not only is the scope of the particular files that may be designated more clearly delineated, but specific actions must be taken concerning the organization and maintenance of designated files; these actions, accompanied by written determinations, will greatly focus the designation process and provide an administrative record to facilitate judicial review. The Chairman is to be commended in securing the acceptance of the CIA to these changes, suggested by the civil liberties community and recommended by several members of the Intelligence Committee.

II. JUDICIAL REVIEW

New subsection 701(e)(1) provides a specialized process of judicial review for public claims that agency search and review of records in response to requests for information under the FOIA was duly limited by improper designation of files as operational or improper placing of non-operational documents in operational files. Judicial review of the designation and maintenance of operational files, exempt from search and review under the FOIA, is independent of the standards for judicial review developed to govern the interpretation of other actions related to the FOIA. This process is intended to minimize the necessity for the CIA to provide specific details on the contents of its filing systems to requestors or to judges reviewing the adequacy of the Agency's search and review of files in response to FOIA requests.

For the most part, judicial decisions under this subsection will be made solely on the basis of sworn affidavits submitted by the parties to the litigation. Ordinarily, the court's review would be limited to assessing, on the basis of the agency's affidavits, that its regulations under subsection 701(d)(1) satisfy the statutory criteria for designation established in subsection 701(a). However, when the requestor establishes on the basis of the affidavits grounds to believe that a specific file containing relevant documents was improperly designated or relevant documents were improperly placed in a designated file, then the court may proceed to review these questions as well.

III. INTELLIGENCE ABUSES OR IMPROPRIETIES

There has been concern that the provisions of this bill might exempt from search and review in response to requests under the FOIA documents relating to abuses or improprieties committed by the intelligence personnel acting in their official capacity. An additional proviso has been added at the end of subsection 701(a) to provide that information reviewed or relied upon in official investigations on such events will be searched in response to requests under FOIA, regardless of whether the particular documents in question are located only in operational files. For the most part, records relevant to abuses or improprieties that have been seriously alleged will have been examined by official investigatory bodies, both internal to the Agency and independent. When, however, such records have been withheld from official investigation, or overlooked through inadvertence by investigators, they would be considered improperly filed if they were found to be located only in designated operational files. As such, failure to search for them and review them for potential release in response to a FOIA request would be subject to judicial review under subsection 701(e)(1).

IV. HISTORICALLY SIGNIFICANT INTELLIGENCE INFORMATION

If operational files could be designated as exempt from search and review under the FOIA for an unlimited period of time, there would be a danger that historically significant intelligence information would never become available to historical researchers and that the writing of history would be distorted as a result. Although actual operations are usually the most sensitive aspect of intelligence and may remain sensitive for a long period of time, nevertheless these operations themselves are an important part of the chronicle of our times. Intelligence operations have been an important part of the relationship between the superpowers in the postwar world, and are therefore important to understanding contemporary as well as past international relations. Details released concerning certain intelligence collection operations—such as the U–2 affair and the Berlin Tunnel operation—have already made a great contribution to our historical understanding of the development of United States-Soviet relations.

Changes have been made in S. 1324 which I hope will greatly expand the access of historical researchers to historically significant information on intelligence operations. Under subsection 701(d)(2) of the amendments, the DCI must formulate regulations providing procedures and criteria for the review of exempt operational file designations every ten years. The criteria issued by the DCI must include consideration of the historical value or other public interest in the subject matter of the particular files. Not only must the DCI consider these interests, but he must also include in his consideration the potential for actually declassifying and releasing a significant part of the information contained in operational files.

The DCI should be able to provide details concerning his decisions to retain or terminate the designation of particular files as operational. This can best be done through the establishment of a definite unit to conduct these reviews, and I am informed that the DCI has agreed separately to establish such an office. I hope that the establishment of this office and these regulations will greatly facilitate the review of operational information for release to historical researchers.

V. INTELLIGENCE REPORTS LOCATED IN OPERATIONAL FILES

Sometimes, because of the extreme sensitivity of certain intelligence reports that inherently refer to or reveal critical sources or methods of intelligence gathering, raw or finished intelligence products continue to be stored only in operational files of the Operations or Science and Technology Directorate or Security Office after being circulated to policymakers. The Committee has been assured that whenever such documents are circulated as intelligence products outside their operational components a record is made of them in the receiving unit prior to their being returned to operational files. We have also been informed that, in the case of both raw and finished intelligence products, adequate information concerning such documents would exist in non-designated files to permit them to be identified as a result of a record search in response to a FOIA request. After being located through this search, such documents must actually be reviewed for release pursuant to the FOIA, regardless of their location only in designated operational files.

VI. THE EXISTENCE OF COVERT ACTIONS

Part of the final proviso in subsection 701(a) provides that designation of files as operational shall not shield them from search and review in response to requests under FOIA if the request concerns "any special activity the existence of which is not exempt from disclosure under the provisions of the [FOIA]". There have been questions concerning the circumstances in which the existence of a covert action could no longer be considered classified and hence not subject to release under the FOIA. Admission of the existence of such an action by the President or an authorized Executive Branch official would of course be sufficient to prevent its complete denial. The Senate has also exercised its power to declassify national security information, including such actions, under Senate Resolution No. 400 (1976), which established the Select Committee on Intelligence and provided definite procedures for the treatment of classified information by members and their staffs. Furthermore, since covert actions are usually considered to be those affirmative measures by the United States government taken with respect to foreign powers the existence of which can plausibly be denied by the United States government, there would undoubtedly be instances in which the existence of the operation became so well known that the Administration could no longer completely deny it. In such cases, the FOIA would certainly demand search and review of relevant files for release of information concerning the activity. In the context of an appeal under the FOIA, the courts can be expected to address this question as a factual one in the absence of an explicit admission by an authorized official of the Executive Branch.

The CHAIRMAN. Now I indicated that Senators Leahy, Durenberger, and Huddleston had some remarks to make, and we will start, I guess with you, if you want to lead off.

Senator HUDDLESTON. Mr. Chairman, thank you, very much. And I will put my remarks in the main in the record. Most of the folks who are here have participated in this process and know pretty well what I would have to say.

But I do want to commend you for initiating this legislation in the first place, and express my appreciation to the committee staff and to individual staff members of the Senators and to the staff of the CIA and others who have been concerned about the legislation and who have worked to bring about an agreed position.

As a result of the changes in the bill and the commitments that have been made to the committee by the CIA, I am satisfied that S. 1324 will serve both the CIA's operational interests and the public's right to have as much information as possible about their government.

During the weeks ahead interested citizens will have an opportunity to examine the new bill language, and the committee's report will help explain the legislative intent. I believe that the bill will withstand this scrutiny and be recognized widely as a unique opportunity to resolve the problems associated with the CIA and the Freedom of Information Act.

I would ask that my total statement, Mr. Chairman, be placed into the record at this point.

The CHAIRMAN. That will be done. Thank you.

[The prepared statement of Senator Huddleston follows:]

PREPARED STATEMENT OF SENATOR WALTER D. HUDDLESTON

Today, the Senate Select Committee on Intelligence is considering S. 1324, the Intelligence Information Act of 1983, with amendments designed to ensure that the bill strikes the right balance between the public's need for information about their government and the CIA's desire for relief from burdens imposed by the current requirements to search and review sensitive operational files under the Freedom of Information Act. I support the amended bill as a practical way to achieve both of these objectives.

There are four significant changes from the bill as introduced. First, the standards for designation of operational files by the Director are spelled out in order to indicate exactly which file systems in the CIA will be exempted from search and review. This amendment results from a careful examination by the Select Committee of CIA record-keeping practices. Our objective is to ensure that the bill applies only to the most sensitive operational files, and not to the files that are used to store the intelligence reports used by analysts and policymakers. The amendment also makes clear that files of other CIA components, such as the Office of the Director, cannot be exempted from search and review even though they contain the operational documents which receive the attention of the Director or Deputy Director. This ensures continued access to all significant policy materials.

The second change in the bill provides that the designation of any operational file shall not prevent the search and review of such file for information reviewed and relied upon in an official investigation for impropriety or illegality in the conduct of an intelligence activity. This applies to any matter that has been investigated by the House or Senate Intelligence Committee, the Intelligence Oversight Board, the CIA General Counsel, Inspector General, or Director. The Committee determined that the nondesignated files of these investigating bodies

sometimes do not contain all the materials that were directly relevant to the subject of the investigation. It is necessary, therefore, to amend the bill in order to ensure full access to the materials in designated operational files that were relevant to the investigation, but were not duplicated in the files of the investigating body.

On this issue the Committee will also state in its report that, in situations where a document was not reviewed in connection with an investigation because it was withheld or overlooked through inadvertence, the document will be considered an improperly placed document and thus accessible under the judicial review procedures. This closes a potential loophole in the language of the amended bill that refers to information "reviewed and relied upon" by investigators.

The third amendment to the bill adds a new subsection requiring the Director to promulgate regulations for designation of operational files and for review of designation at least once every ten years. The regulations must require the appropriate Deputy Director or Office Head to specifically identify categories of files for designation, explain the basis for their recommendation, and set forth procedures based on the statutory criteria to govern the inclusion of documents in designated files. In addition, the regulations must provide procedures and criteria for review of each designation not less than once every ten years to determine whether the designation may be removed from any file. These criteria must include consideration of the historical value or other public interest in the subject of the file and the potential for declassifying a significant part of its contents.

This amendment is especially significant in light of the issues raised by the President's Executive Order on classification, which eliminated the requirement in President Carter's order that the public interest in disclosure be taken into account in making declassification decisions. Senator Durenberger has introduced legislation, which I have cosponsored, to make the public interest standard part of the provisions on classified information in the Freedom of Information Act. Incorporation of that standard in the criteria for removal of designation from CIA operational files under this bill is an important step in the right direction.

Finally, and perhaps most important, the bill is amended to establish clear procedures for judicial review in cases of alleged improper file designation or alleged improper placement of records solely in designated files. At the first public hearing on the bill, I asked CIA officials whether there would be judicial review of file designations; and they replied that there would be none whatsoever. This answer raised serious problems, because many citizens believe the basic principle of the Freedom of Information Act is that the courts will have an opportunity to review the bureaucratic decisions that keep information secret. I am very pleased, therefore, that agreement has been reached on an amendment to the bill that guarantees an opportunity for persons who have evidence of improper file designation or improper placement of records solely in designated files to have the courts look into the matter and determine whether CIA should conduct the requested search and review for information in designated files.

In addition to the changes in the bill, the Committee has examined carefully the likely practical impact of the bill. At the first hearing I said there were several questions that needed to be checked out. Was it true that the bill would not reduce the actual amount of information that comes out under the Freedom of Information Act today? Would reporters and scholars still have access to as much information as possible consistent with national security about the CIA intelligence product that goes to national policymakers? What would happen to the enormous backlog of CIA requests? How did CIA plan to improve its processing of requests for information that can be declassified?

To answer these questions, the Committee has submitted detailed written questions to the CIA and has obtained firm commitments on crucial points. For example, I asked the CIA to review a list of selected CIA documents which have been released to the public and indicate which of them would or would not remain subject to search and review under the bill. This list covered a wide range of significant documents on CIA policies and controversial operations. In response to this request, the CIA prepared an item-by-item analysis of the impact of the bill, which will be part of the record of the Committee's consideration. The CIA's analysis explains why virtually all of the documents are the type that would continue to be accessible to search and review should they be requested under FOIA after this bill is enacted.

The CIA has also agreed to submit to the Committee a detailed plan for eliminating the present backlog of FOIA requests as part of a specific program of administrative measures the CIA will take to improve processing of FOIA requests after enactment of the bill. The agency will not reduce its budgetary and personnel allocation for FOIA processing during the period of two years immediately after the bill is passed. And the CIA agrees that resources freed by elimination of the backlog will be reallocated to augment resources for search and review of nondesignated files. For its part, the Select Committee will regularly and closely scrutinize CIA's actions to insure that concrete results are achieved and that all FOIA requests to the CIA are responded to in a timely manner and treated with the courtesy required by the spirit, as well as the letter, of the FOIA.

As a result of the changes in the bill and the commitments made to the Committee by the CIA, I am satisfied that S. 1324 will serve both the CIA's operational interests and the public's right to have as much information as possible about their government. During the weeks ahead interested citizens will have an opportunity to examine the new bill language, and the Committee's report will help explain the legislative intent. I believe the bill will withstand this scrutiny and be recognized widely as a unique opportunity to resolve the problems associated with the CIA and the Freedom of Information Act.

The CHAIRMAN. Senator Durenberger?

Senator DURENBERGER. Thank you, Mr. Chairman.

I, too, would like my statement in full in the record, and I will summarize it by saying I am happy to join my colleagues on the committee today in supporting the Intelligence Information Act of 1983. The bill will both improve the security of sensitive CIA files and relieve the CIA of a needless administrative burden, while it still maintains freedom of information access to virtually all the material that is currently released under FOIA.

I am especially pleased, of course, by what we have been able to achieve for historians, like Bill Casey in his other life. Yesterday and today, the Director and I exchanged letters in which he agreed to establish a new program of reviewing nondesignated and de-designated CIA files for declassification. In turn, I agreed to take it upon myself to push for approval of the necessary funds for this important undertaking. I hope the whole committee will join with me in securing those funds. Bill Casey and I are both hopeful that this new program will make a major contribution to historical research.

The Intelligence Committee has also taken several actions regarding the bill itself that will safeguard the interests of historians and of the public at large. We are limiting the extent to which information may be exempted from FOIA that might otherwise have been released to the public. We have insured judicial review to guard against improper use of this exemption. We have obtained concrete pledges of better FOIA service by the CIA. And the CIA has agreed to periodic reviews of its files exemptions, with an eye to ending most exemptions by the time an operation has been over for 40 years. So I think it is a good bargain.

Why do I emphasize historians so much? I do love history, but I also deeply believe that historical research and writing influence and benefit all of us. When we protect the historian's access to the full story, we are really protecting our Nation's understanding of itself. And we are insuring that we and the generations to follow will better understand how to deal with the challenge of government at a given time.

All of this concord would not have come about without the fine work of many people—especially you, Mr. Chairman, who gave of your time and encouragement to help us work out this agreement. It was no accident, by the way, that Senator Goldwater asked General Larkin

about the value of historical research on the role of intelligence. I think our chairman knows well the value of history, and certainly all of us appreciate his support on these issues.

I would add that three colleagues, in particular, on the other side of the aisle played very important roles: Senator Leahy, Senator Huddleston, and Senator Inouye. Each of these gentlemen helped keep the committee's efforts on track and helped convince the CIA to accept the package of amendments that we are approving today.

And finally on the CIA's side, we have had a singularly effective and enjoyable person to work with in Ernie Mayerfeld, the Deputy Director of CIA's Office of Legislative Liaison. He is tough, but without him to listen, to explain, and to come up with solutions, neither the CIA nor we could have achieved the fine balancing of interests that this bill now reflects.

Mr. Chairman, I will submit my full statement for the record, along with my letter of October 3 to Director Casey, and his reply of October 4.

The CHAIRMAN. Without objection, they will be placed in the record at this point.

[The prepared statement of Senator Durenberger, along with copies of the aforementioned letters, follow:]

PREPARED STATEMENT OF SENATOR DAVE DURENBERGER

I am happy to join my Intelligence Committee colleagues today in supporting S. 1324, the Intelligence Information Act of 1983. This bill is the product of truly impressive cooperation between the Central Intelligence Agency and both this Committee and outside groups concerned with the flow of information to the public. Thanks to that cooperation, we are able to report out a bill that will both improve the security of sensitive CIA files and relieve the CIA of a needless administrative burden, while still maintaining Freedom of Information access to virtually all the material that is currently released under FOIA.

I am especially pleased, of course, by what we have been able to do to help historians gain access to CIA materials that can safely be released. Yesterday and today, CIA Director Bill Casey and I exchanged letters on the subject of a voluntary CIA program of reviewing non-designated and de-designated files for declassification. The Director, who is a historian himself, enthusiastically agreed to establish such a program, and I agreed to push for Committee approval of the funds for this important undertaking. Both Bill Casey and I are confident that the CIA, by concentrating its effort on those files that are of historical value or other public interest and that have significant releasable information, will be able to increase substantially the flow of historical material to the public.

The Intelligence Committee has also taken several actions regarding the bill itself that will safeguard the interests of historians and of the public at large. Our amendment on standards for designation of operational files is a good example. This amendment makes clear that, in the Office of Security and the Directorate of Science and Technology, only particular files will be eligible for designation as operational.

The amendment on designation standards and our report on this bill also make clear what sort of files will *not* be considered operational. For example, not only finished intelligence products, but also raw intelligence cables and memoranda that the Directorate of Operations sends to CIA's analysts will not be given operational status. Policy memoranda sent outside the Operations Directorate will not be designated. Neither will the files of the Director and Deputy Director, the Comptroller, the Finance Office, the General Counsel, and the other agency-wide management offices that make CIA policy. So the major decisions on CIA operations, as well as the budgetary story of those operations, will remain open to FOIA search and review.

The Intelligence Committee has gone to some length to make sure that there will be no loopholes through which intelligence or policy memoranda might slip into designated status. We have reviewed the CIA's filing systems and secured CIA statements for the record to pin down the fact that even if a memo that had been disseminated to the Intelligence Directorate or shown to the CIA Director was then returned to the Operations Directorate for safekeeping, it will still be considered non-designated and will in practice be accessible for FOIA search and review. We also have made clear that documents sent outside the CIA, like memoranda to the National Security Council, cannot be designated under this bill. And in case there should be an instance of improper designation of a file, or somebody should attempt to keep non-designated material out of FOIA by storing it solely in designated files, the Intelligence Committee has adopted an amendment to make clear that there will be judicial review and court-ordered remedies available whenever a complainant can produce admissible evidence of such improper filing.

One difficult issue that the Intelligence Committee faced was how to treat the files on activities that have been investigated for possible illegal or improper behavior. The amendment and report language adopted by the Committee make clear that FOIA search and review can extend beyond the files of the investigating unit (such as the General Counsel's office) to include materials that were "reviewed and relied upon" by that unit and also files that were withheld or overlooked, but that still contain information directly relevant to the impropriety or illegality. We think of this as being a victory for journalists and political authors, but it is also a victory for historians. For the history of U.S. intelligence must inevitably include the blunders and illegalities along with the successes, and also the nature and impact of the investigations. By keeping these files open to FOIA search and review, we are helping to make sure that historical perspective will not be distorted by keeping embarrassments out of the public eye.

Historians made a strong case for a time limit on the designation of operational files. They correctly argued that such files lose their sensitivity over time and that historians need eventually to have access to the full range of information. I think all of us are sympathetic to that argument; we, too, spend much of our time trying to get the full story on things. But the CIA also had a case when they said that *some* files might remain sensitive for a much longer time than one would predict. Some agents live to be very old; their enemies sometimes live equally long, or keep files on the past, or exact revenge from later generations. Most governments would let bygones of a generation ago be bygones, but maybe not all would. So the committee looked for something other than a rigid time limit.

The amendment adopted by the Committee is a compromise. It requires the CIA to review its designation of files at least once each ten years. It also specifies the basic criteria for removal of designation: "the historical value or other public interest in the subject matter;" and "the potential for declassifying a significant part of the information." Our report language emphasizes that the CIA should consult with historians, and listen to them, regarding the historical value of particular topics. The amendment also indicates that *portions* of files—such as the story of a given operation, even though it may be part of a larger file on operations over the years—should be removed from designation if they meet the criteria for removal. The CIA will make these decisions, and I know that there will be concern over their willingness to consider the public interest in opening files to FOIA search and review. But they are willing to agree to our bill and report language, and their willingness to institute a voluntary program of declassification review gives me increased confidence that the CIA will also review its operational files conscientiously.

The CIA has also agreed to certain commitments regarding the way it handles Freedom of Information requests. They agree not to reduce their FOIA manpower in the next two years, but instead to devote that manpower to reducing their backlog of requests. They agree that if the burden is eased on the Operations Directorate but remains high for the Intelligence Directorate, they will adjust their manpower to tackle the problem. They will also continue to give speedy service to those whose FOIA requests do not require extensive search and coordination. For many FOIA requesters, including historians interested in substantive intelligence products, this should mean faster and more courteous service.

For the historian, then, I think that this bill is a good bargain. The Intelligence Committee has done a great deal to limit the extent to which information may be exempted from FOIA that might otherwise have been released to the public. We have insured judicial review to guard against improper use of this exemption. We have obtained concrete pledges of better FOIA service by the CIA. And we have gotten the CIA to commit itself both to periodic reviews of its file exemptions and to a voluntary program of declassification for significant files that can be released to the public.

Why do I emphasize historians so much? I do love history, but I also deeply believe that historical research and writing influences and benefits us all. History is one of our few shortcuts to wisdom. As Cicero said, "Not to know the events which happened before one was born, that is to remain always a boy." And history is the basis of myth in modern life. Nearly three hundred years ago Andrew Fletcher said, "If a man were permitted to make all the ballads, he need not care who should make the laws of a nation." We have gone from ballads to headlines and histories, but the interpreters of our past still affect virtually the way we will react to events of the present and future.

So when we protect the historian's access to the full story, we are really protecting our nation's understanding of itself. And we are ensuring that we and the generations to follow will better understand how to deal with the challenge of government.

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., October 3, 1983.

Hon. WILLIAM J. CASEY,
Director of Central Intelligence,
Central Intelligence Agency,
Washington, D.C.

DEAR BILL: Last April, our Chairman, Barry Goldwater, introduced a bill that would relieve the Central Intelligence Agency from the burden of searching some of its files in response to Freedom of Information Act requests. While several of us had concerns regarding aspects of this bill, we all agreed with you that it was foolish to require the CIA to search its most sensitive files for documents that would almost never be declassified and released.

Five months of work are now nearing culmination in a bill that we all will be able to support wholeheartedly. You and we have crafted solutions to such difficult problems as the nature of judicial review under this bill, the extent to which the files on activities that have been the subject of investigations will remain open to search and review under FOIA, and how intelligence memoranda or policy memoranda that are circulated outside of designated files but then returned to those files for safekeeping will remain accessible for FOIA search and review. We have also agreed that the CIA will review its designations at least once every ten years to see whether some files—or portion of files—should be removed from designated status.

I think that now is an excellent time to make parallel progress on an issue that our work on S. 1324 has highlighted. This is the need to make more declassified materials available to historians. We both know how important history is. I am an avid reader of history and you are a writer of it. We both have been shaped in part by history that we have read over the years. As historians write the definitive works on the post-World War II era, it is terribly important that their studies be based on as full a record as possible, consistent with the need to protect our national security.

You have recognized this in putting forth a bill that leaves unchanged current FOIA access to intelligence memoranda, policy documents, and files on those covert action operations the existence of which is no longer properly classified. The importance of an accurate historical record is also recognized in your criteria for removing files from designation, which are to include "historical value or other public interest in the subject matter" and "the potential for declassifying a significant part of the information."

I urge you to take the next, vitally important step: to establish procedures for reviewing and declassifying some of the material in your non-designated or de-designated files. Your declassification review program need not review the mass of documents that are either of no interest to historians or still too sensitive to be released. Rather, you could reasonably base your selection of material for review on the same criteria that you have set forth for the review of file designations. The important thing is to make the declassification of useful historical information a cooperative endeavor, rather than a test of wills fought out in FOIA requests and courtrooms.

A declassification review program would be a burden for the CIA, but it would be a manageable burden and one well worth assuming. The CIA would retain control over the size of this effort, and you could avoid the sort of crises and bottlenecks that bedevil areas like FOIA, in which the pace of work may be dictated by the level of outside requests and the vagaries of litigation. You already have a CIA Historian, so it might be reasonable to give him a major role in declassification review. I would be happy to lead the effort to provide you budget support for a dozen positions, say, to be devoted to this enterprise.

Establishment of a declassification review program would be a fitting complement to the fine Intelligence Information Act that I am sure we will pass. It would demonstrate your commitment to openness in the things that matter, while continuing to safeguard that which must remain secret. And it would make a lasting contribution to public understanding of the role of intelligence in a complex and divided world.

Sincerely,

DAVE DURENBERGER.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., October 4, 1983.

Hon. DAVE DURENBERGER,
U.S. Senate,
Washington, D.C.

DEAR SENATOR DURENBERGER: I received your letter yesterday with its kind words about our efforts on the Intelligence Information Act. We have worked diligently through the spring and summer to reach agreement with you and your colleagues on this bill. We have done this because we are convinced, as you are, that the bill will relieve us of a needless burden without harming the interests of the press, authors, or the public at large. I am gratified to hear you say that as a result of our efforts you will be able to support this bill. I certainly believe it merits everyone's support.

Your views regarding the need for an accurate historical record are ones that I share. If Congress is willing to provide the resources, I am prepared to institute a new program of selective declassification review of those materials that we believe would be of greatest historical interest and most likely to result in declassification of useful information.

The term "selective" is very important. There is no point in reviewing files that we basically know will contain little releasable information. And it makes no sense to review—or even to release—material that has become releasable only because it is trivial. Our professionals have a pretty good sense of what is likely to prove releasable; and we would be happy to work with our Historian, other agency historical offices, the Archivist of the United States, and others to determine what topics are of the greatest interest and importance. Historians would have to trust us, however, to make these professional judgments in good faith. A declassification review program could function only if we maintained control over the workload and concentrated our limited resources on the areas where they would do the most good.

One certain consequence of this selectivity would be a concentration of our efforts on the review of older, as opposed to more recent, material. Such material which documents the early years of CIA could well result in the release of information that explains the role of intelligence in the making of foreign policy. As a general rule, we are likely to limit the declassification review program to files at least 20 or 30 years old. However, these older files would certainly contain information which continues to be relevant to today's world. I am hopeful that whatever material we can release, consistent with the need to protect sources and foreign relations, will make a major contribution to historical research and interpretation.

At the moment, I do not know whether our small historical staff would be in a position to manage a selective declassification review program. But no matter where such a program would be placed organizationally within the Agency, I understand that what you are suggesting is a program provided with adequate resources. Several weeks ago, on my own initiative, I had requested the Historian of the CIA to explore a program that would result in the release of usable historical materials from the World War II period. I look forward to working with additional resources having, as you suggest, the mission of declassifying and releasing historical materials that no longer require protection.

Please allow me again to express my appreciation for your support of S. 1324. With the enactment of this important legislation and the achievement of the necessary budget support, I believe this Agency would be more than willing to undertake a new selective declassification review program. With your leadership and support, we can forge a workable means of informing the public while still protecting our nation's secrets.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

The CHAIRMAN. Well, thank you, very much. And I want to thank all three of you for the great work that you have done and the compromises that you have been willing to make. I think it is a much better bill because of it.

Pat, I have you down next.

Senator LEAHY. Mr. Chairman, I will put my whole statement in the record, but I would like to make a couple of points now. When the Intelligence Information Act was first introduced, I stated in the hearings that my primary concern was that it not undercut the public's access to information used in setting U.S. foreign policy under the Freedom of Information Act.

I was then and continue to be sensitive to the CIA's concerns about maintaining compartmentation and protecting identities and sources. But I don't believe that FOIA causes the release of sensitive information. And I am firmly convinced that ultimately it is in the Agency's best interests not to receive a total exemption from the FOIA. If they had a total exemption, I think that it would hurt them in the long run with the American public.

FOIA is vital in maintaining public confidence that there will be no reappearance of past abuses or problems. Nothing has come before me in our intensive scrutiny of this bill, both in public and closed sessions, that has changed my view in this respect.

Mr. Chairman, you and your staff have been particularly helpful in working with me to answer some of my concerns, as has Dave Durenberger and Dee Huddleston, Dan Inouye, their staffs, and others on the committee, as well as a number of outside groups that have come and worked with us, and the CIA themselves. I told some of the people from the CIA and some of the outside groups, I thought they should have their mail forwarded to my office, they were in it so often.

Among those concerns was one I expressed when John McMahon testified to the effect that the CIA did not believe the bill as originally introduced would permit judicial review of the designations of files. I commend the CIA for moving from that initial position to one which is both more realistic and more in line with maintenance of public confidence. After lengthy deliberation the Agency has agreed to an amendment to S. 1324 to provide for judicial review of an allegation that the CIA has improperly designated files as operational, and therefore exempt from FOIA's search and review, or that the CIA has improperly placed records solely in designated files.

There are a number of less critical but still not insignificant matters to be spelled out and agreed in report language. I understand that this is well in train. The draft report should soon be available for us to review. As with any piece of legislation, interpretative report language can be critical in establishing the committee's intent. Of course, my further support for the bill is conditioned on satisfactory completion of the report, but I assume that that will happen.

And finally there is the matter of comments and ideas from interested public groups. This has been a rather fast process for such an important piece of legislation, but I understand it will not be taken up on the floor prior to our recess. While I and others have sought to consult informally with interested groups where possible, many of them have not had sufficient time to study the bill as amended and to express their views as organizations. I would hope that they would take this time prior to it coming on the floor to do that. There should

be ample time for them to examine this amended bill as well as the report language prior to action on the floor.

I remain ready to hear the considered views and comments of such groups, and naturally reserve the right to take such views and comments into account prior to a final vote on this bill.

As I said, I have a lengthy statement to be put in the record, Mr. Chairman, but let me repeat that I am indeed pleased at the progress made in strengthening this bill. I commend the Agency for its cooperative attitude, certainly your own cooperative attitude as chairman of this committee, in making sure that everybody around this table is heard. This is not only in keeping with the Goldwater tradition, but it has also made for a much better bill. I don't believe there is any member, Republican or Democrat, who could quarrel with the amount of time you have given us. You bent over backwards to make that possible.

Finally, I understand the Director of the CIA, Mr. Casey, is sending a letter to the effect that he agrees with the changes that we have proposed. I think that once that comes it should also be part of the record.

It is going to give me a lot of satisfaction to be able to vote for reporting the bill as amended with a favorable recommendation to the Senate.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT BY SENATOR PATRICK J. LEAHY

When S. 1324, the Intelligence Information Act of 1983 was first introduced, I stated for the record my primary concern that it not undercut the public's access through the Freedom of Information Act to information used in setting United States foreign policy.

The purpose of S. 1324 is to exempt the Central Intelligence Agency's operational files in the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security, from search and review in response to FOIA requests. All other Agency files would remain accessible through the FOIA, as at present.

According to the CIA, operational files contain the most sensitive information on sources and methods, and the compartmentation needed to protect this information is broken down in the search and review process even though the Agency invariably refuses to release such information under the national security provisions of FOIA. I was—and continue to be—sensitive to the CIA's concerns about maintaining compartmentation and protecting the identities of sources, but I do not believe that FOIA causes the release of sensitive information.

I am firmly convinced that ultimately it is in the Agency's best interests not to receive a total exemption from the FOIA. The FOIA is vital in maintaining public confidence that there will be no reappearance of past abuses and problems. Nothing which has come before me in the Committee's intensive scrutiny of S. 1324 has changed my views in this respect.

With this fundamental premise in mind, I have worked closely with other Committee members and staff, CIA representatives, and interested public groups to find a proper balance under this bill which would:

Maintain the maximum feasible public access to CIA files of intelligence reports, and policy documents, consistent with the national security; and

Relieve the CIA of an unproductive burden of searching and reviewing those operational files from which it virtually never releases significant information.

I am pleased that significant amendments have been accepted by the chairman and the CIA, and that I can support reporting the Bill, as amended, to the floor. Chairman Goldwater has been very cooperative in withholding Committee action in order that I and others with particular concerns would have sufficient opportunity to see whether mutually acceptable solutions could be worked out in discussions with CIA representatives, and others. I want to thank in particular

Eric Newsom, my designee on the Select Committee on Intelligence staff, and John Podesta, from the Judiciary Committee staff, who were of special help in working out a satisfactory arrangement on judicial review.

In the Committee hearings and in separate meetings with CIA officials, four basic concerns have been identified. Most of the work of the last three months has concentrated on them. These key issues are:

1. How to provide for adequate judicial review of Agency designations of files as having operational functions and Agency placement of documents in designated files, and therefore the basis for exempting them from search and review under the FOIA.
2. How to ensure that adequate procedures exist for public access through FOIA and, if necessary, the judicial process, to documents relevant to alleged abuses and improprieties by the CIA.
3. How to devise mechanisms and arrangements so that public groups, such as historians and other researchers, could continue to have access to documents in designated files which could be significant in study of U.S. policies.
4. What specific commitments the CIA could and should make to improve responsiveness to FOIA requests concerning search and review of files not exempted by this Bill.

JUDICIAL REVIEW

Provision for adequate judicial review was of special concern to me.

I was dismayed by Deputy Director McMahon's testimony to the effect that the CIA did not believe the Bill as originally introduced would permit judicial review of its designations of files. I commend the CIA for moving from its initial position to one which is both more realistic and more in line with maintenance of public confidence.

After lengthy deliberations, the CIA has agreed to an amendment to S. 1324 to provide for judicial review of an allegation that the CIA has improperly designated a file as operational, and therefore exempt from FOIA search and review, or that the CIA has improperly placed records solely in designated files.

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

However, as a strong supporter of the FOIA, I also am resolved that the Agency must not be the sole judge of whether its decisions comply with the standards for designation established in this Bill. Therefore, the Bill now provides full authority for the courts to review the basis for file designations. In addition, upon my request, the CIA has agreed to Report language which makes clear that "(t)he bill does not deprive the court of its authority to attach to its additional affidavits, as part of its sworn response, the requested Agency records in extraordinary circumstances where essential to determine whether such records were improperly placed solely in designated files." My understanding of this language is that while a discovery process is not open to plaintiffs, the court retains the power to require the Agency to include such documents, even if highly classified and tightly held, as part of affidavits submitted by the CIA as part of its sworn response, in order that the court might itself examine those documents in camera and ex parte if necessary to reach a determination. CIA's agreement to this language was central to my acceptance of the amendment on judicial review.

ABUSES AND IMPROPRIETIES

Another major concern upon reading S. 1324 as introduced was that it had inadequate provision for public access through FOIA to documents which might pertain to an alleged abuse or impropriety involving the CIA. As originally written, the Bill seemed to leave it to the Agency's sole discretion as to what documents were or were not relevant to an investigation of an alleged abuse or impropriety.

I compliment my colleague, Senator Huddeston, for his diligent work in devising a solution to this issue. He has recommended a new provision in the Bill, to which the CIA agrees, providing that designation of a file will not prevent the search and review of that file for any information relevant to an official investigation of an alleged abuse or impropriety in the conduct of an intelligence activity. Bill language makes clear that an official investigation may be opened by either of the two intelligence committees, as well as the Intelligence Oversight Board, the General Counsel and the Inspector General, the internal investigative organs of the CIA, or the Director of the Agency.

In cases where relevant documents were either withheld or overlooked in an official investigation, such documents will be deemed to have been improperly filed, and will be subject to the judicial review process I have already described. Thus, the amendment will ensure that even where materials exist which were not "reviewed and relied upon" by official investigators, such material will continue to be accessible under the FOIA upon a determination by the courts.

HISTORIANS' ISSUES

A third set of issues related to those of special interest to historians and other research groups. Senator Durenberger has stressed the importance of ensuring that the designation concept does not put historically valuable files permanently out of reach of legitimate researchers.

A new provision to which the CIA has agreed will provide for review of the designation of files at least every ten years, upon the basis of criteria to be developed, and which must include the historical value or other public interest in the designated operational file, and the files potential for declassification.

The second part of Senator Durenberger's approach which I also strongly support, is an arrangement that the Agency will establish a procedure for selective declassification of material in nondesignated and dedesignated files. This is an extremely significant agreement with the CIA, in view of the present administration's negative policy on declassification. Senator Durenberger and Mr. Casey can count on my support in implementing this selective declassification system.

This change in the Bill and the separate arrangement will ensure better access to materials of interest to historians and other public interest groups through the designation review and declassification process. As a cosponsor with Senator Durenberger of the Freedom of Information Improvement Act to reestablish the public interest standard in the national security provisions of the FOIA, I believe inclusion of that as one of the criteria which must be weighed by the Agency in its periodic review of designations is a major step.

AGENCY RESPONSIVENESS

The essence of the compromise which has been reached on this Bill is a trade of relief for the CIA from search and review of its most sensitive operational files in return for better Agency responsiveness on FOIA requests relating to information in other significant CIA file systems. My continued support of this Bill on the floor and in conference with the House is predicated on the understanding that the Agency will fulfill its commitment. To ensure that the Agency undertakes specific steps to this end, draft Report language stipulates, and the Agency agrees, that:

The CIA will prepare and submit to the Committee a program of administrative measures to improve processing of FOIA requests. This program is to include a detailed plan to eliminate the current backlog of FOIA requests.

The Agency agrees not to reduce its budgetary and personnel allocation for FOIA processing for two years after enactment of this Bill. This will enable the Committee to evaluate the Agency's budgetary and personnel requirements to ensure timely and responsive handling of FOIA requests.

The CIA will provide the Committee with its annual FOIA statistical report, as well as periodic progress reports and briefings on implementation of the program for improved FOIA response.

The other side of the coin is that the committee will make good use of its oversight powers and the additional information to be provided to it by the CIA to ensure the agency fulfills its side of this bargain. I, for one, intend to do so.

OTHER ISSUES

There are a number of less critical but still insignificant matters to be spelled out in agreed Report language. This is, I understand, well in train, and a draft Report should soon be available for us to review. As with any piece of legislation, interpretive Report language can be critical in establishing the Committee's

intent. Therefore, once again, my further support for this bill is conditional upon satisfactory completion of the report.

Finally, there is the matter of comments and ideas from interested public groups. This has been a rather fast process for such an important piece of legislation. While we have sought to consult informally with interested groups where possible, candidly they have not had sufficient time to study the Bill as amended and to express their views as organizations. There should be ample time for them to examine this amended Bill as well as the Report language prior to action on the floor. I remain ready to hear the considered views and comments of public interest groups, and naturally reserve the right to take such views and comments into account prior to a final vote on passage of the Bill after floor debate.

After this lengthy recitation, Mr. Chairman, let me repeat that I am indeed pleased at the progress made in strengthening this Bill, and I commend the CIA for its cooperative attitude. It gives me great satisfaction to be able to vote for reporting the Bill as amended with a favorable recommendation to the Senate.

The CHAIRMAN. Thank you, very much, Pat.

Joe, did you have anything?

Senator BIDEN. Yes; I would like to read a portion of my statement and then put the rest in the record, if I may.

The CHAIRMAN. That will be done.

Senator BIDEN. It is redundant, but congratulations to you, Mr. Chairman, and to Senators Durenberger, Leahy, and Huddleston, for your success in finding a precise legislative solution to some of the specific problems that have been identified concerning the CIA's responsibilities under the Freedom of Information Act. For quite a few years now, many affected parties and interested observers have described the almost blinding complexity of this question. Others have analyzed the competing and seemingly irreconcilable objectives of protecting the valid secrets of necessarily secret intelligence agencies on the one hand, and insuring the American people that they have absolutely the fullest possible access to Government information, on the other.

We have all, time and time again, used the word "balance" to indicate the ultimate goal of improved and more reasonable treatment for the CIA under the Freedom of Information Act. But it was you who worked on this in the committee who were able to see your way through the maze of complexities and draft legislation responsive to the need for balance.

I think one result of the committee's work on this bill over the last several months has been an increase in the admiration which the committee has for the seriousness and respect with which the CIA has responded to requests from the public for information under the Freedom of Information Act.

The committee should use this markup, one of its rare opportunities, I might add, in open session, to congratulate the CIA for its fastidious compliance with the Freedom of Information Act, even though the CIA had sharp, and as we have recognized today, legitimate criticisms of the act. Although the American people cannot, as we did, investigate how the CIA has met its legal responsibilities under the Freedom of Information Act, they should be reassured that the members of the Central Intelligence Agency have recognized the rights to information of the American people.

With S. 1324, though, we are formally removing large areas of very important information from even nominal coverage by the Freedom of Information Act. As such, the bill reminds us that it is only through congressional oversight that the American people can be

assured that the constitutional system of checks and balances extends to secret intelligence programs.

Most of the activities of greatest concern to the American public are precisely the ones whose records will fall into these operational files. The implementation of the President's Executive order on intelligence activities, the occurrence of U.S. intelligence operations against U.S. persons, and the intelligence components of the conduct of U.S. foreign policy are activities of this sort.

I feel strongly that with the passage of this bill, we should expect from the CIA a firm commitment to provide full reporting to both the congressional oversight committees that deal with intelligence operations.

In short, Mr. Chairman, I think we are doing what needs to be done, but I think it enhances or increases our responsibilities to look at what is not any longer going to be available for public scrutiny.

Thank you, Mr. Chairman.

[The full, prepared statement of Senator Biden follows:]

STATEMENT OF SENATOR BIDEN AT MARKUP OF S. 1324, THE INTELLIGENCE INFORMATION ACT OF 1983

I would like to congratulate and thank Senators Goldwater, Durenberger, Leahy, and Huddleston, for their success in finding a precise legislative solution to some of the specific problems that have been identified concerning the Central Intelligence Agency's responsibilities under the Freedom of Information Act. For quite a few years now, many affected parties and interested observers have described the almost blinding complexity of this question. Others have analyzed the competing and seemingly irreconcilable objectives of protecting the valid secrets of necessarily secret intelligence agencies, on the one hand, and ensuring that the American people have absolutely the fullest access to government information possible, on the other.

We have all, time and time again, used the word "balance" to indicate the ultimate goal of improved and more reasonable treatment for the CIA under the Freedom of Information Act". But it was my colleagues on the Committee who were able to see their way through this maze of complexities and draft a legislative response that has not only the aim of balance but its achievement. S. 1324 with amendments, has my full support.

I think one result of the Committee's work on this bill over the last several months has been to increase the admiration that the Committee has for the seriousness and respect with which CIA has responded to requests from the public for information under the Freedom of Information Act.

The intelligence agencies' experience of spending hundreds of hours on the review of highly sensitive documents that anyone with the least familiarity with intelligence operations and techniques knows will never see the light of day can only have been frustrating.

The Committee should use this markup, one of its rare appearances in open session, to congratulate CIA for it fastidious compliance to FOIA even though the CIA had sharp, and as we have recognized today, legitimate criticisms of that Act. Although the American people cannot, as we did, fully investigate how CIA has met its legal responsibilities under the FOIA, they should be reassured that the members of the Central Intelligence Agency recognize the rights to information of the American people.

Having expressed my support on S. 1324, I feel it important to remark that it is unfortunate that S. 1324, as legitimate as its purposes, is [illegible] a series of information control initiatives advanced by the Administration whose purposes are far less legitimate. Because [illegible] minish and qualify the information available to the American people, Americans are suspicious of any attempt [illegible] that have an effect on the free flow of information.

For example Executive Order 12356 [illegible] in April 1982 reversed both [illegible] President Eisenhower's Administration [illegible] government information. Similarly, [illegible]

guarding National Security Information raised the spectre of greatly enlarging the number of current or former government officials who must submit their writings to a pre-publication review process. There is no indication that there has been any study of the delays in publication that this extended application would produce, of the restraining effect it would create on public commentary, or even of the hypothetical benefits that it would produce. That March Directive further threatens to increase the use of the polygraph throughout the federal government even though the merits of that particular investigative technique are highly problematic.

These various steps are only a few of the attempts which the Administration has made in order to curtail and re-constitute the information available to the public on the workings of the government. As I have said, it is an ironic but established fact that this Administration, with its scorn for the values of government and the people who work for it, has consistently tried to limit access of the American people to information about the workings of the government.

Fortunately, S. 1324 is a refreshing change from these broad attempts to reduce the availability of government information. It recommends quite specific and narrow changes in response to identified problems. It expresses a spirit of moderation and compromise. It is based on concrete experience. It appears to have the support of a spectrum of political outlooks. It appears to be, in short, a reasonable solution to the problem of CIA's spending the time and talents of experienced intelligence officers on the review of mountains of documents that have virtually no chance of being disclosed under the Freedom of Information Act.

When S. 1324 was first introduced I had questions on several important issues. Most importantly, these questions related to the needs for some sort of judicial review of file designations under the bill and for continued public access to information on intelligence improprieties and illegalities. Today I believe that the amendments that have been worked out provide satisfactory answers to these questions.

However, S. 1324 has the effect of accentuating the importance of Congressional oversight of U.S. intelligence operations. It has often been said that Congressional oversight goes hand in hand with occasional public scrutiny of intelligence activities through the window provided by the FOIA. In practice, this was never really the case across the board. As the Committee's research has shown, under FOIA the Central Intelligence Agency has never been required to disclose a meaningful amount of information from its operational files.

With S. 1324, though, we are formally removing large areas of very important information from even nominal coverage by the FOIA. As such, S. 1324 reminds us that it is only through Congressional oversight that the American people can be assured that the Constitutional system of checks and balances extends to secret intelligence programs.

Most of the activities of greatest concern to the American public are precisely the ones whose records will fall into operational files. The implementation of the President's Executive Order on Intelligence Activities, the application of U.S. intelligence operations against U.S. persons, and the intelligence components of the conduct of U.S. foreign policy are activities of this sort.

I feel strongly that with the passage of S. 1324 the Committee should expect from the CIA a firm commitment to provide full reporting on and to facilitate Congressional oversight of all U.S. intelligence operations.

The CHAIRMAN. Thank you, very much.

Lloyd, did you have any comments?

Senator BENTSEN. Thank you, Mr. Chairman. I'll put mine in the record.

The CHAIRMAN. Are there comments from other members?

Senator CHAFEE. Mr. Chairman, just briefly.

This represents the culmination of a long effort, as you know, in connection with this area of legislation. I think a lot of credit should go to Billy Doswell, formerly with the CIA as head of their External Affairs Office, and who was instrumental in helping initiate work on this bill. I know that he worked hard with the press association and others at trying to arrive at a satisfactory solution. I take it that if it doesn't have unanimous approval, it has a good deal of approval, which is quite something when we're dealing with the Freedom of Information Act. So I just hope we can get on with these compromises that have been worked out. Finally, may I say I congratulate you, Mr. Chairman?

The CHAIRMAN. Senator Roth, do you have any comments?

Senator ROTH. No.

The CHAIRMAN. We have a quorum present, and I propose to amend S. 1324 by striking all after the enacting clause, which ends at line 2 and substitute the following, beginning with line 3 of the proposed substitute and continuing to the end. Is there a second?

Senator HUDDLESTON. I second, Mr. Chairman.

The CHAIRMAN. A second is heard.

All those in favor signify by saying aye.

[A chorus of ayes.]

The CHAIRMAN. The ayes have it.

Now, does anybody want to speak on the substitute?

Hearing nothing in the affirmative, all those in favor of reporting the bill as amended will say aye.

[A chorus of ayes.]

The CHAIRMAN. The ayes have it. The bill will be reported.

The committee report for S. 1324 will be ready by the time we get back from our recess, and it will be disseminated to members for their approval within the next 2 weeks. In fact, it is in the final draft form now.

Well, I want to thank all of you, and I particularly want to thank Vicki Toensing and the whole staff. This has been a real work of love and a challenge, because when you start tampering with the Freedom of Information Act, it is sort of like rewriting the Bible. There are some in favor of it and there are some opposed to it. But I think this is going to make a big difference in the operation of the CIA. I think it will save money and will speed up their operations.

Do any of you have any comments to make on any other subject?

Senator HUDDLESTON. Move we adjourn.

The CHAIRMAN. Move we adjourn? I hear that motion, and without objection, the motion to adjourn is approved.

[Thereupon, at 3 p.m., the markup on S. 1324 was concluded and the committee adjourned, subject to the call of the Chair.]

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