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SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
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PUBLIC HEARING

H.R. 5164, CIA INFORMATION ACT

2203 Rayburn House Office Building
May 10, 1984

WITNESS LIST

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Chairman Glenn English
Government Information, Justice, and Agriculture Subcommittee

Hearing on H.R. 5164, CIA Information Act
May 10, 1984

OPENING STATEMENT

The subject of today's hearing is H.R. 5164, the Central Intelligence Agency Information Act. H.R. 5164 was introduced by Congressman Mazzoli, Chairman of the Legislation Subcommittee of the House Committee on Intelligence. The bill was jointly referred to the Intelligence Committee and the Government Operations Committee.

Last month, H.R. 5164 was ordered reported by the Intelligence Committee, and a report was filed on May 1. A similar bill, S.1324, was passed by the Senate last year.

This legislation exempts selected CIA files from search and review under the Freedom of Information Act. The theory behind the bill is that these files contain information that is exempt from disclosure under the FOIA. By exempting files from unproductive search and review, the backlog of FOIA requests at the CIA will be reduced, FOIA requests will be processed more rapidly, and the security of CIA information will be protected. At the same time, no information now available to a requester will be removed from public availability. These are worthy goals, and our purpose here today is to find out if the bill lives up to these goals.

I would like to make clear at the outset that the need for secrecy in the conduct of intelligence operations is not at issue today. No one disputes that secrecy has its place in intelligence activities. The Freedom of Information Act has always recognized that the government has a legitimate need for secrecy to protect our national security interests.

At the same time, however, intelligence agencies do possess information about which the public can legitimately inquire and which is relevant to public debate. The House Intelligence Committee report on H.R. 5164 lists examples of this type of information. These include:

--Directives on the management, coordination, and general conduct of intelligence activities;

--National Intelligence Estimates, including estimates relating to the 1962 Cuban missle crisis;

--Memoranda from the CIA General Counsel on the legality of covert action operations;

--Records concerning CIA efforts to forestall publication of news stories on the Glomar Explorer; and

--Internal CIA studies of particular intelligence operations, such as the Berlin Tunnel operation in the 1950's.

It is our responsibility in this Committee and in the Congress to balance the national security needs for an effective intelligence service and the benefits of an informed public. Finding the appropriate balance between these two important values is our ultimate goal here today.

STATEMENT OF

CHARLES A. BRIGGS

EXECUTIVE DIRECTOR

CENTRAL INTELLIGENCE AGENCY

BEFORE THE

GOVERNMENT OPERATIONS SUBCOMMITTEE

ON GOVERNMENT INFORMATION, JUSTICE & AGRICULTURE

10 MAY 1984

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, IT IS A PLEASURE TO APPEAR BEFORE YOU THIS MORNING TO DISCUSS H.R. 5164, THE "CENTRAL INTELLIGENCE AGENCY INFORMATION ACT". WE LAST APPEARED BEFORE YOU TO DISCUSS OUR CONCERNS WITH THE FREEDOM OF INFORMATION ACT (FOIA) IN FEBRUARY 1980. SINCE THAT TIME, THE CENTRAL INTELLIGENCE AGENCY (CIA) HAS PERSISTED IN ITS EFFORTS TO ACHIEVE NEEDED RELIEF FROM THE UNIQUE PROBLEMS POSED TO IT BY THE FOIA. WE BELIEVE THAT H.R. 5164 WILL PROVIDE THE CIA WITH SUBSTANTIAL RELIEF FROM THESE PROBLEMS WITHOUT REDUCING THE AMOUNT OF MEANINGFUL INFORMATION WHICH CAN BE RELEASED TO THE PUBLIC.

AS YOU KNOW, MR. CHAIRMAN, DEPUTY DIRECTOR MCMAHON HAS PRESENTED OUR PROBLEMS WITH THE FOIA IN GREAT DETAIL TO BOTH THE SENATE AND HOUSE INTELLIGENCE OVERSIGHT COMMITTEES DURING THE COURSE OF THE 98TH CONGRESS. WITH YOUR PERMISSION, MR. CHAIRMAN, I WOULD LIKE TO SUBMIT FOR THE RECORD DEPUTY DIRECTOR MCMAHON'S EXPLANATION OF THESE PROBLEMS AS CONTAINED IN THE STATEMENT HE GAVE BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE LAST FEBRUARY. I WILL THEN SUMMARIZE THESE PROBLEMS AND BRIEFLY DISCUSS H.R. 5164.

AS AN INTELLIGENCE AGENCY, OUR RECORDS SYSTEMS MUST BE RESPONSIVE TO BOTH THE FUNCTIONS OF THE CIA AS WELL AS TO THE SECURITY NEEDS OF THE AGENCY. THEREFORE, RATHER THAN HAVING ONE OVERALL FILING SYSTEM WITH ONE CENTRAL INDEX, THE CIA HAS

NUMEROUS SELF-CONTAINED FILE SYSTEMS. COMPARTMENTATION FULFILLS A VITAL SECURITY NEED AND ALSO ALLOWS EACH FILE SYSTEM TO REFLECT THE NEEDS OF AN INDIVIDUAL AGENCY COMPONENT. OUR OPERATIONAL FILES ARE EVEN MORE STRINGENTLY COMPARTMENTED BECAUSE THEY DIRECTLY REVEAL INTELLIGENCE SOURCES AND METHODS. ANOTHER RELEVANT SECURITY PRINCIPLE WE OPERATE UNDER IS THAT AGENCY PERSONNEL HAVE ACCESS TO SPECIFIC FILES ONLY ON A "NEED TO KNOW" BASIS. WHEN AN FOIA REQUEST IS RECEIVED BY THE CIA THESE PRINCIPLES OF COMPARTMENTATION AND LIMITED ACCESS ARE BROKEN DOWN. AN FOIA REQUEST ON A GENERALLY DESCRIBED SUBJECT MATTER MUST BE DISTRIBUTED TO SEVERAL DIFFERENT AGENCY COMPONENTS SO THAT A SEARCH CAN BE MADE OF ANY FILE SYSTEM WHICH MIGHT CONTAIN RESPONSIVE RECORDS. IN MANY INSTANCES THE RESULTS OF THESE SEARCHES ARE PRODIGIOUS. THOUSANDS OF PAGES OF RECORDS ARE AMASSED FOR REVIEW EACH YEAR. THUS, RECORDS OTHERWISE RESIDING IN COMPARTMENTED FILE SYSTEMS ARE PULLED TOGETHER AND NUMBERS OF AGENCY PERSONNEL ARE GIVEN ACCESS TO INFORMATION WHICH THEY OTHERWISE HAVE NO NEED TO KNOW.

ONCE RESPONSIVE RECORDS ARE LOCATED, THEY MUST BE CAREFULLY REVIEWED 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 WHICH COULD BE USED BY OUR ADVERSARIES. THE REVIEWING OFFICER IS FULLY AWARE OF THE REQUIREMENT OF THE FOIA THAT EACH "REASONABLY SEGREGABLE" ITEM OF UNPROTECTED

INFORMATION MUST BE RELEASED AND THAT HE OR SHE MUST BE PREPARED TO DEFEND EACH DETERMINATION TO WITHHOLD AN ITEM OF INFORMATION BECAUSE IT IS CLASSIFIED OR OTHERWISE EXEMPTED FROM RELEASE UNDER THE FOIA.

THIS REVIEW PROCESS IS PARTICULARLY BURDENSOME WHEN IT INVOLVES OUR OPERATIONAL RECORDS. AN FOIA REQUESTER WHO MAKES A REQUEST FOR INFORMATION TO THE CIA WHICH INVOLVES RECORDS IN OUR DIRECTORATE OF OPERATIONS CAN NOW ANTICIPATE WAITING TWO TO THREE YEARS TO RECEIVE A RESPONSE. THE BACKLOG WHICH STEMS FROM THE TIME-CONSUMING PROCESS OF REVIEWING OPERATIONAL RECORDS CANNOT BE SOLVED FOR THE CIA BY SIMPLY HIRING MORE REVIEWERS. THESE INDIVIDUALS ARE NOT AND CANNOT BE SIMPLY CLERICAL STAFF OR EVEN "FOIA PROFESSIONALS". IN ORDER TO DO THEIR JOB, THEY MUST BE CAPABLE OF MAKING DIFFICULT AND VITALLY IMPORTANT OPERATIONAL JUDGMENTS, AND, CONSEQUENTLY, MOST OF THEM MUST COME FROM THE HEART OF THE AGENCY'S INTELLIGENCE CADRE. MOREOVER, BEFORE ANY ITEM OF INFORMATION IS RELEASED UNDER THE FOIA, THE RELEASE MUST BE CHECKED WITH A DESK OFFICER WITH CURRENT KNOWLEDGE OF THE OPERATIONAL ACTIVITY INVOLVED. HENCE, WE MUST NOT ONLY CALL INTELLIGENCE OFFICERS ON A FULL-TIME BASIS AWAY FROM THEIR PRIMARY DUTIES, BUT WE MUST ALSO CONTINUALLY DIVERT THE ATTENTION OF THE OFFICERS OF OUR OPERATING COMPONENTS. I AM SURE THAT YOU CAN UNDERSTAND THE NECESSITY FOR THIS PRACTICE SINCE THE RISK OF COMPROMISE IS SO GREAT. UNFORTUNATELY, EVEN WITH THIS PRACTICE WE KNOW THAT

MISTAKES CAN BE MADE AND, THEREFORE, THE ELEMENT OF HUMAN ERROR IN THE REVIEW AND RELEASE OF OPERATIONAL RECORDS IS ALWAYS PRESENT AND ALWAYS A CONCERN.

AFTER WAITING TWO TO THREE YEARS, WHAT DOES THE FOIA REQUESTER RECEIVE WHEN OPERATIONAL RECORDS ARE INVOLVED? THE PAPER RELEASED IS USUALLY A COMPOSITE OF BLACKED OUT WORDS, INTERSPERSED BETWEEN DISCONNECTED PHRASES WHICH HAVE BEEN APPROVED FOR RELEASE. THUS, AFTER OPERATIONAL RECORDS HAVE BEEN PROPERLY REVIEWED PURSUANT TO THE EXISTING EXEMPTIONS IN THE FOIA, THE PUBLIC DERIVES LITTLE OR NO MEANINGFUL INFORMATION FROM THE FRAGMENTARY ITEMS OR THE OCCASIONAL ISOLATED PARAGRAPH WHICH IS ULTIMATELY RELEASED FROM OPERATIONAL FILES.

THE FACT THAT THESE EXEMPTIONS ARE PROVIDED IN THE FOIA IS GENERALLY LOST ON OUR HUMAN SOURCES AND FRIENDLY FOREIGN INTELLIGENCE SERVICES. IN THEIR VIEW, THE VERY PROCESS OF SEARCHING OPERATIONAL FILES AND REVIEWING THE INFORMATION CONTAINED IN THEM POSES A SERIOUS THREAT TO THE ABILITY OF THE UNITED STATES TO PROTECT EITHER THEIR IDENTITY OR THE INFORMATION THEY ENTRUST TO US.

IN OUR VIEW, MR. CHAIRMAN, H.R. 5164 WILL SUBSTANTIALLY ALLEVIATE THE PROBLEMS I HAVE JUST OUTLINED. ONLY OPERATIONAL FILES AS DEFINED BY THIS BILL WOULD BE REMOVED FROM THE FOIA SEARCH AND REVIEW PROCESS. AS I HAVE JUST EXPLAINED, THE OPERATIONAL INFORMATION CONTAINED IN THESE FILES TAKES THE

LONGEST TO REVIEW AND RESULTS IN THE RELEASE OF LITTLE, IF ANY, MEANINGFUL INFORMATION TO THE PUBLIC. THE PUBLIC, THEREFORE, RETAINS ITS ACCESS UNDER THE LAW TO OTHER AGENCY RECORDS. THIS INCLUDES ALL INTELLIGENCE WHICH IS DISSEMINATED TO OUR NATION'S POLICY-MAKERS, AS WELL AS ALL MATTERS OF POLICY FORMULATED AT AGENCY EXECUTIVE LEVELS. IN ADDITION, UNDER H.R. 5164, THE CIA WOULD CONTINUE TO SEARCH ALL ITS FILES, AS IT DOES TODAY, IN RESPONSE TO THREE TYPES OF REQUESTS, THESE BEING REQUESTS BY UNITED STATES CITIZENS OR PERMANENT RESIDENT ALIENS FOR INFORMATION CONCERNING THEMSELVES, REQUESTS FOR INFORMATION CONCERNING A COVERT ACTION THE EXISTENCE OF WHICH IS NO LONGER CLASSIFIED, AND REQUESTS FOR INFORMATION CONCERNING THE SPECIFIC SUBJECT MATTER OF AN INVESTIGATION FOR ANY IMPROPRIETY OR ILLEGALITY IN THE CONDUCT OF AN INTELLIGENCE ACTIVITY.

THERE ARE TWO OTHER IMPORTANT PROVISIONS IN H.R. 5164 WHICH I WOULD LIKE TO TOUCH UPON. FIRST, THERE IS THE REQUIREMENT THAT NO LESS THAN ONCE EVERY 10 YEARS THE DIRECTOR OF CENTRAL INTELLIGENCE SHALL REVIEW ALL THE EXEMPTIONS IN FORCE TO DETERMINE WHETHER ANY CAN BE REMOVED. THIS COULD ALLOW OPERATIONAL FILES TO BECOME ACCESSIBLE TO FOIA SEARCH AND REVIEW WHEN THE SENSITIVITY OF THE INFORMATION THEY CONTAIN HAS DIMINISHED AS A RESULT OF THE PASSAGE OF TIME OR FOR OTHER REASONS. AND SECONDLY, H.R. 5164 SETS FORTH THE RIGHT OF REQUESTERS TO SEEK JUDICIAL REVIEW OF AN AGENCY DECISION TO WITHHOLD INFORMATION BASED ON THE PROVISIONS OF THIS ACT.

As you know, Mr. Chairman, legislation very similar to this was passed unanimously by the Senate last November. H.R. 5164 comes to you after having been unanimously reported out of the House Permanent Select Committee on Intelligence. I believe the strong bipartisan support being shown for this legislation stems from the recognition that this is a carefully crafted piece of legislation which will benefit the public as well as the CIA. The public will benefit because FOIA requesters will be able to receive responses to their requests on a more timely basis without the loss of any meaningful information.

This concludes my testimony, Mr. Chairman. I have with me the Deputy Director of the Office of Legislative Liaison, Ernest Mayerfeld, and Larry Strawderman, Chief of the Information and Privacy Division. We will be pleased to answer any specific questions you or the other Members may have.

STATEMENT

OF

CHARLES S. ROWE
EDITOR & CO-PUBLISHER
THE FREE LANCE-STAR
FREDERICKSBURG, VIRGINIA

FOR THE

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

AND THE

AMERICAN SOCIETY OF NEWSPAPER EDITORS

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE & AGRICULTURE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

H.R. 5164
THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

MAY 10, 1984

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS CHARLES ROWE AND I AM THE EDITOR AND CO-PUBLISHER OF THE FREE LANCE-STAR IN FREDERICKSBURG, VIRGINIA. I AM TESTIFYING TODAY ON BEHALF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS. WE APPRECIATE THE OPPORTUNITY TO SHARE OUR CONCERNS WITH YOU ABOUT THIS LEGISLATION TO EXEMPT CERTAIN OPERATIONAL FILES FROM THE SEARCH AND REVIEW PROVISIONS OF THE FREEDOM OF INFORMATION ACT.

THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IS A NONPROFIT MEMBERSHIP CORPORATION ORGANIZED UNDER THE LAWS OF THE COMMONWEALTH OF VIRGINIA. ITS MEMBERSHIP CONSISTS OF NEARLY 1400 NEWSPAPERS ACCOUNTING FOR MORE THAN 90 PERCENT OF U.S. DAILY AND SUNDAY CIRCULATION. MANY NON-DAILY NEWSPAPERS ALSO ARE MEMBERS.

THE AMERICAN SOCIETY OF NEWSPAPER EDITORS IS A NATIONWIDE, PROFESSIONAL ORGANIZATION OF MORE THAN 850 MEN AND WOMEN WHO HOLD POSITIONS AS DIRECTING EDITORS OF DAILY NEWSPAPERS THROUGHOUT THE UNITED STATES.

MR. CHAIRMAN, LIKE YOU, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS ARE FIRMLY COMMITTED TO THE EXISTING FREEDOM OF INFORMATION ACT (FOIA OR THE ACT). THROUGH FOIA, THE PRINCIPLES OF OPEN GOVERNMENT UPON WHICH THIS COUNTRY WAS FOUNDED BECOME A REALITY. THE ACT STANDS AS TANGIBLE PROOF THAT A FREE PEOPLE ARE ENTITLED TO INFORMATION ABOUT HOW THEIR GOVERNMENT OPERATES AND HOW ITS DECISIONS ARE MADE. WHEN PUBLISHERS AND EDITORS DEFEND FOIA, WE DO

SO NOT SOLELY IN OUR PERSONAL INTEREST, BUT IN THE INTERESTS OF OUR FREE SOCIETY AND ALL ITS INDIVIDUAL CITIZENS.

THERE IS AN IMPORTANT POINT WHICH MUST BE REMEMBERED IN LOOKING AT THE CENTRAL INTELLIGENCE AGENCY (CIA) AND ITS PROBLEMS WITH FOIA. THE EXISTING STATUTE CONTAINS THE EXCEPTIONS REQUIRED TO STRIKE THE DELICATE BALANCE BETWEEN OPENNESS IN GOVERNMENT AND THE NEED FOR A DEGREE OF SECRECY IN OUR INTELLIGENCE OPERATIONS. EXEMPTIONS 1 AND 3 OF FOIA, IN CONJUNCTION WITH SECTION 102(D)(3) OF THE NATIONAL SECURITY ACT OF 1947, PROTECT CLASSIFIED NATIONAL SECURITY INFORMATION AND INTELLIGENCE SOURCES AND METHODS FROM DISCLOSURE. COURTS HAVE GIVEN GREAT DEFERENCE TO THE CIA IN IMPLEMENTING THESE EXCEPTIONS.

MR. CHAIRMAN, OVER THE PAST FEW YEARS WE HAVE CAREFULLY FOLLOWED VARIOUS FOIA EXEMPTION PROPOSALS DEALING WITH THE CIA. WE STRONGLY OPPOSED A BLANKET EXEMPTION OF THE CIA FROM THE REQUIREMENTS OF FOIA. WE HAVE ALSO HAD SERIOUS RESERVATIONS CONCERNING THE PROVISIONS OF S 1324 WHICH WOULD EXEMPT CERTAIN CIA OPERATIONAL FILES FROM THE SEARCH AND REVIEW REQUIREMENTS OF FOIA. AT THE SAME TIME, I MUST POINT OUT THAT REPRESENTATIVES OF THE NEWSPAPER BUSINESS HAVE NOT REJECTED OUT OF HAND THE CIA'S PLEAS FOR RELIEF FROM FOIA SEARCH AND REVIEW REQUIREMENTS. OVER THE PAST FEW YEARS, WE HAVE MET SEVERAL TIMES WITH CIA OFFICIALS TO DEVELOP A DIALOGUE ON THIS ISSUE.

WITH RESPECT TO S 1324, WHICH PASSED THE SENATE NOV. 17, 1983, WE WERE CONCERNED THAT THE LEGISLATION COULD UNNECESSARILY DENY INFORMATION TO THE PUBLIC WHICH NOW IS AVAILABLE, AND WE

WERE NOT SATISFIED WITH REPORT LANGUAGE ON CIA EFFORTS TO ADDRESS THE BACKLOG OF FOIA REQUESTS. WE ALSO FAVORED A MUCH STRONGER JUDICIAL REVIEW PROVISION THAN WAS INCLUDED IN THE SENATE BILL.

I WOULD NOW LIKE TO ADDRESS THESE THREE CONCERNS IN THE CONTEXT OF HR 5164 AS REPORTED BY THE HOUSE PERMANENT SELECT INTELLIGENCE COMMITTEE.

UNDER THIS VERSION, CERTAIN OPERATIONAL FILES WILL BE EXEMPT FROM THE SEARCH AND REVIEW REQUIREMENTS OF FOIA. THE STATED RATIONALE FOR THIS EXEMPTION IS THAT THESE FILES ALMOST NEVER CONTAIN INFORMATION RELEASABLE UNDER THE ACT, AND THAT BY UNBURDENING THE CIA FROM LABORIOUS REVIEW REQUIREMENTS, THE AGENCY WILL BE ABLE TO CLEAN UP ITS BACKLOG AND GENERALLY GIVE MORE EXPEDITIOUS CONSIDERATION TO OTHER FOIA REQUESTS. THIS LEGISLATION GIVES THE CIA DIRECTOR THE RESPONSIBILITY TO DESIGNATE THE FILES COVERED BY THE EXEMPTION.

HOWEVER, THERE ARE TWO UNDERLYING PREMISES WHICH MUST WORK IN UNISON IF THE STATED ENDS ARE TO BE ACHIEVED. FIRST, WE MUST PLACE OUR FAITH AND TRUST IN THE CIA TO CAREFULLY EXECUTE ITS RESPONSIBILITIES IN ACCORDANCE WITH THE STATUTE. SECONDLY, WE MUST LOOK TO THE CONGRESS FOR STRINGENT OVERSIGHT TO GUARD THE PUBLIC INTEREST AGAINST EXCESSES BY THE AGENCY.

MR. CHAIRMAN, THE HISTORICAL RECORD OF THE CIA, MOST RECENTLY PUNCTUATED BY THE MINING OF THE NICARAGUAN HARBOR, BRINGS EACH OF THESE PREMISES INTO SERIOUS QUESTION. UNDER THE INTELLIGENCE OVERSIGHT ACT OF 1980, THE CIA IS TO KEEP THE HOUSE AND SENATE

INTELLIGENCE COMMITTEES "FULLY AND CURRENTLY INFORMED OF ALL INTELLIGENCE ACTIVITIES." NEVERTHELESS, THE CHAIRMAN OF THE SENATE SELECT INTELLIGENCE COMMITTEE AND SEVERAL OTHER MEMBERS OF THE COMMITTEE CLAIMED THEY WERE NOT ADEQUATELY INFORMED ABOUT CIA MINING OF A NICARAGUAN HARBOR. CLEARLY, THE QUESTION WHICH COMES TO MIND IS, "IF THE CIA DOES NOT MEET ITS RESPONSIBILITIES UNDER THE INTELLIGENCE OVERSIGHT ACT, CAN WE EXPECT IT TO RESPECT THE PARAMETERS OF THIS LEGISLATION?" AND FURTHER, "IF THE OVERSIGHT COMMITTEES ARE NOT BEING ADEQUATELY INFORMED OF CIA ACTIVITIES, HOW WILL THEY BE ABLE TO MONITOR EFFECTIVELY THE IMPLEMENTATION OF HR 5164?" THIS BILL PROVIDES THAT OPERATIONAL FILES CONCERNING THE SUBJECT MATTER OF AN OFFICIAL INVESTIGATION WILL NOT BE EXEMPT FROM FOIA SEARCH AND REVIEW. BUT CAN WE EXPECT SUCH AN INVESTIGATION EVER TO BE TRIGGERED IF THE INTELLIGENCE COMMITTEES ARE SHIELDED FROM INFORMATION ON IMPORTANT ACTIVITIES OF THE CIA?

MR. CHAIRMAN, IN TESTIMONY BEFORE THE HOUSE AND SENATE INTELLIGENCE COMMITTEES WE EMPHASIZED THE NEED FOR FREQUENT AND THOROUGH OVERSIGHT OF THE CIA'S IMPLEMENTATION OF THIS LEGISLATION. TODAY WE EMPHATICALLY REPEAT OUR CALL FOR SKEPTICAL OVERSIGHT. THE CIA, THROUGH THIS LEGISLATION, WILL BE VESTED WITH A GREAT DEAL OF POWER WHICH, IF MISUSED, COULD SUBVERT THE SPIRIT OF PUBLIC ACCESS TO INFORMATION.

THIS COMMITTEE SHOULD MONITOR CLASSIFICATION OF FILES TO ENSURE THAT THE EXEMPTIONS BUILT INTO THIS LEGISLATION - FOR REQUESTERS SEEKING INFORMATION CONCERNING THEMSELVES, COVERT ACTIONS AND INVESTIGATIONS FOR IMPROPRIETY OR ILLEGALITY - ARE ADHERED TO BY THE AGENCY.

FURTHER, THE CIA SHOULD BE STRICTLY ACCOUNTABLE TO THIS COMMITTEE FOR CLEAN UP OF THE BACKLOG AND DEVELOPMENT. IN TESTIMONY BEFORE THE HOUSE SELECT PERMANENT INTELLIGENCE COMMITTEE, JOHN MCMAHON, DEPUTY DIRECTOR OF THE CIA, STATED THAT CURRENTLY THERE ARE "OPERATIONS" STAFFERS ASSIGNED TO FOIA REQUESTS, AND UPON PASSAGE OF THE LEGISLATION THESE STAFFERS WILL BE TRANSFERRED BACK TO THE OPERATIONS DIRECTORATE. WE WANT TO ENSURE THAT THE FOIA OFFICE IS ADEQUATELY STAFFED TO HANDLE FOIA REQUESTS. THE LEGISLATION SHOULD PROVIDE FOR ANNUAL REPORTS BY THE CIA TO THE HOUSE AND SENATE INTELLIGENCE COMMITTEES AND TO YOUR COMMITTEE ON THE HANDLING OF FOIA REQUESTS, INCLUDING THE EXISTENCE OF A BACKLOG, THE AVERAGE RESPONSE TIME TO A FOIA REQUEST, AND STAFFING LEVELS.

THIS COMMITTEE, TO SATISFY ITSELF THAT THE CIA IS KEEPING ITS PROMISES - BOTH AS TO THE BACKLOG AND THE FILE DESIGNATIONS -SHOULD BE WILLING TO HEAR FROM FOIA REQUESTERS WHO SERIOUSLY BELIEVE THE SPIRIT OF THIS BILL IS NOT BEING RESPECTED BY THE AGENCY.

WE ARE PLEASED WITH THE MUCH IMPROVED JUDICIAL REVIEW PROVISION CONTAINED IN HR 5164. WE VIEW DE NOVO JUDICIAL REVIEW AS A CORNERSTONE OF THE FREEDOM OF INFORMATION ACT. UNDER HR 5164, THE COURT WILL EXERCISE DE NOVO REVIEW OF THE AGENCY'S FILE DESIGNATION.

WHILE THIS LEGISLATION GENERALLY EXEMPTS OPERATIONAL FILES FROM FOIA SEARCH AND REVIEW THERE HAS BEEN AN ATTEMPT IN THE LEGISLATION TO CAREFULLY DELINEATE THE TYPE AND LOCATION OF FILES

WHICH FALL INTO THIS CATEGORY. THERE ARE EXCEPTIONS FOR FIRST PARTY REQUESTERS, COVERT ACTIONS AND OFFICIAL INVESTIGATIONS OF IMPROPRIETY.

UNFORTUNATELY, MR. CHAIRMAN, THE CONGRESS' EFFORT TO BALANCE THE PUBLIC'S NEED FOR INFORMATION WITH THE NEED TO KEEP NATIONAL DEFENSE SECRETS MAY ALL BE FOR NOUGHT GIVEN RECENT DEPARTMENT OF JUSTICE/OMB REGULATIONS. UNDER THESE REGULATIONS, ANY RECORDS EXEMPTED FROM DISCLOSURE UNDER THE PRIVACY ACT OF 1974 ARE ALSO EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT. THIS IS A REVERSAL OF THE DEPARTMENT OF JUSTICE AND OMB'S POSITION WHICH IT HAS HELD SINCE PASSAGE OF THE PRIVACY ACT IN 1974. THE DEPARTMENT OF JUSTICE/OMB REGULATIONS ARE ALSO CONTRARY TO THE WELL REASONED OPINION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN GREENTREE V. CUSTOMS SERVICE 674 FED 74 (D.C. CIRCUIT 1983). THE ISSUE IS ONE WHICH THE U.S. SUPREME COURT HAS DECIDED TO REVIEW.

UNDER SUBSECTIONS J AND K OF THE PRIVACY ACT, THE CIA HAS EXEMPTED RECORDS AND SYSTEMS OF RECORDS FROM DISCLOSURE. HOWEVER, FIRST AND THIRD PARTY REQUESTORS HAVE A RIGHT TO USE THE FOIA TO MAKE A REQUEST FOR THESE SAME RECORDS -- IN THIS CASE, EXEMPTIONS 1 AND 3 OF FOIA GOVERN THE DISCLOSURE OF INFORMATION. THESE EXEMPTIONS ARE LESS BROAD THAN THOSE AVAILABLE UNDER THE PRIVACY ACT.

THE EFFECT OF THE NEW OMB INTERPRETATION WOULD BE TO ALLOW AGENCIES SUCH AS THE CIA TO EXEMPT BROAD CATEGORIES OF RECORDS UNDER THE AUTHORITY OF THE PRIVACY ACT, THUS FORECLOSING FOIA

ACCESS BEYOND EVEN THE AUTHORITY OF THIS BILL. THIS WAS NOT THE INTENT OF CONGRESS WHEN IT PASSED THE PRIVACY ACT. SECTION 552A (B)(2) WAS SPECIFICALLY INSERTED INTO THE PRIVACY ACT IN ORDER TO PRESERVE THE PUBLIC'S RIGHTS UNDER FOIA.

MR. CHAIRMAN, WE RECOMMEND THAT THE JUSTICE/OMB INTERPRETATION OF THE RELATIONSHIP BETWEEN THE PRIVACY ACT AND FOIA BE OVERTURNED THROUGH LEGISLATION TO REFLECT THE ORIGINAL AND TRUE MEANING OF CONGRESS. WE BELIEVE THAT THIS BILL GOES FAR ENOUGH IN THE DIRECTION OF ACCORDING DISCRETION TO THE AGENCY IN FOIA AREA. WE DO NOT WANT THE CIA TO BE ABLE TO FORECLOSE ACCESS UNDER FOIA BY INVOKING THE BROAD PRIVACY ACT EXCEPTIONS.

## CONCLUSION

OUR NATION'S NEWSPAPERS RECOGNIZE THE NEED FOR A DEGREE OF SECRECY IN OUR INTELLIGENCE OPERATIONS. BUT THIS NEED MUST NOT OVERSHADOW THE PRINCIPLE OF OPEN GOVERNMENT IN OUR FREE SOCIETY. AS JUSTICE BLACK STATED IN NEW YORK TIMES V. UNITED STATES, 403 U.S. 713, 724 (1971),

> "SECRECY IN GOVERNMENT IS FUNDAMENTALLY ANTIDEMOCRATIC, PERPETUATING BUREAUCRATIC ERRORS. OPEN DEBATE AND DISCUSSION OF PUBLIC ISSUES ARE VITAL TO OUR NATIONAL HEALTH."

MR. CHAIRMAN, THIS COMMITTEE, AND IN PARTICULAR THIS SUBCOMMITTEE, HAS LEGISLATIVE RESPONSIBILITY FOR THE FREEDOM OF INFORMATION ACT. WE IN THE PRESS ARE VERY GRATEFUL FOR YOUR ONGOING

ROLE IN PROTECTING THE FOIA FROM ASSAULT. IF THE PENDING LEGISLATION IS TO BE ENACTED, WE ASK YOU TO EXERCISE CAREFUL VIGILANCE OVER THE CIA'S IMPLEMENTATION OF ITS PROVISIONS. THE PUBLIC RELIES ON YOU TO SAFEGUARD ITS RIGHT TO AN OPEN GOVERNMENT AND TO ASSURE THAT INFORMATION RELEASABLE UNDER CURRENT LAW REMAINS ACCESSIBLE.

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

ON H.R. 5164

BEFORE THE
SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
MAY 10, 1984

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on H.R. 5164. The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the Freedom of Information Act 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 amend the FOIA. This is especially true with respect to the CIA, for the FOIA has been a significant part of a larger process over the past ten years of bringing that Agency under public and congressional scrutiny. While maintaining this skepticism, we have concluded after long and careful consideration of H.R. 5164 that this bill will be a gain for public access to CIA information and we therefore support the bill.

Anyone who has made an FOIA request to the CIA knows that the wait for a substantive response is intolerable -- two to three years. There is good reason to believe that this delay is primarily due to the amount of time that it takes to review

records in the Agency's operational files. We also know from nearly ten years of litigation with the CIA that, with very few exceptions, documents from operational files, as that term is narrowly defined in the bill, are exempt under the provisions of the FOIA and that the courts do not order the release of such information. (In some instances, the CIA has released documents from operational files with everything deleted but random words that have no meaning, and therefore we do not regard these releases as meaningful.)

These factors suggest that if operational files are exempt from routine search and review, with exceptions to cover substantive material which is now released, the delay in responding to requests will be reduced and no meaningful information which is currently released will be lost. Accordingly, we took the position that if both these conditions were met -- improved service and no loss of currently available information -- we would support legislation to exempt CIA operational files from routine search and review. We believe that H.R. 5164 meets these tests and should be enacted.

Operational files are defined in the bill as: (1) files in the Directorate of Operations "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;" (2) files in the Dirctorate for Science and Technology "which document the means by which foreign intelligence or counter-

intelligence is collected through scientific and technical systems;" and (3) files in the Office of Security "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." The Report of the House Intelligence Committee makes clear that the files in these three components covered by these definitions "concern the intelligence process as distinguished from the intelligence product."

Files within these three components which do not meet the statutory definitions will not be eligible for exemption from search and review. Furthermore, records in all other parts of the CIA, including information which originated in the operational components, will continue to be subject to search and review. For example, all documents which go to the Director of Central Intelligence, even if they concern the most intimate details of an operation, will be subject to search and review. Furthermore, all intelligence collected through human and technical means will continue to be covered by the FOIA because the operational components forward such information to the analytic components of the Agency. What will be exempt from search and review is information about how intelligence is collected -- for example, how a source was spotted and recruited, how much he is paid, and the details of his meetings with his case officer. Such information is invariably exempt from disclosure under the FOIA and will continue to be exempt under any conceivable standard for classification.

In some instances, collected intelligence is so sensitive that it is disseminated to analysts and policy-makers on an "eyes only" basis and then returned to the operational component for storage. To cover these situations and to guard against the possibility of an expansion of this practice to circumvent the intent of this legislation, the bill also includes a proviso that files maintained within operational components as the sole repository of disseminated intelligence cannot be exempt from search and review.

The bill provides for three circumstances in which operational files will be subject to search and review. First, information about covert operations in operational files will be subject to search and review if the fact of the existence of the operation is not exempt from disclosure under the FOIA. This provision codifies well-established case law that in some instances the existence of such operations can be properly classified. However, if the existence of a covert operation is not properly classified, the Agency will be required to review all its records concerning the operation.

Second, any information in operational files which concerns the subject matter of an investigation for impropriety or illegality in the conduct of an intelligence activity will be subject to search and review. Such investigations may conducted by the Agency's Inspector General or General Counsel, by the congressional oversight committees, or by the President's Intelligence Oversight Committee. It is important to note from the legislative history of the bill that the CIA undertakes investigations whenever it

receives an allegation of illegality or impropriety from any member of the public, except where the individual has repeatedly made frivolous allegations. The House Intelligence Committee Report makes clear that "frivolous allegations" are those such as "the CIA is manipulating by brain waves."

Whenever such an investigation is conducted, all information concerning the subject matter will be subject to search and review even if the investigators did not review the particular documents. This is an important improvement over the Senate bill which reaches only information that was reviewed or relied on in the course of an investigation.

This provision on the subject matter of investigations is very important for two reasons. First, for historical purposes, it insures that all information concerning the abuses that were addressed by the Church and Pike Committees will continue to be accessible. Second, if future abuses come to light, the public -- acting either on its own or through the congressional oversight committees -- can trigger investigations which will make relevant information in operational files subject to search and review. Thus, the bill insures that operational files cannot be used to hide information on improper and illegal activities of the CIA.

Third, the bill requires that operational files must be searched in response to requests by United States citizens and permanent resident aliens for information about themselves. This provision recognizes the importance of the right of individuals to be able to seek information about themselves in all CIA

files and also preserves the degree of access currently afforded by the Privacy Act.

In hearings before the House Intelligence Committee, we urged the Committee to consider whether the concept of first-person requests should be broadened to include United States political, religious, academic, and media organizations. The Committee staff investigated this issue carefully and found that it is very difficult to identify the nature of organizations from the CIA's indices without actually reviewing the files. Consequently, the Committee concluded that including organizations within the scope of first-person requests would require extensive file searches and thus jeopardize the goal of eliminating the delay in processing FOIA requests.

We are willing to live with this judgment because of the proviso in the bill that requires the CIA to search operational files for the subject matter of an investigation. Under this proviso, an organization that suspects it is being improperly used or targeted by the CIA can request an investigation, and the information concerning that investigation will be subject to search under the FOIA. Consequently, we believe that the interests of organizations involved in First Amendment activity are adequately protected by this bill.

The bill also contains a provision to insure that information in operational files will not necessarily be exempt from search and review forever. Every ten years the CIA is required to review its operational files to determine whether files, or

portions of files, of historic value or other public interest can be removed from exempt status and made subject to search and review. As an example of this process, the CIA has already assured the Senate Intelligence Committee that the files of the OSS, which are currently maintained by the Operations Directorate, will not be exempt from search and review. Another provision of the bill also requires the Agency, in consultation with the Archivist, the Librarian of Congress, and historians selected by the Archivist, to submit a report to Congress by June 1, 1985, on the feasibility of reinstituting systematic declassification reviews of historically significant information. Although this provision is not directly connected to the FOIA, it responds to the complaints of historians over the Reagan Administration's elimination of systematic declassification reviews.

In the area of judicial review, the House bill is a marked improvement over the Senate bill. In hearings last June before the Senate Intelligence Committee, the CIA took the position that there should be no judicial review of whether a particular file meets the definition of operational or whether particular documents are improperly placed solely in operational files. The Committee, at our urging, rejected this position and insisted on judicial review. However, the Senate bill and the accompanying report left some confusion over whether the standard of review was de novo, as under the FOIA, or a more generous arbitrary and capricious standard. H.R. 5164 resolves this confusion by making it crystal clear that review is de novo. The bill

also codifies certain litigation procedures concerning the parties' submissions, discovery, and in camera proceedings that do not depart from the practices which the courts currently apply in FOIA cases involving classified information.

The House bill also contains an improvement over the Senate bill with respect to the issue of retroactivity. The provisions of both bills will cover all requests pending at the administrative stage on the date of enactment. This provision makes sense because if the bill had only prospective effect, it would take another two to three years to eliminate the backlog and thus defeat one of our principal interests in this legislation. However, the House bill, unlike the Senate bill, does not apply retroactively to any lawsuit which was pending on February 7, 1984. This date was selected because it was the day before the hearings before the House Intelligence Committee where members of the Committee expressed opposition to the retroactivity provision of the Senate bill. To avoid a rush to the courthouse, the Committee chose that date rather than the date of enactment as the cut-off point.

For the foregoing reasons we believe that this bill will not enable the CIA to withhold any meaningful information which the Agency is now required to release or which it would be required to release under any conceivable standard for classification. Furthermore, the Director of Central Intelligence has provided the House Intelligence Committee with a written assurance that he will establish a specific program of measures to speed up the processing of FOIA requests. The Director has also agreed

not to reduce the current budgetary and personnel allocations for FOIA processing for the first two years after enactment of the bill so that the resources now devoted to processing operational files will be devoted to eliminating the backlog in processing requests for all other information. Another positive effect of the legislative process which has produced this bill is that the two intelligence committees and their staffs have become intimately familiar with and interested in the administration of the FOIA at the CIA. Consequently, we can expect vigorous oversight in this area and attentive follow-through to insure that the CIA delivers on its promises to improve FOIA processing.

Since both our criteria for this legislation have been met, we support H.R. 5164 and urge its prompt enactment without further amendment. Furthermore, we must stress that any movement away from what has been achieved in H.R. 5164 would be unacceptable, and we would oppose any tinkering with this bill in a House-Senate conference. Since the CIA supports H.R. 5164 as it is, there should be no obstacle to enacting the bill without the need for a conference.

Thank you Mr. Chairman.

Mr. Chairman, and members of the committee, it is my pleasure to appear today, bringing to your attention my research into the proposed C.I.A. exemption to the Freedom of Information Act.

By way of introduction, I am Angus Mackenzie, director of the Freedom of Information Project at the Center for Investigative Reporting in San Francisco. I am a freelance reporter; this year my stories have appeared in Jack Anderson's column in more than 550 newspapers, on the cover of the Society of Professional Journalists magazine, The Quill, which goes to 28,000 scribes, and in the publication of the Newspaper Guild, called the Guild Reporter, among others.

I gained my expertise in the FOIA by banging my head against agency reluctance to supply documents that I know exist. Specifically, in 1979 while on assignment for the Columbia Journalism Review, themost prominent publication of its kind. I requested that the Central Intelligence Agency release files it accumulated during its campaign against the dissident U.S. press. As you know, the agency is prohibited from internal-security functions by the 1947 National Security Act, and because the exemptions to the FOIA enacted by Congress are NOT supposed to be used to cover up illegal activities, I expected the CIA to release them. That was in 1979.

With permission of the chairman, I wish to submit for the record of this hearing several of my articles describing the efforts of the CIA to keep those records from me. Suffice it to say that one of the goals of this legislation is to keep from me, and from the American public, information on how the CIA led the U.S. intelligence community on a war against domestic newspapers that were opposed to the Vietnam conflict.

The CIA infiltrated newspapers like the Quicksilver Times of Washington, D>C>, and kept control of local police informants through double-blind arrangements so that local informants in such places as Lubbock, Texas, did not know that the information they were giving local police regarding the publication of mimeographed sheets against the war was really going to the Central Intelligence Agency.

At the time, my article, "Sabotaging the Dissident Press," was published by the Columbia Journalism Review in March, 1981, not one record released to me under the FOIA by the CIA. I am still trying to obtain CIA documents regarding that campaign.

The first obstacle the agency threw in my path was a large fee for the search of its records. The agency wanted a down payment of $30,000 and a promise to pay a total of $61,501 for

the search, in return for which the agency said it might find no documents releasable. On the same day that my article was being picked up by the Associated Press, both in newspapers and radio stations nationwide, the agency stated that my work would not benefit the general public and so no fee waiver would be granted in this case.

With pro bono counsel provided by Steptoe and Johnson, obtained for me by the Reporters Committee for Freedom of the Press, I filed suit against the CIA June 14, 1982, and that case is still very much before the courts. Judge Pratt in this district has ordered the CIA to finish processing records on Ramparts magazine by May 15. However, from what we hqave seen so far it is clear that the agency is severely censoring most of the documents I have requested. In other instances, the agency has not admitted to possessing records which I can prove to this committee exist. In other instances, the agency has released records to others, but not to me, showing in my opinion some degree of arbitrariness. To the agency's credit, it forgot all about the $61,601 fee the minute I stepped into federal court with my complaint. The agency granted me a fee waiver in that case, but not in most of my other pending FOIA requests.

So that gives a brief explanation of how I come to be here today, and why I have gained some expertise with the FOIA, and how it applies to the CIA.

I oppose H.R 5164. I bring from The Newspaper Guild President, Charles A. Perlik, Jr., who regrets that he cannot be here today, a message for the commmittee. The Newspaper Guild is against this legislation, and asks you not to report it to the House.

This legislation has sailed through the Senate, and through one House committee, without even one public discussion of what this bill would cover up. Indeed, we have heard that this bill would hide nothing. The CIA says that. The ACLU says that. But I don't say that. I bring to you today research to show exactly what the agency intends this bill to hide, including some very embarassing CIA activities, like those actions against the dissident U.S. press.

I will also raise some political questions concerning whether or not Congress at this point really thinks it wise to grant to the Director of Central Intelligence sweeping new powers to keep secrets when he has been roundly blasted for keeping information from Congress regarding the mining of Nicaraguan ports. But first, allow me to examine with you the precise wording of the legislation before us -- wording that my research indicates was drafted by the CIA.

What does H.R. 5164 really say, and why? It says that operational files of the CIA may be exempted by the Director of Central Intelligence from the provisions of the FOIA.

Then, Sec. 710 (b) defines "operational files." That term

So the question of CIA domestic political activities is not exactly a thing of the past, necessarily.

Section 710 c) (3) presents another problem. It says that I will be able to request records when those documents have been "the specific subject matter of an investigation by the intelligence committees of the congress, etc."

Well, now, my request for CIA records of operation CHAOS which targeted the underground press, comes under this section. Indeed, because CHAOS was the subject of an investigation by Sen. Church°s committee on Government Operations with respect to intelligence activities, it might seem that those records would be accessible to me. But no. The Church committee did not SPECIFICALLY inspect the agency's files on the underground press, and this proposal would allow the CIA to therefore deny my request. Provisions such as this provide the CIA with loopholes which render the FOIA virtually useless.

At the House Intelligence Committee hearings on this legislation I specifically asked Mr. Mayerfeld what files on the dissident U.S. press might be available under FOIA should this legislation be enacted -- given that Sen. Church°s committee overlooked them. Mr. Mayerfeld said that he'd have to do more research into that question. The agency has used every legal and less-than-legal trick in the book to keep those files from me, and Mr. Mayerfeld's non-answer means that this section of the proposal would be used in court to deny my access to those files that now are almost 15 years old. At any rate, we might be tied up in court for the next five years figuring out whether that language means those files are exempt. The CIA has more money to pay lawyers than any newspaper in the nation, and any proposed legislation that would delay the release of information while what the meaning of the language is hashed out in court, accordingly serves the agency's intent.

So, to conclude this section of my testimony, I hope that I have begun to show that while the agency says this proposal would cover up nothing, that this is far from the case. The proposed law would in reality cover up much that is embarrassing to the agency.

Whether or not the proposed law is a coverup is a hard question to answer. First, C.I.A. files are secret. So no one outside the agency knows much about operational files. Second, the F.O.I.A. is so technical, especially in regards to the C.I.A., that only a handful of experts understand the bills.

However, this investigation has discovered that C.I.A. officials intend the proposed law to cover up some of its most embarassing illegal operations -- and some of its blunders. Worse, C.I.A. officials at a hearing on the proposal at the Capitol February 8 asked the House Intelligence Committee to remove one of the only checks on the agency's power -- judicial review of its files as provided for in the F.O.I.A.

F.O.I.A. requesters who are refused documents may file civil suit in federal court for the release of information. Judges may

means "(1) files of the Directorate of Operations which document the conduct of foreign intelligence OR intelligence OR security liaison arrangements OR information exchanges with foreign governments or their intelligence or security services."

Now I have capitalized the ORs here. Because what this bill as now written says is that intelligence activities of the CIA as recorded in DO are exempt from disclosure. The committee should understand that this amounts to an exemption from the search and release requirements of the FOIA for CIA domestic operations which were prohibited and still are prohibited by the 1947 National Security Act. This is because since 1967, CIA domestic operations have been run in part by the Directorate of Operations, and so files on any future domestic intelligence operations in the Directorate of Operations would be hidden by this legislation. I do not believe that it is Congress's intent to with this bill allow the CIA to cover up domestic operations of questionable legality. Yet that is exactly what this legislation will do, if passed.

Further, the bill as now written will allow the CIA to hide from the search and release requirements of the FOIA its liaison arrangements with local U.S. police departments. Again, the 1947 National Security Act prohibits CIA police functions, and we know that at least from 1967 onward the agency has worked very closely with local police, including running local police informants who were inside dissident publications. Now, as written, the proposal would allow the agency to hide documentation of any such continuing relationships of questionable legality with local police departments.

Likewise, the bill would allow the CIA to cover up its past and any future domestic operations by calling those operations "counterintelligence." This bill provides that counterintelligence files no longer have to be searched and released. Fine. Counterintelligence is the word the agency used to describe its entire program against the civil rights movement, the antiwar movement, and the so-called underground press. In other words, by approving this language, the Congress will be providing statutory permission for the CIA to cover up its domestic operations, which many fine people in the CIA agree are illegal. And that point, I am afraid, has not been raised in previous hearings on this proposal.

As I have said, I am opposed to this legislation, largely for the above reasons. If you are going to approve this measure, I would strongly hope that this committee would change the language of the measure, removing the ORs so that just foreign counterintelligence operations on foreign soil be exempted, and that only foreign security liaision arrangements be exempted. The least that could be done is not make this bill a coverup for domestic activities of questionable legality. I need not remind the committee that on December 4, 1981, President Reagan authorized CIA domestic counterintelligence activities again, and that the Director of Central Intelligence has been implicated by the White House chief of staff in domestic political espionage.

then summon the requested papers to their chambers, read them, and decide whether the agency's withholding decision was correct. So far the C.I.A. has not lost a single case on appeal. Nevertheless, it unnerves intelligence officials to have judges inspect their files.

In addition, C.I.A. officers dislike judicial review because the possibility of inspection prompts the agency to disclose information that it might otherwise withhold.

After F.O.I.A. suits are filed, officials release information to head off the possibility that a judge might reverse the agency's decision to withhold documents.

One section of the bill passed by the Senate may retroactively remove judicial review by permitting the dismissal of pending cases that now seek C.I.A. operational files. Last year Senator Patrick J. Leahy, Democrat from Vermont, asked the C.I.A. to specify which lawsuits the proposed law might dismiss of the sixty-odd pending against it. The C.I.A. responded on September 22 with a list of 12 that it said "may be affected." This investigation has centered on that unpublished list and has pulled the complete filings out of courthouses from around the nation -- a task not performed by either of the congresssional intelligence committees which approved this legislation.

This C.I.A. list of suits that this legislation may affect essentially remains the only indiction of agency intent in a debate stymied by the cloak over the files in question. Here, then, are the suits the agency says might be dismissed by the proposed law, giving some indication of the type of information the agency wishes to hide under this proposed law.

* Ann Arbor, Michigan -- Glen L. Roberts owns a computer software company. He publishes a newsletter that describes itself as "a fresh outlook on government arrogance." He requested C.I.A. files on David S. Dodge, formerly the acting American University president in Beirut who was kidnapped there July 19, 1982, and released July 21, 1983.

The C.I.A. failed to produced its records. Roberts sued. On September 28, 1983, U.S. District Court Judge Charles W. Joiner ordered the C.I.A. to produce information by January 26, 1984. One day prior to that deadline, the agency express mailed Roberts five Directorate of Operations documents which indicated inconclusively that the agency did not have much direct knowledge of the Dodge affair. The papers were heavily censored.

Roberts is now seeking more of the withheld Dodge documents. His lawsuit remains on the C.I.A.°s "may be affected" list apparently because the information he wants is held by the agency's Directorate of Operations, which is one of the departments of the agency to be exempt from disclosure under the proposed law.

* Washington, D.C. -- On August 6, 1982, Monica Andres, formerly the librarian for the American Civil Liberties Union's Center for National Security Studies, requested C.I.A. documents regarding agency involvement in the El Salvador elections of March, 1982. The C.I.A. failed to produce and the Center sued on

October 5, 1982. In response, the agency released some information.

One memorandum of January 22, 1982, two months before the election, appears to describe what the agency proposed to assist the balloting. Subpoint A in that memo details the intended use of "indelible ink" to identify those who might try to vote more than once, and the need for 8,000 lights to illuminate the identifying ink on voters' hands. Other subpoints were deleted.

One expert on Central America, Robert Armstrong, says, "On the basis of those documents, we can say the C.I.A. was involved in the El Salvador elections in areas other than had previously been admitted by the Director of Central Intelligence. If we get the rest of those documents, we could see what that role was."

A C.I.A. affidavit filed with the court says the release of more information "would reasonably be expected to increase tensions between the U.S. and the country at issue."

* Washington,D.C. -- The C.I.A. responded to another Center for National Security Studies suit by releasing reports from C.I.A. infiltrators inside the Students for a Democratic Society (the defunct radical group), the Vietnam Veterans Against the War, radical U.S. bookstores and newspapers, and the Los Angeles antiwar convention at the University of California July 21 and 22, 1972. The agency also released an informant report on Pacific News Service, the San Francisco-based syndicate. Those domestic operational files are of particular interest because the agency is prohibited from "internal-security functions" by the 1947 National Security Act.

The C.I.A. included this lawsuit in its "may be affected" list, perhaps because, as CNSS attorney Graeme W. Bush says, "We've gotten a whole lot of documents from the operational files. Although some say the files are worthless, the Center has found useful stuff in them."

Washington, D.C. -- J. Gary Shaw of Cleburne, Texas, is investigating with a coalition of researchers the President John F. Kennedy assassination. So he requested C.I.A. files on suspects including right-wing French terrorists in Dallas that fateful day who hated Kennedy. The C.I.A. refused Shaw's 300 requests for information, so he sued the agency 32 times. Since those lawsuits began, the agency has released to Shaw four linear feet of files, his attorney says.

Shaw's suits have been consolidated, and now six of them constitute half of the 12 on the "may be affected" list, making the Kennedy-related information the single biggest pile of paper the agency has said it wants to hide under the proposed law.

One source who attended a secret meeting to discuss the list between representatives of a congressional committee and C.I.A. attorneys says the Kennedy-related requests are indeed for operational files and so clearly would be dismissed by the Senate's version of the legislation.

Reader's Digest writer Henry Hurt says the Kennedy C.I.A. files are "essential" and he is incorporating those released to Shaw in his forthcoming book on the tragedy. Shaw says the

nuggets of information contained in the files already released to Shaw contradict C.I.A. claims that any operational files that have been released contain little useful information.

Says Hurt, "There's no one left at the C.I.A. who understands the relevance of those files. If they DO think there's anything useful in them, they WON'T release it. It is my job to make sense out of those thousands of pages. Each nugget I discover contributes to the larger picture. It is chilling to think of having those files cut off by this legislation."

* New York City -- Digest writer Hurt wrote a book on Dr. Nicholas George Shadrin, who had commanded a Russian navy destroyer before he defected to the U.S. in 1959. On December 20, 1975, something went wrong. Shadrin disappeared from Vienna, Austria and is presumed dead.

Hurt and others have accused the C.I.A. of mishandling Shadrin, of twisting his arm to become a double agent, a role that ended with his disappearance. Tad Szulc in New York magazine roasted the agency for using Shadrin as "bait for the Russians."

To clarify matters, on July 9, 1979, Reader's Digest requested Shadrin's C.I.A. file. The C.I.A. refused. On September 11, 1979, the Digest sued. In court, C.I.A. officials said 50,000 pages of information were involved -- a document-count that later ran the agency into trouble with the judge. Intelligence officials also said, "The Shadrin case is of such sensitivity that the disclosure of even fragementary details...could jeopardize the lives of our sources."

Nevertheless, under the gun of judicial review, the agency between January and May, 1980, released 61 Shadrin documents. U.S. District Court Judge Robert J. Ward was convinced by the C.I.A. that "this information should not be revealed," and he prepared to dismiss the case.

The C.I.A. then changed its document count from 50,000 to 205,000 and displayed other inconsistancies so gross that the judge reversed his inclination to dismiss the case and complained, "The court has been lead on a merry chase." The judge asked the U.S. attorney if pending legislation might affect the case, on which the judge was spending so much time. The U.S. attorney indicated no such legislation was pending. However, unknown to the judge, legislation that might affect the case had been introduced to Congress three years earlier in 1979, and was high on the C.I.A.°s list of congressional priorities.

The judge ordered the Shadrin file brought from C.I.A. headquarters into his chambers for his inspection because he could no longer believe the C.I.A. Ten months later, on April 22, 1983, the C.I.A. had yet to deliver the papers to the judge.

"The old government game is at work, that if we delay long enough, they will go away," complained the judge. Finally, only 5,000 pages were brought to his chambers. His decision is pending on whether to make that information public.

* Washington, D.C. -- The C.I.A. list of suits that may be affected includes one that seeks information on behalf of this correspondent regarding the agency's targeting of dissident U.S.

periodicals, exposed in "Sabotaging the Dissident Press," Columbia Journalism Review, March/April, 1981. C.I.A. congressional liaision Ernest Mayerfeld refused to specify to this reporter which of its files on U.S. publications the agency would seek to hide with this proposed law. To answer that, he said, would require further research. This suit seeks withheld documents on the New York-based radical Guardian, the defunct Washington, D.C., Quicksilver Times, which was infiltrated by C.I.A. agent Salvatore John Ferrera, and Ramparts magazine.

The C.I.A. claims the proposed law would cover up nothing. But really the measure would allow the agency to hide some of the most controversial information in its possession. Even if pending lawsuits were allowed to continue, as provided for in the House bill, the proposal would give the C.I.A. more ammo in court with which to fight future releases of information. Indeed, the court battles under the proposed law would be so expensive and lengthy that attempts to obtain information by F.O.I.A. lawsuit might be beyond the resources of journalists. The agency, never a friend of free information, always leaning naturally toward secrecy, will certainly use this proposed law to keep its operations secret.

Reporters need access to government documents to inform the public. To allow Mr. William Casey to designate which of his agency's documents will be kept from the public is a conflict of interest not allowed other agency chiefs. And when that CIA head himself was, as the President's campaign manager, involved in domestic political espionage, as exposed by Debategate scandals, the broadening of his already-considerable power to keep secrets seems a dubious proposition, especially when he is under fire for illegally withholding information from Congress regarding the mining of Nicaraguan ports. Instead, Congress might better safeguard open government by strengthening, not weakening, the power of the judiciary to inspect and order the release of information concerning the activities of all government agencies, especially the CIA, whose covert operations here and abroad continue to be so controversial.

And finally I would like to answer one question -- why, when the Department of Defense, like the CIA, holds much classified data, does the DoD so promptly respond to FOIA requests, while the CIA maintains such a large backlog? The answer was given to me by an old State Department and CIA hand, who attended the House Intelligence Committee hearing on this legislation. He said that the DoD has always kept on eye on public opinion, and has had to lobby hard and publicly for its appropriations. So when the public asks DoD for something under the FOIA, DoD responds as the laws says it must. But, pointed out this observer, the CIA has never had to worry as much about public opinion, nor about the public debate over its appropriations. That for me explained the mystery of why the CIA drags its feet on the FOIA when DoD, also full of secrets, makes an effort to comply with the time limits of the FOIA. What the CIA needs is not this legislation to clear up its paperwork, but rather instructions from Congress that it must now comply with the FOIA.

STATEMENT OF RALPH W. MCGEHEE
AUTHOR OF
DEADLY DECEITS MY 25 YEARS IN THE CIA
AND A REPRESENTATIVE OF THE FUND FOR OPEN
INFORMATION AND ACCOUNTABILITY, INC.

BEFORE

THE GOVERNMENT OPERATIONS COMMITTEE OF THE HOUSE OF REPRESENTATIVES

ON

PROPOSED LEGISLATION TO REMOVE CERTAIN CIA FILES FROM THE REQUIREMENTS THE FREEDOM OF INFORMATION ACT.

17 MAY 1984

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE THE GOVERNMENT OPERATIONS COMMITTEE TO EXPRESS THE CONCERNS OF THE FUND FOR OPEN INFORMATION AND ACCOUNTABILITY, INC. RE THE PROPOSED LEGISLATION. I AM A RETIRED CIA OFFICER WHO EARNED NUMEROUS AWARDS AND MEDALS INCLUDING THE CIA'S PRESTIGIOUS CAREER INTELLIGENCE MEDAL. WHILE IN THE CIA I HAD EXTENSIVE EXPERIENCE IN DOCUMENT MANAGEMENT AND FILE SYSTEM MANAGEMENT IN THE DIRECTORATE OF OPERATIONS. I AM ALSO KNOWLEDGEABLE ABOUT THE FILE SYSTEMS OF THE DIRECTORATE OF SUPPORT AND THE DIRECTORATE OF SCIENCE AND TECHNOLOGY. ONE OF MY SUGGESTIONS RESULTED IN A MAJOR CHANGE IN THE PROCESSES FOLLOWED IN THE VARIOUS DIRECTORATE FILE SYSTEMS.

I AT ONE TIME SUPERVISED A VAST FILE REVIEW COVERING A PERIOD OF SOME MONTHS. MY EXPERIENCE DISPROVES CIA CLAIMS THAT IT CANNOT ADEQUATELY HANDLE FOIA REQUESTS. SUCH CAN BE ACCOMPLISHED QUICKLY IF THERE IS THE INTENT TO COMPLY WITH THE REQUIREMENTS OF THE FOIA ACT. THE CIA HAS ONE OF THE WORST RECORDS I N RESPONDING TO FOIA REQUESTS NOT DUE TO THE DIFFICULTY OF THE TASK BUT BECAUSE OF ITS DELIBERATE DELAYS.

THE PROPOSED LEGISLATION EXEMPTS FROM THE PROVISIONS OF FOIA THE FILES OF THE DIRECTORATE OF OPERATIONS WHICH DOCUMENT THE CONDUCT OF FOREIGN INTELLIGENCE OR COUNTERINTELLIGENCE OPERATIONS OR INTELLIGENCE OR SECURITY LIAISON ARRANGEMENTS OR INFORMATION EXCHANGES WITH FOREIGN GOVERNMENTS OR THEIR INTELLIGENCE SERVICES. AS NOTED IN THE U.S. SENATE'S CHURCH COMMITTE INVESTIGATION OF THE CIA, LIAISON OPERATIONS ARE A VAST MAJORITY OF ITS TOTAL OPERATIONS. A ROUGH ESTIMATE INDICATES THAT SOME 80 TO 90 PERCENT OF ITS FILES WOULD FALL INTO THE LIAISON CATEGORY AND THEREFORE WOULD BE EXEMPT FROM FOIA PROVISIONS.

IN THE 1960'S AND EARLY 1970'S THE CIA CONDUCTED AN ILLEGAL OPERATION CALLED MHCHAOS. MHCHAOS ASSETS MONITORED VIA LIAISON WITH FOREIGN SECURITY AND INTELLIGENCE SERVICES LOCALLY AND INTERNATIONALLY-BASED DOMESTIC DISSIDENTS. THE CIA BURGLARIZED THEIR HOTEL ROOMS, THEIR HOMES AND BUGGED THEIR CONVERSATIONS. VIA SUCH LIAISON ACTIVITY MHCHAOS COMPILED FILES ON ONE THOUSAND DOMESTIC ORGANIZATIONS AND INDEXED THE NAMES OF HUNDREDS OF THOUSANDS OF AMERICANS. INFORMATION ABOUT SUCH ILLEGAL OPERATIONS WOULD BE DENIED FOIA REQUESTS UNDER THE PROVISIONS OF THE PROPOSED LEGISLATION.

THE DIRECTORATE OF OPERATIONS UNILATERALLY AND IN LIAISON WITH OTHER SECURITY SERVICES SPONSORED THE WRITING OF MORE THAN A THOUSAND BOOKS. IT PLANTED INFORMATION IN THE U.S. MEDIA VIA FOREIGN ASSETS. IT SUBVERTED AND USED, FREQUENTLY VIA LIAISON OPERATIONS, RELIGIOUS, LABOR, VETERAN, YOUTH, STUDENT, TEACHER AND BUSINESS GROUPS. ALL OF THIS INFORMATION WOULD BE EXEMPT FROM THE PROVISIONS OF FOIA.

THE DIRECTORATE OF OPERATIONS, IN LIAISON WITH FOREIGN SECURITY SERVICES, ATTEMPTED TO ASSASSINATE FOREIGN LEADERS. IN THE LAST FEW YEARS THE DDO HAS,IN LIAISON WITH FOREIGN SECURITY SERVICES, PLANTED A "COMMUNIST" WEAPONS SHIPMENT AND FORGED DOCUMENTS TO DECEIVE THE AMERICAN PEOPLE AND CONGRESS TO GET THEM TO SUPPORT ITS COVERT ACTION GOALS. THESE AND UNDOUBTABLY NUMEROUS OTHER SUCH INCIDENTS OCCUR WITHOUT THE KNOWLEDGE OF CONGRESS OR THE AMERICAN PEOPLE AND DETAILS OF SUCH WOULD BE DENIED FOIA QUERIES UNDER THE PROPOSED LEGISLATION.

THE PROPOSED LEGISLATION WOULD EXEMPT FROM FOIA REVIEW FILES OF THE DIRECTORATE FOR SCIENCE AND TECHNOLOGY WHICH DOCUMENT THE MEANS BY WHICH FOREIGN INTELLIGENCE OR COUNTERINTELLIGENCE IS COLLECTED THROUGH SCIENTIFIC AND TECHNICAL SYSTEMS.

IN THE PAST THE DIRECTORATE FOR SCIENCE AND TECHNOLOGY TESTED, ON UNWITTING SUBJECTS, A VARIETY OF DRUGS AND MIND ALTERING TECHNIQUES. ONE U.S. ARMY COLONEL COMMITTED SUICIDE AFTER BEING SUBJECTED TO SUCH TESTING. THE DDS&T HAS ALSO EXPERIMENTED IN THE EFFECTS OF RADIATION, ELECTRIC SHOCK, PSYCHOLOGICAL, SOCIOLOGICAL AND HARASSMENT TECHNIQUES. DETAILS OF THESE ILLEGAL AND DANGEROUS OPERATIONS WOULD BE DENIED THE PUBLIC UNDER THE PROPOSED LEGISLATION.

THE PROPOSED LEGISLATION WOULD EXEMPTTHE FILES OF THE OFFICE OF SECURITY WHICH DOCUMENT INVESTIGATIONS CONDUCTED TO DETERMINE THE SUITABILITY OF POTENTIAL FOREIGN OR COUNTERINTELLIGENCE SOURCES.

IN THE PAST THE OFFICE OF SECURITY HAS MASSIVELY VIOLATED U.S. LAW USING SUCH JUSTIFICATIONS.

OSTENSIBLY LOOKING FOR FOREIGN AND DOMESTIC DISSIDENCE THE OS VIA OPERATION MERRIMAC INFILTRATED MORE THAN 10 ORGANIZATIONS INCLUDING THE WASHINGTON ETHICAL SOCIETY, THE WAR RESISTERS LEAGUE, THE CONGRESS FOR RACIAL EQUALITY, THE WOMENS STRIKE FOR PEACE, THE HUMANIST SOCIETY AND THE URBAN LEAGUE.

ANOTHER OS PROJECT, RESISTANCE, WAS OSTENSIBLY DESIGNED TO PROTECT AGENCY RECRUITERS ON COLLEGE CAMPUSES BUT SOON EXPANDED INTO A MAJOR INTELLIGENCE EXCHANGE OPERATION WITH DOMESTIC AND FOREIGN POLICE SERVICES. IN ADDITION THE OS SURVEILLED NUMEROUS INDIVIDUALS, USED 32 WIRETAPS, BUGGED 32 INSTALLATIONS AND BROKE INTO 12 ESTABLISHMENTS.

THE FILES OF THE OS AS OF MID 1975 CONTAINED OVER 900,000 FILES AND 950,000 CARD INDEXES ON OTHER INDIVIDUALS. THE OS HAD SECURITY FILES ON 75 SITTING MEMBERS OF CONGRESS. VIRTUALLY ALL OF THIS INFORMATION WOULD BE REMOVED FROM THE PROVISIONS OF THE FOIA ACT UNDER THE PROPOSED LEGISLATION.

IN THIS CURRENT ERA OF POLITICAL INTOLERANCE WHEN THE ADMINISTRATION HAS REWRITTEN THE CLASSIFICATION SYSTEM TO ASSURE MORE INFORMATION IS CLASSIFIED, HAS RESTRICTED THE FLOW OF FILMS INTO AND OUT OF THE COUNTRY, HAS ATTEMPTED -- BUT WAS FOILED BY CONGRESSIONAL ACTION -- TO SUBJECT GOVERNMENT OFFICIALS TO LIFETIME CENSORSHIP, HAS THREATENED UNIVERSITIES CONCERNING THEIR RIGHT TO PUBLISH AND DISCUSS UNCLASSIFIED INFORMATION AND NOW ATTACKS THE FOIA IN THIS AND FUTURE LEGISLATION I SUGGEST THAT THE OVERRIDING OBJECTIVE OF CONGRESS SHOULD BE TO VIGOROUSLY PROTECT AND EXPAND RATHER THAN LIMIT THE FOIA ACT.

THE PROPOSED LEGISLATION PERMITS THE INTELLIGENCE COMMITTEES OF CONGRESS, THE INTELLIGENCE OVERSIGHT BOARD AND THREE ELEMENTS OF THE CIA (SIC) TO REQUEST SEARCH AND REVIEW. THE CIA HAS NEVER VOLUNTEERED TO CONGRESSIONAL OVERSIGHT THE DETAILS OF ITS ILLEGAL ACTIVITIES: ITS DRUG TESTING/MIND CONTROL OPERATIONS, ITS MAIL OPENING ACTIVITIES, ITS PENETRATION OF AMERICAN ACADEMIA, MEDIA, LABOR; STUDENTS, YOUTH, RELIGIOUS AND OTHER GROUPS, ITS SURVEILLANCE OF AMERICAN NEWSMEN, ITS ILLEGAL BREAKINS OF HOMES AND FOREIGN EMBASSIES, ITS MASSIVE AND TOTALLY ILLEGAL CHAOS OPERATION AIMED AT AMERICAN POLITICAL ACTIVITIES, ITS ATTEMPTS VIA FOREIGN LIAISON TO ASSASSINATE FOREIGN LEADERS AND NUMEROUS OTHER ILLEGAL ACTIVITIES. EVEN THE NATIONAL SECURITY COUNCIL WAS NOT BRIEFED ON 70 TO 80 PERCENT OF ITS COVERT OPERATIONS.

IT IS RELEVANT TO NOTE THAT THE MAJOR INVESTIGATIONS OF THE CIA BY CONGRESS HAVE BEEN TRIGGERED BY MEDIA EXPOSÉS BASED IN A LARGE PART ON INFORMATION ACQUIRED VIA THE PROVISIONS OF FOIA. CONGRESSIONAL INTELLIGENCE COMMITTEES DO NOT HAVE THE MANPOWER TO DELVE INTO ALL THE MYRIAD AREAS OF ILLEGAL CIA OPERATIONS -- AND THE CIA HAS PROVED THAT IT WILL NOT VOLUNTEER SUCH INFORMATION TO CONGRESS. TO APPROVE THIS LEGISLATION IS TO UNLEASH, WITH SMALL OPPORTUNITY OF DISCOVERY, THE TERRIBLE REALITIES OF SECRET GOVERNMENT, TO WEAKEN OUR DEMOCRATIC INSTITUTIONS AND TO REINFORCE CURRENT POLICIES OF CREATING A NATIONAL POLICE STATE. I FERVENTLY HOPE THAT SOMETHING CAN BE DONE TO PREVENT THIS FROM HAPPENING. THANK YOU.

THIS TESTIMONY WAS SUBMITTED TO THE CIA FOR PREPUBLICATION REVIEW.