ARTICLES.

A C.I.A.-A.C.L.U. DEAL

The Operational Files Exemption

ANGUS MACKENZIE

The American Civil Liberties Union, the Central Intelligence Agency and Senate Intelligence Committee chairman Barry Goldwater have become strange bedfellows in the latest effort to exempt the agency from the Freedom of Information Act. Senate bill 1324. Although the A.C.L.U., the C.I.A. and the senators will be nit-picking over the language of the bill during the markup sessions, which begin in the coming weeks, they have already agreed on its key provision, which exempts the agency's "operational files" from F.O.I.A. search and disclosure requirements.

S. 1324 is a revision of a bill proposed in 1979 by then-C.I.A. Deputy Director Frank C. Carlucci, which the A.C.L.U. opposed at the time. The new version was drawn up by the C.I.A.'s legal representatives in cooperation with Senator Goldwater. It was introduced in Congress after the A.C.L.U. informally agreed to the operational-files exemption.

The A.C.L.U. and the C.I.A. claim that the exemption would not expand the C.I.A.'s authority to withhold documents. Under the F.O.I.A., the agency may deny requests for information that relates to national security matters or that reveals confidential sources and investigative techniques. They contend that since operational files invariably contain such information, they are never released. Freeing the agency of the requirement that it conduct time-consuming searches of files that are never released, proponents say, would enable it to process other F.O.I.A. requests more expeditiously.

Critics of the proposed legislation counter that the term "operational files" is so broadly defined that it will amount to a total exemption from the F.O.I.A., permitting the agency to cover up illegal domestic spying and other wrongdoing. Many information act experts say the C.I.A. has taken the A.C.L.U. for a ride.

The deal between the C.I.A. and the A.C.L.U. was initially discussed in informal conversations between the agency's Deputy Counsel, Ernest Mayerfeld, and A.C.L.U. attorney Mark H. Lynch, who have been friendly enemies in F.O.I.A. court battles for seven years. As Lynch put it, "We're two guys who've spent a lot of time in court together shooting the shit, and I've always told him if they get off the total exemption thing we might be able to work something out."

The basic elements of the agreement are that in exchange for the C.I.A.'s dropping its campaign for "the total exemption thing" and speeding up the processing of F.O.I.A. requests, the A.C.L.U. will not oppose the exemption of operational files in the agency's most sensitive departments.

Would the Senate bill cut off the flow of information on C.I.A. wrongdoing obtained through F.O.I.A. requests? On June 21, C.I.A. Deputy Director John N. McMahon told the Senate Intelligence Committee not to worry. "There will not ever again be a repeat of the improprieties of the past," he said. "And let me assure you that Bill Casey and I consider it our paramount responsibility that the rules and regulations not be violated."

Leaving aside the C.I.A.'s assurances that it will speed up the release of information, what does the bill itself say? The heart of the proposed legislation is the definition of "operational files." The agency and the A.C.L.U. agree that if the bill is passed, such files will no longer be subject to the search process—that they will be, in short, exempt from the F.O.I.A. But they disagree substantially over just what operational files are.

Mayerfeld told me that operational files deal with foreign intelligence, counterintelligence and counterterrorism operations; investigations to determine the suitability of potential foreign intelligence sources; "security liaison arrangements" with other intelligence agencies; and information exchanges with foreign governments. Mayerfeld's definition covers most of the agency's business, except—perhaps—intelligence reports derived from operational files. I say "perhaps" because some critics of the bill believe that even those reports could be exempt under the proposed legislation.

Let us examine some of Mayerfeld's categories. Take "counterintelligence operations," for example. Those operations include C.I.A. domestic spying, which President Reagan authorized in his executive order of December 4, 1981. If the Senate bill is passed, files on domestic spying could presumably be exempt from F.O.I.A. inquiries.

Files relating to past counterintelligence operations like Operation Chaos, which spied on the antiwar and civil rights movements and the underground press between 1967 and 1974, might also be exempt. Some of the activities carried out under Operation Chaos were revealed in 1976 by Senator Frank Church's Select Committee on Intelligence. And stories about the operation based on information obtained under the F.O.I.A. have appeared in the press. But the complete account has not emerged, and a C.I.A. source told my attorney that the agency has two roomfuls of unreleased Chaos files.

Opinion is divided on whether that material would be exempt under the Senate bill. Lynch told me the documents could be made public since Operation Chaos was the subject of a Congressional investigation and the House version of

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the bill specifically provides for the release of such material (more on that later). Mayerfeld, however, was not so certain. He told me that whether Chaos files would be released "gets to be a complex question I can't answer."

Information about "counterterrorism operations" would also be exempt under Mayerfeld's reading of the bill, and the files on Operation Chaos could be included in that category. In 1974, Chaos merged with the International Terrorism Group, with the same chief, Richard Ober. Ober's group retained the Chaos files on more than 300,000 Americans. When I asked Mayerfeld if those files would be exempt, he refused to comment.

Files relating to "security liaison arrangements" with other intelligence agencies would also be exempt. Included in this category could be information about the extensive ties the C.I.A.'s Office of Security maintained with intelligence units of local police forces in the late 1960s and early 1970s. These local Red squads provided information that was used in Operation Chaos, among other things [see Philip Melanson, "The C.I.A.'s Secret Ties to Local Police," *The Nation*, March 26].

The C.I.A.'s cooperation with local police departments contravened the 1947 law establishing it, which provided that "the agency shall not have police, subpena [*sic*], law-enforcement powers or internal-security functions." If those relationships with local law enforcement agencies continue, the public may never know, for the files on them could be exempt under S. 1324.

These examples are sufficient to show that the C.I.A. has a very broad definition of "operational files." The A.C.L.U.'s interpretation of the bill differs from the C.I.A.'s. According to Lynch, the Senate bill contains "no definition of operational files." Allan Adler, legislative counsel for the Center for National Security Studies, an A.C.L.U. project, said: "Operational files contain how the intelligence is gathered. You are not talking about intelligence itself." Adler's definition not only differs from the C.I.A.'s; it differs from those of other information specialists as well. For instance, Anna K. Nelson of the Organization of American Historians testified before the Senate Intelligence Committee that all C.I.A. files might be considered operational. "Is there any file of a government agency that does not deal with 'operations'?" she asked.

Adler told me that if the A.C.L.U. can win "pinned-down meanings of operational files," the bill will contain "no additional withholding authority" and the A.C.L.U. will support it. According to a spokesman for Senator Walter Huddleston, a member of the Intelligence Committee, when the A.C.L.U. was asked to submit revised wording for the bill, it declined, saying it supported the language in the House version of S. 1324, introduced by Romano Mazzoli of Kentucky. But the language in Mazzoli's bill is basically the same as that in the Senate bill.

Still, the A.C.L.U. says the Mazzoli bill is an improvement over the Senate version, which authorizes the director of central intelligence to determine which files are exempt from the F.O.I.A. That language was dropped from the House bill. However, Huddleston's spokesman said that the omission "makes no difference"—that in both versions it is the C.I.A. that will decide which files are operational.

The Mazzoli bill "does preserve the right of search and review for subjects which have come under investigation for illegality," whether by Congress or the C.I.A., he added. That A.C.L.U.-suggested change is an important distinction between the two bills, except it is left to the C.I.A. to determine what constitutes the subject of an investigation.

Deputy Director McMahon told the Senate Intelligence Committee on June 21 that where there has been an investigation of any impropriety and "it is found that these allegations are not frivolous," the records would be released. That means the C.I.A. would decide which charges against it are frivolous and which are not. The agency would then release only those files that prove the damaging allegations against it—a public-spirited act that those who have attempted to gain access to C.I.A. documents find highly unlikely.

The Mazzoli bill, like the Senate bill, contains a requirement that the C.I.A. search and review intelligence reports derived from operational files. But the language is vague on the question of whether the C.I.A. would be required to *release* those reports. If it would not be, the agency would have what amounts to a total exemption from the F.O.I.A. David Sobel, an attorney who is suing the C.I.A. for its records on the United States Student Association, points out that the agency might withhold such intelligence reports by claiming they reveal what is in the operational files from which they were derived. The F.B.I. exempts its intelligence reports, Sobel says, by claiming that to release them would show how and from whom the information in them was obtained.

Both the Senate and House bills exempt from search and review "operational files located in the Directorate of Operations, Directorate of Science and Technology and Office of Security." The Directorate of Operations oversaw Operation Chaos. The Office of Security was involved in Operation Chaos. It also infiltrated the underground press.

The bills would still require the C.I.A. to search records in response to requests from individuals for their own files. But the language in both bills is vague on whether such files would have to be *released*.

Does the exemption of operational files pose the threat of C.I.A. cover-ups? An agency spokesman said, "By removing these sensitive operational files from the F.O.I.A. process, the public is deprived of no meaningful information whatsoever." Lynch agrees. He told the Senate Intelligence Committee on June 28 that those files "are now invariably exempt from disclosure," so, presumably, nothing would be lost.

Actually, both gentlemen are wrong. Operational files *have* been released by the C.I.A. Indeed, they have been used to document news stories that embarrassed the agency. For example, Chip Berlet, who operated the Denver-based College Press Service, which provides antiwar news to more

than 500 college newspapers, requested his personal file. On October 25, 1976, the C.I.A. released an informant's report about him. The report, dated April 29, 1971, said that the news service was moving from its Washington, D.C., headquarters to Denver. The informant, Salvatore John Ferrera, wrote that Berlet "is an enthusiastic person but was close-mouthed about his background." I drew on that report, along with other documents obtained under the F.O.I.A., in writing an article entitled "Sabotaging the Dissident Press," which appeared in the *Columbia Journalism Review* in 1981.

In February of this year, the College Press Service received copies of four documents in the files of the Directorate of Operations and two in those of the Office of Security. The documents came from files that the C.I.A. and the A.C.L.U. say are never disclosed.

Still another example: On July 16, *The Washington Post* published my story about C.I.A. operations that targeted the United States Student Association, which represents 3 million college students. *The Post*'s story was based on documents obtained under the F.O.I.A.—indexing files of the Directorate of Operations. Under S. 1324, such indexes would not be released.

Perhaps the most serious flaw in these bills is the provision that would prevent legal challenges to the C.I.A.'s withholding of documents. Suits challenging the withholding of operational files would be thrown out of court.

Mayerfeld told the Senate Intelligence Committee on June 21 that of seventy-seven suits pending against the agency under the F.O.I.A., forty-six would be affected by the proposed legislation: twenty-two would be dismissed outright because they involve requests for operational files, and a majority of the requested files would be exempt in the remaining twenty-four cases.

A few days later, Mayerfeld changed his figures. He submitted amended testimony saying that of sixty-nine suits pending against the agency, "it is believed that 39 litigations would be unaffected. . . . I cannot with certainty state how many, or if indeed any, of [the other] 30 would be dismissed."

Why the change in testimony? A committee staff member who interviewed Mayerfeld explained that "he was guessing" the first time around.

As for the A.C.L.U.'s position on this critical provision, Adler said, "We haven't addressed that issue at this point."

An example of a lawsuit that might be dismissed if the Senate bill is passed is one I filed. In 1979, when I was working on the *Columbia Journalism Review* article, I requested the agency's extensive files on the underground press. The C.I.A. replied that the cost of searching its files would be $61,501. In June 1982, after it persisted in refusing to release even one page, I filed suit.

Last September, the C.I.A. agreed to release some of the files. Some are located in the Directorate of Operations, and those would be exempt from release under the Senate bill. My lawsuit could result in more files being released, but under the proposed legislation it could be dismissed.

Why didn't the A.C.L.U. oppose this legislation from the start? The group offers many explanations, but the plain fact is that it reached an informal agreement with the C.I.A. not to oppose it. A source who works closely with Lynch confirmed that "the deal is on." The C.I.A. has said that the deal is on.

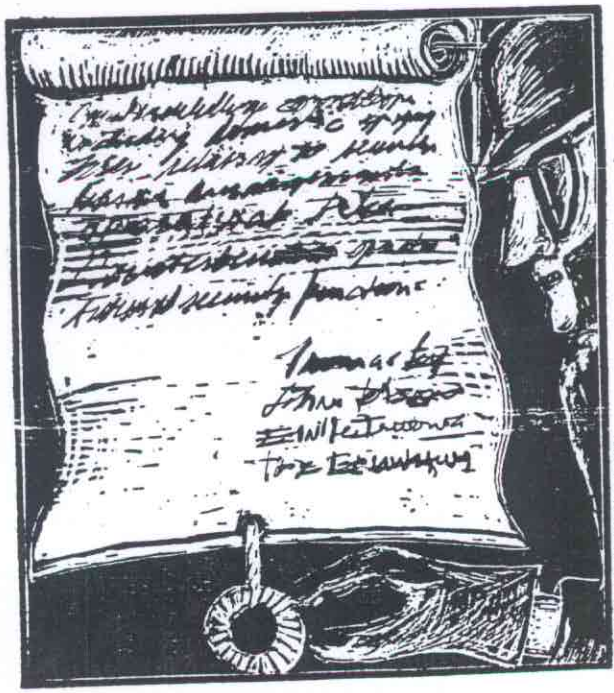
Or, as Mayerfeld told me, "There was kind of an understanding that we should wind up somewhere between total relief and the status quo. There was a mutual realization that some improvements could be achieved, and this bill was it."

Mayerfeld said that the C.I.A. discussed the bill with Lynch. When asked when the agency and the A.C.L.U. reached an understanding, Mayerfeld said, "Before the bill was introduced."

What would have happened if the A.C.L.U. had refused the deal? Morton Halperin, who heads the Center for National Security Studies, and who works closely with Lynch, said, "The C.I.A. would not have given up their public and vigorous effort to secure a total exemption unless we were willing to state that this new approach was one we could consider." In other words, but for the A.C.L.U. deal, the C.I.A. might have obtained a total exemption from the F.O.I.A., instead of the limited exemption the bill gives it.

The agency, however, takes a different view of the matter. C.I.A. General Counsel Stanley Sporkin told me, "We would have liked a full exemption but we realized that wasn't in the cards."

Tonda Rush, who directs the Freedom of Information Service Center in Washington, D.C., said, "There wasn't anybody in the Senate who would sponsor the total exemption." Another F.O.I.A. expert said, "Basically, you've got



DRAWINGS BY FRANCES JETTER

the C.I.A. and the A.C.L.U. If they're in agreement, who is going to pick a fight?"

And if the A.C.L.U. fights the legislation? Lynch said, "If the A.C.L.U. opposes this bill, it won't go through Congress." Congressional sources I talked with agree.

Steven Dornfeld, president of the Society of Professional Journalists, said, "It would be difficult to persuade the A.C.L.U. to oppose the bill. From my vantage point, it appeared that staff members of that group had much to do with giving birth to the measure."

The A.C.L.U. seems to have forgotten the Congressional testimony of its legislative director, John H.F. Shattuck, against exempting the C.I.A. from the act. In July 1981, he told the House Subcommittee on Government Information, "CIA Director William Casey . . . is determined to pursue a broader FOIA exemption for the CIA. What is the public to make of this when confronted with reports of a proposed Reagan Executive Order authorizing the CIA to carry out broad domestic security functions inside the United States? Why should Congress accept this 'trust us' approach to CIA accountability?"

Yet the A.C.L.U. appears to have swallowed the C.I.A.'s "trust us" argument.

The A.C.L.U. should continue its fight for less secrecy in government. It should tell Congress the deal is off, and it should use its influence to kill the legislation. A.C.L.U. members should urge the organization to support openness in government and to oppose granting the C.I.A. any more exemptions from the Freedom of Information Act. □

REPLY

There Is No Deal

MORTON H. HALPERIN AND ALLAN ADLER

Angus Mackenzie seems determined to prove that the A.C.L.U. has joined the C.I.A. in a sinister "deal" to sell out the Freedom of Information Act. In his zeal to portray the A.C.L.U. with unclean hands, he has distorted or ignored its explanation of its position on S. 1324 in public testimony and in conversations between himself and A.C.L.U. lawyers.

The A.C.L.U. has made no "deal" and does not support the version of S. 1324 that is now before the Senate Intelligence Committee. That was stated explicitly by Mark Lynch in his testimony on behalf of the A.C.L.U. at the committee's hearing on June 28. The last paragraph of that testimony describes the A.C.L.U. position concisely:

> 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.

Contrary to Mackenzie's statements, the A.C.L.U. is taking that position not because of some prior commitment but because it believes it to be substantively correct and in the best interests of those who favor open government. The A.C.L.U. is not, as Mackenzie disparagingly asserts, "nit-picking" over the language of S. 1324. If the bill is amended to eliminate the problems the A.C.L.U., various press and historians' groups and others have identified, the A.C.L.U. believes it will improve C.I.A. compliance with the F.O.I.A. If the necessary changes are not made, the A.C.L.U. will oppose the bill.

In the meantime, those of us involved in this legislation would welcome the opportunity to talk to those "critics" and "information experts" who, if Mackenzie states their view correctly, think the A.C.L.U. is being taken for a ride. Except for David Sobel, they have not brought their opinions directly to our attention.

Sobel's concern, insofar as it has not been overstated by Mackenzie, is a valid one. His solution—maintaining full search requirements when a domestic organization requests information about itself—is one of several changes proposed to the Intelligence Committee by people outside the A.C.L.U. that we support. The A.C.L.U. has never claimed a monopoly on wisdom in these areas, and it has publicly stated its intention to support any proposals it thinks will improve the bill.

As for Mackenzie's critique of the bill, there is little that requires a response. Much of his criticism is based on materials the A.C.L.U. provided him upon request, and reflects the positions the A.C.L.U., press groups and historians took in the Senate hearings. We all agree that the bill must be amended to insure that no useful information that was released in the past would be exempt from search and review. Similarly, we all agree that Congress must insure that the C.I.A. will live up to its promise to process F.O.I.A. requests more expeditiously.

On one point, however, Mackenzie simply misunderstands the bill. It does not create a new exemption for any information. Any intelligence information that is exempt from release now because it identifies sources or methods would continue to be exempt, but the bill would not provide a rationale or authority for withholding additional information.

When the Senate Intelligence Committee completes its review of the bill and is ready to vote on a revised version, the A.C.L.U., press groups and others will have to decide whether it is acceptable. There will be then, as there is now, room for genuine debate and disagreement over the likely consequences of enactment and the appropriate legislative strategy to follow. However, that debate—and the subsequent efforts of all who participate in it—will not be enhanced by a search for secret and impure motives on the part of those who have been in the front lines of the battle to preserve and to implement the F.O.I.A. □

Morton H. Halperin is director of the Center for National Security Studies. Allan Adler is legislative counsel for the Center for National Security Studies.

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EDITORIALS.

Locking the Files

The steady erosion of the Freedom of Information Act continues to disfigure the internal security landscape in the Reagan era. On April 11, the House Intelligence Committee began a public markup of an Administration bill that would largely exempt Central Intelligence Agency "operational files" from public scrutiny under the F.O.I.A. [see Angus Mackenzie, "The Operational Files Exemption," *The Nation*, September 24, 1983]. Later this month, the House Government Operations Subcommittee on Information will consider the bill. Both bodies are expected to make only minor language changes; then the bill will go to the floor for a vote. The Senate has already approved the exemption. Following the predicted passage in the House and resolution of differences in a House-Senate conference, President Reagan will sign the final bill. Then hundreds of thousands of documents—no one knows the extent of the material—detailing the C.I.A.'s

domestic and foreign programs of disinformation, surveillance, recruitment of informers, subversion and assassination will be officially and irrevocably closed to press and public.

It is not that C.I.A. files have been easily pried open in the past. All the agency's files that relate to national security matters or that might reveal confidential sources or investigative techniques are exempt from F.O.I.A. requests. Civil libertarians who support the exemption say that operational files contain only unreleasable material and so the bill's passage will not reduce the current flow of information. But the blanket exemption would preclude many of the kinds of suits journalists and researchers now bring against the C.I.A. in Federal court for relevant papers. Those suits force the agency to justify its claims when national security is invoked; judges then review the raw files in their chambers and decide whether the documents should be released. The C.I.A. has not lost a single such suit in eighteen years, but even the possibility that a rogue judge could rule against the agency worries the spymasters enough to press for the exemption.

Even suits pending in Federal courts may be removed from judicial review by the Senate's version of the law. Last year, Democratic Senator Patrick J. Leahy of Vermont, a member of the Senate Intelligence Committee, asked the C.I.A. which of the sixty-odd suits then in litigation might be dismissed if the exemption passed. The agency specified twelve that "may be affected," and Angus Mackenzie, of the Center for Investigative Reporting, obtained a list of them for *The Nation.** It includes the following:

§ Glen L. Roberts, owner of a computer software company and publisher of a newsletter that provides "a fresh outlook on government arrogance," requested C.I.A. files on David S. Dodge, former acting president of the American University of Beirut, who was kidnapped in Lebanon in July 1982 and was subsequently released.

§ The Center for National Security Studies, an A.C.L.U. affiliate, initiated two suits. The first seeks information about the C.I.A.'s covert operations in Central America, including details of its involvement in El Salvador's March 1982 election. The second is an omnibus suit covering a wide range of center requests under the F.O.I.A. that the C.I.A., in effect, simply ignored. One request relates to the agency's files on its domestic operations against various organizations and publications. In response to the suit, the C.I.A. released some documents on the Students for a Democratic Society, the Vietnam Veterans Against the War, various bookstores which carry radical reading material, left-wing newspapers, an antiwar convention held in 1972 at the University of California and Pacific News Service. The center continues to press for more documents, but the C.I.A. hopes to get the suit dismissed under the exemption.

§ J. Gary Shaw of Cleburne, Texas, is trying to get C.I.A. files on suspects in the John F. Kennedy assassination case, including right-wing French terrorists reported to have been in Dallas on November 22, 1963.

§ Henry Hurt, a *Reader's Digest* writer, is researching C.I.A. involvement in the case of a Soviet defector, Nicholas George Shadrin, who disappeared in Vienna on December 20, 1975, and is presumed dead—the victim of a botched double-agent masquerade.

§ A suit is pending against the C.I.A. for files on the agency's infiltration of the underground, dissident and left-wing press in the United States. Publications believed to have been targeted include *Ramparts*, *Quicksilver Times* (both defunct) and the New York City-based *Guardian*.

On March 15, Representative Romano Mazzoli and others introduced a bill (H.R. 5164) to permit all suits filed before February 7 to continue. Even if the ongoing suits are saved, they serve as examples of what would be thrown out of court under the exemption.

In many cases, the C.I.A. has released some files, apparently in an attempt to head off unfavorable judicial rulings. Sometimes the agency simply stonewalls. In one of the most egregious cases of official obstinacy, the C.I.A. has refused to release a single page of some 180,000 documents on the Guatemala coup of 1954, by which the agency overthrew the elected government of Jacobo Arbenz Guzmán and installed a right-wing regime whose successors rule to this day.

Writer Stephen Schlesinger, who with Stephen Kinzer published a thorough study of the coup in a 1982 book, *Bitter Fruit*, sued the C.I.A. for its files on the events. Recently his request was denied by the U.S. District Court for the District of Columbia. Judge Thomas Flannery held that disclosure would be "risking damage to American foreign relations . . . particularly in Central America at this time in light of the delicate political situation." No doubt he was referring to U.S. covert operations against the Nicaraguan government, which are distressingly similar to those carried out by the C.I.A. in Guatemala thirty years ago.

What is in the mountains of C.I.A. operational files is not just of academic or historic interest. Much of it is still pertinent to dirty tricks and drastic practices in progress today. No one claims it will be easy to scotch such schemes, but when the press, the public and independent political forces have access to intelligence information, they are better able to prevent history from being repeated.

* Mackenzie's research was partially funded by a grant from the Fund for

Hunger in Africa

Last month the Reagan Administration attached a controversial military appropriations bill for Central America to a popular measure for emergency food aid to Africa. Because of that cynical maneuver thousands on that continent continue to die, victims of the worst drought there in recent memory.

Emergency food aid for Africa has strong bipartisan support. In January, Republican Senator John Danforth visited an area in southern Mozambique that is suffering terrible famine. His group saw skeletons of cattle lying where they had died in dry basins that had once been small lakes. Refugees from interior regions of the country had fled to the coast, although there was little more to eat there than leaves and roots. A U.S. Air Force doctor with Danforth's group