Strange Bedfellows

When the ACLU teams up with the CIA . . .

BY KEENEN PECK

"Who would want their intelligence?" asked Ralph W. McGehee. "It doesn't deal with the illegalities or the details—how the Agency went about arranging for the massacre of a half million Indonesians, how it dragged us into the Vietnam war, its liaison with the Shah's SAVAK."

McGehee and I were sitting in the basement office of his comfortable suburban Virginia home. Behind him on the wall was a map of Southeast Asia and the framed citation that accompanies his Career Intelligence Medal, awarded by the CIA in 1977 "for exceptional achievement." The medal capped twenty-five years with the Agency; McGehee had served fourteen of those years in countries depicted on the map, the other eleven in CIA headquarters just a few miles from his house.

"Intelligence is nothing more than policy-supportive data," he continued. "The only reason you'd want to see it is to prove how bad it is. But all of the details about operations are included in the Agency's operational files."

Those files, said McGehee, verify that the CIA helped overthrow democratically elected governments in Guatemala and Chile; show how the Agency infiltrated U.S. political organizations; contain the plans for mining the harbors of Nicaragua, and document other abuses committed in the name of national security. Operational files describe the CIA's dirty tricks; intelligence is simply information gathered by CIA employees and eavesdropping devices around the globe—"not really heavy-duty stuff," as McGehee said.

Just days after our talk, on September 19, the U.S. House of Representatives voted to remove almost all CIA operational files (but not intelligence reports) from the purview of the Freedom of Information Act, the celebrated law that gives Americans the right to obtain records produced by the Executive branch of the Federal Government.

The House bill then sailed through the Senate, and the measure went to President Reagan for his signature.

To some, the legislation was another triumph for an Administration determined to restrict public debate on controversial issues. To others—the CIA itself and, most notably, the national leadership of the American Civil Liberties Union—it represented mere procedural streamlining that will not reduce citizen access to information.

Despite their history of conflict, the CIA and the ACLU's Washington office collaborated closely in drafting the bill and ensuring Congressional approval. The ACLU's role was crucial to passage, according to aides on Capitol Hill.

The unusual alliance produced more than a law, however: It sparked an intense controversy within the ACLU and among civil libertarians in general. By cozying up to an arm of the Government that historically has undermined the Constitution, the ACLU leadership fueled doubt about its own commitment to the protection of constitutional rights.

Washington staff members seemed to lose sight of their principles in a thicket of legislative particulars. They entered into compromise politics when they believed their goals could not be achieved through advocacy alone. But in the halls of Congress, "realism" counts for more than values, and petitioners are expected to adapt themselves to the resurgent clout of the intelligence community.

The outcome of the ACLU's maneuvering may deprive the public of some kinds of information that were accessible before. What's worse, the organization never established, beyond a reasonable doubt, that there is any need for the new Central Intelligence Agency Information Act it helped bring into being.

ACLU lobbyists say the new law eliminates only the CIA's obligation, in response to a request, to search for and review operational documents that are never released anyway. Federal statutes already allow the Government to withhold material that is classified or describes intelligence sources and methods. And judges routinely accept the CIA's claims that such records must be kept secret.

The CIA argued that the burden of searching operational files containing sensitive material caused today's two-to-three-year backlog in processing information requests. The bottleneck would be eliminated if operational files were exempted from search and review, the Agency said; the availability of information would not be diminished.

The ACLU leadership was persuaded.

"Not a single sentence that has ever been released—or that there was ever any chance of having released—will be withheld as a result of this," says Morton Halperin, a key ACLU lobbyist and director of the Center for National Security Studies, an ACLU project in Washington. "This gets the CIA committed to a substantial speeding up of processing requests; it gets the CIA to admit that the CIA and the Freedom of Information Act are compatible; it gets the CIA and the White House off support for a total exemption for the CIA, and it eliminates any pressure from the Reagan Administration to make other changes in the Freedom of Information Act relating to the CIA or other intelligence agencies."

But each of those assertions has been challenged by individuals and organizations usually aligned with the ACLU: reporters' groups, lawyers and historians who use the Freedom of Information Act, other civil liberties activists, progressive members of Congress, and even ACLU affiliate chapters.

Some of the criticisms leveled against the ACLU position—that the CIA would never release another shred of information, that court procedures delineated in the new law would weaken the entire judicial system—seem unfounded. Still, opponents of the legislation did pinpoint ways in which it may curtail access to information.

David Sobel, a Washington lawyer, worries that Americans will no longer be able to find out whether certain files even exist. Though the CIA almost invariably withholds operational specifics, judges have often directed the Agency to release a public index to the secret records, he notes.

For Sobel, the Vaughn Index, as it is called, has been of great importance. One

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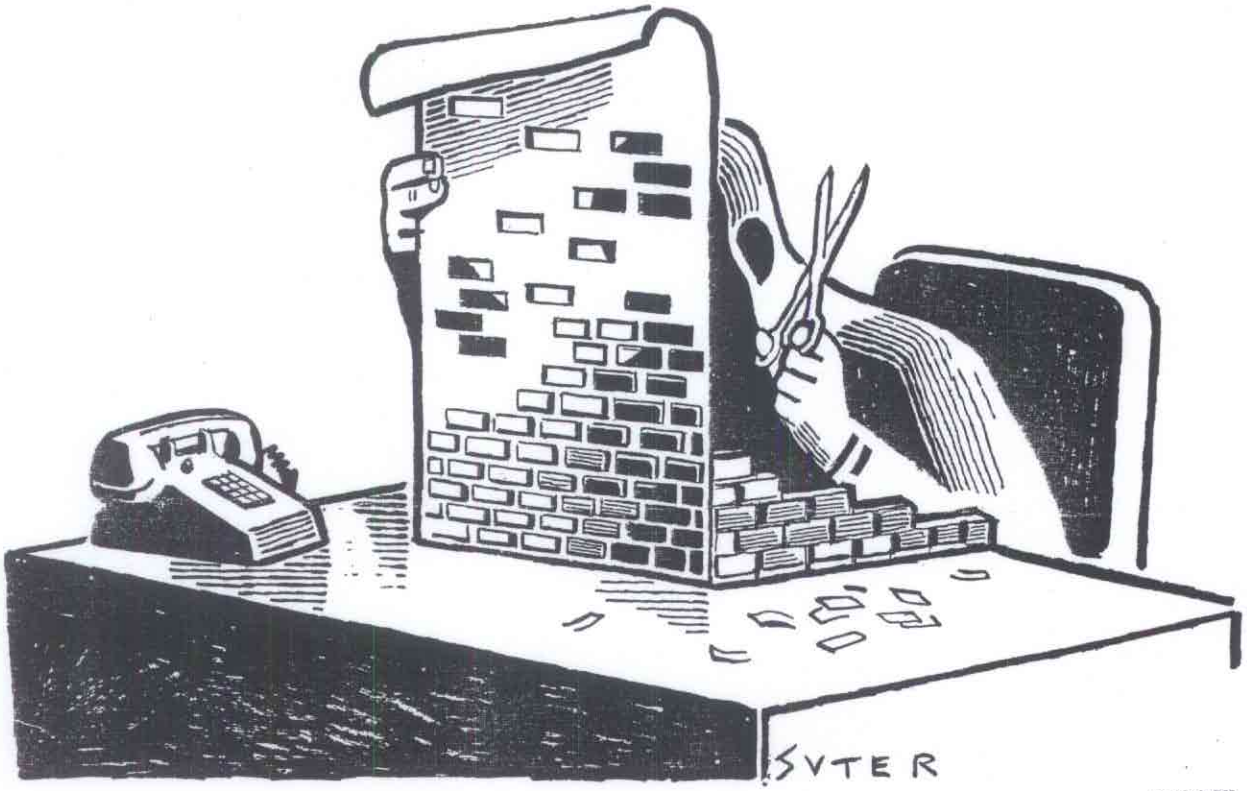

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of his clients, the United States Student Association, requested CIA files about itself and its predecessor, the National Student Association. The CIA resisted for five years, and Sobel sued. In 1952, the Agency had begun surreptitiously using the National Student Association for intelligence gathering. When the relationship was uncovered by the press in 1967, the CIA promised to leave the group alone. Sobel, however, found a 1979 entry in the Vaughn Index prepared by the CIA.

"All of our files come from the [CIA's] Directorate of Operations," he says. "If this request had been filed after the bill was enacted, they would have said, 'This falls outside the scope of the Freedom of Information Act.'" The CIA's operational files would have been exempt from review; Sobel would never have received his Vaughn Index, which runs 1,000 pages in reference to 1,500 documents.

"I would rather know they have the files and not get them than not know whether they have files," he says.

Halperin responds, "Any material that is of any use or interest to people—or almost all of it—is exempt from the exemption, so they will still have to do Vaughn Indexes."

The new law requires the CIA to continue looking through operational files when:

¶ a U.S. citizen or permanent resident asks for records kept on himself or herself;

¶ the request concerns a "special activity," or covert operation, the existence of which is not classified;

¶ the operational file is the only place where relevant "disseminated intelligence" can be found, or

¶ the request addresses itself to "the specific subject matter of an investigation" into illegal CIA conduct. Such an investigation may be carried out by the intelligence committees of Congress, the President's Intelligence Oversight Board, the Department of Justice, or the CIA's Director, General Counsel, or Inspector General.

But these protections may prove to be of limited value. "The list of investigative bodies has obvious omissions," according to James H. Lesar, a lawyer who has handled Freedom of Information Act cases. If asked, the CIA would not have to inspect operational files pertaining to the research of, say, the Rockefeller Commission or the House Select Committee on Assassinations.

"The present list is almost entirely limited to investigative bodies that are either internal organs of the CIA or, like the intelligence committees of Congress, have a history of being quite deferential to the Agency," Lesar wrote in a memorandum to Washington civil libertarians. The investigators may not investigate much.

Sobel predicts that those seeking information will also have difficulty putting their finger on the "specific subject matter" of an inquiry. He looks to his own experience: The law already compels the CIA to release information that was the subject of a prior disclosure, and in the mid-1970s, the Senate Select Intelligence Committee reported on the CIA's connections to the National Student Association. However, the CIA says its 1,500 documents do not overlap with the Senate investigation—an incredible claim that a judge has so far accepted.

Because of his encounters with the CIA, Sobel urged ACLU lobbyists to include a provision in the law that would allow organizations as well as individuals to request operational material about themselves. The ACLU tried and failed. The House Intelligence Committee called such a requirement "impracticable," saying it would impose a burden on the CIA which the legislation was trying to ameliorate in the first place.

Halperin considers it a minor matter, since an organization can have its leaders request their own personal records. But what if the Agency maintains a file on the organization only, not on the individual officers? The group, he suggests, can trigger

an investigation into illegal CIA conduct and then ask for its file.

Nobody's ever suggested that this is a great triumph for open government," says Halperin.

Nonetheless, he insists that whatever information was available in the past will remain accessible. Lawyers from both the ACLU and the CIA examined a series of previously released documents, many of which referred to assassination plots, drug experiments, and the like. The lawyers satisfied themselves that such information will not be exempt from search and review in the future.

Sobel does not share that optimistic construction of the law. "I'm afraid that once they [the CIA] have a Congressional statement that they're entitled to more protections, there will be nothing left. I foresee there being a form letter that almost everyone will get: 'If we had anything, and we're not saying we do, it would be operational.' "

Representative Ted Weiss, the New York Democrat who led the fight against the legislation, says, "It's going to be easier for the CIA to keep material which the public has a right to know away from the public." As for the ACLU's stance, "That just proves to me that nobody's perfect."

Weiss opposed not only the exemption, but also accompanying ground rules for judicial oversight of the law. He charged that these rules would discourage impartial court review of CIA decisions. The ACLU leadership disputed him, though Halperin concedes that people who sue the Agency will now have diminished opportunities for pretrial discovery in two "narrow" circumstances.

The quarrel hinged on a larger question: the need for the law. Once Congress accepted the premise that the CIA was entitled to administrative relief, it devised means to ensure that this purpose would not be frustrated every time someone cries "foul" in court. Time will tell whether the judicial rules do, in fact, allow the Agency to escape scrutiny.

But the premise is the crux of the issue. Was the law really necessary?

"It was never clear to me, if the operational files automatically contained material that would not have to be disclosed, why it takes the CIA so long to look through them," says Thomas I. Emerson, emeritus professor at Yale Law School (and the recent recipient of the ACLU's Medal of Liberty).

"The Agency could process everything they have in a year's time, with the manpower they've got now, if they'd stop stalling," maintains Ralph McGehee.

"The proper solution," states a resolution approved by the Southern California ACLU, "is not increased exemptions, but rather is found in additional funding and stronger judicial review of obstructive conduct." The ACLU of Northern California also dissented from the national position.

"The solution of saying, 'Do not raise the bridge, let's lower the river,' seems to us to be of doubtful validity," a representative of the American Historical Association told Congress in an early hearing on the legislation. (Historians are distressed because there is no schedule for putting old, exempted files back into the purview of the Freedom of Information Act; the law only requires the Agency to "review" files once every ten years for possible downgrading.)

"The way to go about tackling the backlog is to find some way to give the Agency more money and personnel to handle requests," says Elaine P. English, director of the Freedom of Information Service Center, a subsidiary of the Reporters Committee for Freedom of the Press.

The CIA, the ACLU, and the Congress rejected such arguments. Searching and reviewing operational material, they said, requires relatively senior officers who can judge what is sensitive and what is not; no amount of money or additional personnel could speed up the process.

"What they're not saying is that the operational people spend a small amount of their time doing Freedom of Information requests," declares McGehee, a former operational officer himself. "I processed a massive amount of the Agency's information. We did it in several months and it didn't seriously disrupt our normal working activities."

"Essentially, the CIA is asking us to respond to its current intransigence to and phobia of releasing information by enshrining it into law," protested Representative John Conyers Jr., Michigan Democrat, during the House debate. "Our constitutional values will not allow us to place the elimination of some red tape in an Agency office above the right of citizens to even attempt to discover the activities of their own Government."

In other Federal agencies, the red tape is noticeably thinner. The Food and Drug Administration received 39,612 Freedom of Information Act requests in 1983. Of course, the FDA does not handle classified material, but it must protect trade secrets. The Department of Defense, which does grapple with classified documents, received 72,534 requests in 1983. Both the FDA and the Pentagon responded to inquiries much faster than the CIA, which received only 1,266 requests last year.

The House Intelligence Committee located the "primary cause" of the CIA's delay in "security review of these [operational] records on a time-consuming line-by-line basis." Can the CIA, if asked, simply restrict a search of files to intelligence reports outside the Directorate of Operations? "We could do that," Ernest Mayerfeld, one of the CIA's attorneys, told me.

Theoretically, then, the CIA could have reduced its backlog by publicizing the problem and asking requesters to agree to limited document hunts. The thorough, long course would have remained an option for patient correspondents.

Improved efficiency was the national ACLU's primary reason for supporting the new law. But the Washington office also saw the legislation as a way to head off efforts to remove the CIA entirely from the jurisdiction of the Freedom of Information Act. Halperin notes that a campaign to do so began in the Carter Administration, and "while one can argue about the prospects for early success, I think in the absence of something like this [law], it would have continued for a very long time, until it was successful." Outside of the ACLU, however, no one I spoke with in Washington thought a total exemption had been in the cards.

The ACLU's timing was curious for another reason: A case pending before the Supreme Court might have forced the CIA to use a much tighter definition of "intelligence source" in responding to requests for information. Several years ago, the CIA withheld the names of witting and unwitting participants in MK-ULTRA, the Agency's behavior modification program, by labeling them "intelligence sources"—even the universities that conducted the research. A Federal judge overruled the CIA, and an appeals court sustained the decision.

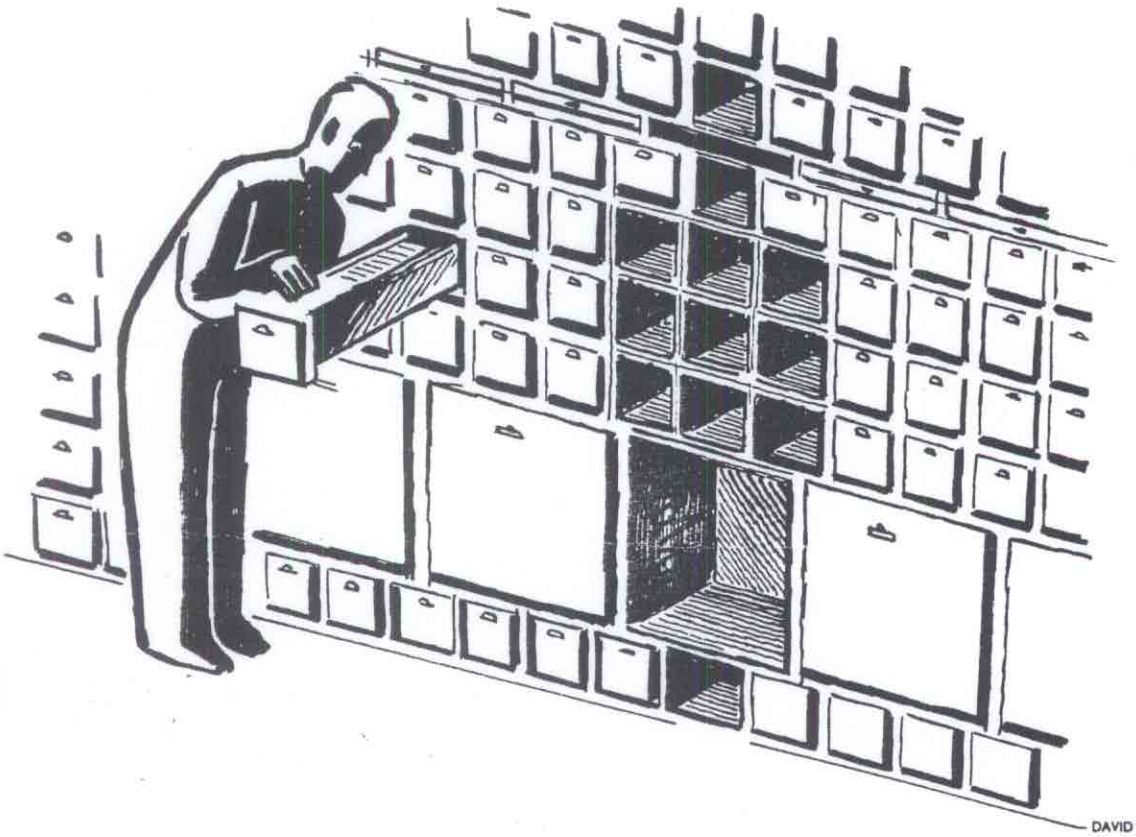
The new law could preempt a Supreme Court ruling to open up mislabeled "source" files like MK-ULTRA. The ACLU may have prematurely concluded that operational information was inevitably out of reach.

In any event, the CIA's operational exemption might inspire other agencies to seek similar relief. The Reagan Administration promised Congress that it would not be back for more, but the FBI wants exemptions for its informant files. "It did set a precedent, and will keep things moving in the wrong direction," says Emerson of Yale.

My main concern is political," says Stephanie T. Farrior, Washington director of the National Committee Against Repressive Legislation. "The message of the [law] is not just a Freedom of Information Act message—it's giving the CIA more leeway."

Ralph McGehee echoes Farrior. "If I were an Agency officer, I'd say, 'Set the horses free; nobody's going to find out about this stuff.' "

Michael E. Tigar, professor of law at the University of Texas, looks for the constitutional implications. "The Freedom of Information Act created by statute what some of us thought existed in the First Amendment: a presumption of access" to information, he says. Now, for a category



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of information, the Government no longer carries the burden of denying access. "I don't regard a disappointing record of judicial performance as a reason to eliminate judicial review," Tigar observes.

William Schaap, an editor of *Covert Action Information Bulletin*, which regularly documents CIA abuses, believes the new law will handicap reporters. "There's a whole group of investigative journalists who bottom a lot of their work on the Freedom of Information Act," he notes. "It's a way of confirming things. Corroboration sometimes makes the difference between running a story and not running a story."

Schaap, who is also a cooperating attorney with the Center for Constitutional Rights, has litigated cases under the Freedom of Information Act. The ACLU's stance angers him. "They've forgotten what their historic role should be. Instead of taking principled stands, they now feel their duty is to compromise. The CIA has so clearly co-opted the ACLU that it's got the ACLU doing its work for it.

"They are not members of Congress," he says of the ACLU staff. "If Ron Dellums and Ted Weiss want to sit down with some right-wing Congressmen to say, 'We'll give you this if you give us this,' fine. But that's not for the ACLU to do. How can Weiss go to his colleagues and ask them for something stricter if the ACLU takes this position?

"I'm not saying there's no place for compromise. The problem," Schaap cautions, "is once the ACLU starts compromising, one end of the spectrum gets pushed in. There's less pressure to move closer to their position."

Is the ACLU retreating from its absolutist legacy on civil liberties issues? "If we're unwilling to compromise or deal with the system, they will ignore us," says Jerry J. Berman, legislative counsel in the Washington office. "In defending civil liberties in the Congress, you cannot simply stand up and say, 'Don't touch the Freedom of Information Act.' There is considerable pressure, votes, an Administration pushing, and, in some cases, agencies able to make some valid case for relief—maybe not valid from the public's right to know, but there are other interests that Congress is willing to listen to. You're not just arguing your principle against nothing."

Isn't it the ACLU's job to take unqualified stands? "The ACLU had that idealistic voice for many years," Berman declares. "It was when the ACLU did not have a lobbying operation. You had the Warren [Supreme] Court, and you could go to court and win cases—file an *amicus* brief, a friend-of-the-court brief articulating pure positions. But today you're not dealing with the Warren Court. Time after time, we've had to go to Congress, which is supposedly hostile to civil liberties (because it's majority will versus minority rights) and convince it to reverse Supreme Court decisions.

"The bottom line is that we never support legislation which cuts back on civil liberties protections."

But working for what Berman calls "the best of the bargain" has its dangers: Standards that frustrate influence may be put aside; building credibility can become more important than achieving ultimate goals. Though such shifts are visible from a distant perch, they are not necessarily apparent to the participants in day-to-day political battle.

In the ACLU, the outside check is found in the national directors and the membership as a whole. But the Washington staff was testifying on behalf of the Central Intelligence Agency Information Act even before the national board had discussed the matter in detail. And most rank-and-file members of the organization probably never knew about the flap.

Clearly the ACLU did not set out to increase Government secrecy. But it agreed to play an accommodating role in Washington, and in doing so it ended up strengthening interests that are wholly inimical to the rights of Americans. ■