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TO: Ira Glasser and Burt Neuborne

FROM: Mark Lynch

This memo responds to the portions of Meir Westreich's memos of July 31 and August 31 1984, concerning the judicial review provisions of H.R. 5164. For ease of reference, the judicial review provisions, section 701(f), and the corresponding portion of the House Intelligence Committee's report are attached. Indeed, a careful reading of these materials answers many of Mr. Westreich's concerns.

Before discusssing the specific judcial review provisions of H.R. 5164, it is important to address one of Mr. Westreich's fundamental points that this bill establishes dangerous precedents that threaten judicial review in litigation involving constitutional rights. The problem with this point is that it assumes that the scope of judicial review and the amount of discovery are uniform in all types of litigation. Particularly with respect to review of agency administrative action, not involving constitutional rights, judicial review is often deferential, and discovery is correspondingly limited. H.R. 5164, like the FOIA, provides for unusally searching judicial scrutiny of administrative action, as demonstrated below. But even judicial review and discovery under the bill it were as circumscribed as Mr. Westreich suggests, the adoption of special procedures for very limited and specialized issues concerning the CIA's filing system simply has no relevance to other types of litigation. Thus, to suggest that H.R. 5164 will be a precedent in cases involving constitutional rights confuses apples and oranges. I certainly agree that Harlow v. Fitzgerald has created serious problems in constitutional tort litigation, but the judicial review provisions of H.R. 5164 are simply irrelevant to those problems.

Also before addressing Mr. Westreich's specific comments on the judicial reivew provisions, it may be useful to review how they evolved. The bill which was originally introduced in the Senate by Senator Goldwater contained no mention at all of judicial review, and we assumed that the judicial review provisions of the FOIA would govern. Therefore, we were startled when the CIA announced at the first public hearing on the bill before the Senate Intelligence Committee in June 1983 that in the Agency's view the bill did not authorize any judicial review. We immediately denounced this position and made clear that without de novo judicial review the bill was unacceptable. In response to our position, the Senate Intelligence Committee modified the bill to provide for some judicial review. Although we won the principle that judicial review was imperative, the hastily drafted provision in the Committee's bill was ambiguous and still unacceptable.

When the House Intelligence Committee held hearings on the bill in February 1984, judicial review was a central issue. At that point, the CIA, having already agreed to the Senate provision, had accepted judicial review in principle but had not yet agreed to any details beyond those in the Senate bill. In response to our detailed criticism of the Senate provision, the House Committee instructed its staff to negotiate a judicial review provision that would be an improvement over the Senate provision and acceptable to both the ACLU and the CIA. During the intensive discussions that followed, the precise nature of the issues that could arise under the bill became clearer, and problems were identified that would be unique to this legislation. This bill, of course, does not involve disclosure of documents but access to files, and much information about the Agency's filing system is itself exempt from disclosure under exemptions 1 and 3 to the FOIA and two separate statutes regarding CIA information. 50 U.S.C. §§ 403(d)(3) and 403g.

Our guidelines for agreeing to the various provisions were that we would accept no provisions that restricted current litigation practices for existing issues and would accept new procedures for dealing with novel issues only if they were reasonable and consistent with the bill's purposes. As bargaining chips in this negotiation we were willing to codify certain practices, discussed below, that have become so well established by the courts in FOIA litigation with the CIA that there is no reasonable possibility that they will be changed in future litigation or through legislative amendment. It should be evident to anyone who considers our position on this bill that we, as the most active litigants with the CIA, would not agree to any provisions that would undermine our present position. As demonstrated below, section 701(f) of H.R. 5164 meets the

standards we set for ourselves.

Mr. Weistreich's first memo makes numerous assertions about H.R. 5164 without reference to any specific portions of the bill, and the memo also reflects a large degree of misunderstanding about the provisions of the bill. Therefore, rather than attempt to address his points seriatim, this response can be best presented by going through each one of the judicial review provisions, explaining why they are acceptable, and where relevant responding to Mr. Westreich's comments.

Section (f) begins by stating that "[w]henever any person who has requested agency records under [the FOIA] alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that -- [paragraphs (1) - (7)]." Section 552(a)(4)(B) is the section of the FOIA that provides for de novo review and places the burden of proof on the agency.

Thus, section (f) states the general rule that issues arising under H.R. 5164 will be reviewed as any other FOIA issue, subject only to the limitations set forth in the following seven paragraphs. Mr. Weistreich argues that this general rule is meaningless because paragraphs (3) and (4), cited and discussed below, "cover the entire gamut of issues" that can arise under H.R. 5164. This assertion is mistaken because paragraph (3) deals only with improper placement of a document solely in an operational file (as, for example, where an intelligence report is stored solely in an operational file and not in a non-operational file where it should be) and paragraph (4) deals only with the improper exemption of a file as operational. The most common and important issues that will arise under this bill are whether specific documents meet one of the exceptions set forth in section 701(c) that require a search of operational files -- i.e., whether records responsive to first person requests are located in operational files, and whether requested records concern the subject matter of an investigation or a covert action the existence of which is not properly classified. These issues are not encompassed by paragraphs (3) and (4), and therefore they are not subject to any of the restrictions imposed on litigation of issues arising under those two paragraphs.

The House Intelligence Committee Report also reinforces the point which is evident from the structure of section (f) that paragraphs (3) and (4) do not include all the issues which can arise under H.R. 5164: "Matters not addressed by paragraphs 701(f)(1) through (7) will continue to be decided in accordance

with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience." This statement would be meaningless, if paragraphs (3) and (4) subsumed all the issues, such as those arising under section 701(c), that will arise under the bill.

Paragraph (1) provides that "in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court." This means that counsel for plaintiff will not have access to any classified information which may be filed in support of the agency's position. Courts routinely permit the CIA to file classified affidavits, and sometimes the requested documents, when necessary to carry its burden of proof.*/ No court has ever permitted counsel for plaintiff to examine such information, despite our repeated efforts to permit such participation in in camera proceedings.**/ Indeed, Judge Harry Edwards, joined by Judge Luther Swygert, recently held "[i]t is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requesters' counsel to participate in an in camera examination of putatively privileged material." Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983). Although this ruling came in a dispute over discovery rather than under the FOIA, we believe that this ruling from two liberal judges, combined with our previous lack of success, forecloses any realistic chance to obtain the participation of plaintiff's

*/E.g., Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

**/E.g., Salisbury v. U.S., 690 F.2d 966, 973 (D.C. Cir. 1982); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Colby v. Halperin, 656 F.2d 70 (4th Cir. 1981); Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

counsel in in camera proceedings under the FOIA. Accordingly, we do not believe that paragraph (1) detracts from any right we now have or reasonably might expect to have in the future.

Paragraph (2) provides the "the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties." Mr. Westreich makes a great deal of the fact that in "normal federal litigation," courts decide cases on the basis of evidentiary hearings. While that is true, there has never been an adversarial evidentiary hearing in any FOIA case involving national security information*/ and relatively few such hearings in other FOIA cases.**/ After ten years of extensive experience under the Act as it was amended in 1974, the judicial preference for deciding factual issues in FOIA cases on written submissions is well-established.***/ If anything, paragraph (2) gives us ammunition to argue for evidentiary hearings since it contemplates that in some situations a decision on written submissions is not practicable. Indeed, the House Intelligence Committee Report states:

> [C]ases will arise in which a court will find it impracticable to decide such issues based on sworn written submissions. Paragraph 701(f)(2) does not place obstacles in the path of the court in obtaining information it needs to decide these issues. Thus, when necessary to decision, the court may go beyond sworn written submission to require the Agency to produce additional information, such as live testimony, or the court may examine the contents of operational files.

*/In a few cases, courts have heard agency officials ex parte in camera.

**/Most of the few trials that have been conducted in FOIA cases have involved exemption (b)(4) where the issue is whether commercial or financial information submitted to the government would cause competitive harm to the submitter if released under the FOIA.

***/It should be noted that paragraph (2) is limited to decisions on issues of fact and therefore will not change the practice of hearing oral argument on legal issues presented on motions for summary judgment.

Mr. Westreich also mistakenly contends that paragraph (2) abolishes the right to discovery. The only limitation on discovery is in paragraph (5) which is limited to the specific issues arising under paragraphs (3) and (4). The House Intelligence Committee Report is quite clear that the limitation in paragraph (5) has no effect on discovery with respect to issues other than those raised under paragraphs (3) and (4):

> The specific provision concerning the issue of discovery in the context of the issues of improper placement of records and improper exemption of files is not intended to carry a negative implication that discovery on other issues is to be either especially encouraged or discouraged in any manner by this subsection. The question of discovery with respect to other issues shall continue to be governed by the practices developed by the courts under the judicial review provision of the Freedom of Information Act (5 U.S.C. 552(a)(4)).*/

As noted above, paragraphs (3), (4), and (5) deal only with two issues that will arise under H.R. 5164 -- i.e., whether documents are withheld because they have been improperly placed solely in exempt operational files and whether files have been improperly exempted as operational. Although these paragraphs alter the procedures that are followed with respect to existing issues, they are consistent with the overall purpose of H.R. 5164 and do not, contrary to Mr. Westreich's assertions, render the provisions of the bill unenforceable.

Paragraph (3) provides "when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence." If a plaintiff could make a bare allegation that a record has been improperly placed in an exempt operational file, the CIA would be required to search the entire file in order to respond

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*/Mr. Westreich is mistaken when he asserts that discovery is "perfunctory" in FOIA cases with the CIA. In response to a complaint, the Agency files a motion for summary judgment supported by affidavits to carry its burden of proof under the FOIA. In nearly every case where a plaintiff attempts to take discovery, the Agency files a motion for a protective order arguing that its affidavits are sufficient for the court to rule. Thus, in practice, because the CIA routinely responds to discovery requests with motions for a protective order, the plaintiff must convince the court that discovery is necessary.

to the allegation. If file searches could routinely be required on the basis of bare allegations, one of the purposes of the bill -- to relieve the CIA of searching operational files -- would be defeated. Thus, paragraph (3) requires something more than a bare allegation; the allegation must be supported by a sworn written submission or otherwise admissible evidence in order to trigger the search.

In practice this means that a plaintiff cannot allege improper placement on the basis of a hunch or generalized suspicion; he must be able to point to some evidence of improper placement. This requirement is no different from current practice, for courts do not require the CIA to expand its search for documents on the bare allegation that some are being hidden from the scope of a routine search. E.g., Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980). Although a sworn written submission based on personal knowledge would be the strongest support for such an allegation of improper placement, paragraph (3) does not require a verified complaint. Any admissible evidence will do. For example, if the Agency releases documents from non-operational files which refer to other documents which have not released, that would be evidence that the documents yet to be released are improperly located in operational files. This provision does not, as Mr. Westreich asserts, require a plaintiff to prove his case conclusively before filing it, but only requires that he have solid support for his case.

Paragraph 4 provides:

> (A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and
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> (B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence.

This paragraph establishes a procedure for dealing with allegations that a file which has been exempted as operational does not in fact meet the definitions for operational files. It does not deal with the requirements for a plaintiff to support an allegation, as does paragraph (3), but rather deals with

the showing required by the CIA to respond to an allegation that a file has been improperly exempted as operational. Subparagraph (A) provides that in the first instance, the CIA does not have to file a document-by-document description of a file in order to demonstrate that a file is operational within the meaning of section 701(b), but can meet its burden by filing affidavits that files likely to contain records responsive to an FOIA request currently fit the definition of operational. This provision insures that the Agency cannot meet its burden by demonstrating that the file at sometime in the past was designated operational, as the CIA wanted, but must demonstrate on the basis of a current review made in the context of the litigation that the file meets the definition. Since these sworn submissions will be submitted in support of motions for summary judgment that a file is properly exempt, they will have to meet the personal knowledge requirement of Rule 56(e), and there is no basis for Mr. Westreich's assertion that the Agency is relieved of this requirement or that the bill creates a double standard between the Agency and plaintiffs.

Subparagraph (B) provides that after the Agency has made its initial showing under subparagraph (A), the court can order the Agency to perform a document-by-document review of the file if the plaintiff controverts the Agency's initial showing through an affidavit or other admissible evidence. This provision merely codifies existing practice under the FOIA: if a plaintiff draws a genuine issue with an agency's affidavits, courts generally require the agency to file more specific affidavits to attempt to resolve the issue. As noted above, courts are extremely reluctant to take FOIA cases beyond summary procedures and have never done so in national security cases. Of course, as the House Intelligence Committee Report makes clear, if the Agency fails to carry its initial burden of proof under subparagraph (A), the court can order a search forthwith without moving on to the subparagraph (B) procedures.

Paragraph (5) provides: "in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure except that requests for admission may be made pursuant to rules 26 and 36." As already noted, this limits the use of discovery only with respect to issues arising under paragraphs (3) and (4). Thus, Mr. Westreich's repeated assertions that plaintiffs are deprived of discovery to enforce any of the bill's provisions is a mistaken exaggeration.

The House Intelligence Committee Report states that paragraph (5) "does not address access by the court to information" and "does not prevent the complainant from proposing to the court matters on which the complainant believes the court should

itself seek information from the CIA to decide issues in the lawsuit." As a practical matter, detailed information concerning the function and content of the CIA's files will itself be classified, and therefore plaintiffs will not have access to such information and will have to rely on the court's in camera evaluation of the CIA's submissions. Thus, this restriction on discovery does not deprive plaintiffs of information they can realistically obtain.

Paragraph (6) provides: "if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision on this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section." This provision is intended to insure that if a court finds that the CIA has violated any provision of H.R. 5164, the court can only order the search and review of responsive records and the release of records which do not fall within the FOIA's exemptions. Under this provision, the court cannot order the CIA to reorganize its file system, as the CIA paranoically feared might happen. Mr. Westreich contends that this provision prohibits a court from imposing sanctions for the CIA's misconduct in litigation. The House Intelligence Committee Report squarely contradicts this assertion by stating that "[t]his provision, of course, does not affect the court's authority under the Freedom of Information Act to assess reasonable attorneys fees, to punish for contempt, or to handle other, similar ancillary matters."

Paragraph (7) provides "if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint." This provision merely enables the CIA to moot challenges of noncompliance with H.R. 5164 by agreeing to process an FOIA request without regard to the exemption for operational files. In some cases this is likely to be an attractive alternative to litigation, and Mr. Westreich has not objected to this paragraph.