INTELLIGENCE REFORM ACT OF 1981

HEARING

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

INTELLIGENCE REFORM ACT OF 1981

JULY 21, 1981

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INTELLIGENCE REFORM ACT OF 1981

TUESDAY, JULY 21, 1981

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

The committee met, pursuant to notice, at 9:30 a.m., in room 6226, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater, Chafee, Durenberger, Moynihan, and Inouye.

Staff present: John G. Blake, staff director; Abram Shulsky, minority staff director, Dorthea Roberson, clerk of the committee; professional staff members Ed Levine, Sam Bouchard, Robin Cleveland, Michael Mattingly, Eugene Iwanciw, Spencer Davis, Gary Schmitt, Evelyn Chavoor, Robert Simmons, Ben Marshall, Ted Ralston, Ellen Burkhardt, Jean Evans, John Pingree, Kathleen Gallagher, Keith Raffel, Robert Butterworth, and John Elliff.

CHAIRMAN GOLDWATER'S OPENING STATEMENT

The CHAIRMAN. The meeting will come to order. I have put out the announcement that the hearing would not start until 9:45 a.m., but I was able to get here earlier and I think that in the interest of time, since we are going to have votes in the Senate all day, I will make my statement and I have asked Senator Chafee to make his, and then we will start with Admiral Inman and go through the list.

The Freedom of Information Act has created a serious problem for the Central Intelligence Agency and all Federal intelligence agencies that was certainly not intended at the time that the act was passed.

LOSS OF CONTACTS

Since the act was passed in 1966 and amended in 1974, we have been denied intelligence information that we normally could be expected to get from foreign sources, friendly foreign services, and some American citizens traveling abroad.

The reason that this has happened is that these sources no longer believe that our Government can protect them. Both our foreign and domestic contacts are turning away from us and frequently state that they have lost trust in our Government's ability to stop public disclosure and, in the case of foreign contacts, some suffer the real possibility of being killed.

SECURITY RISKS

The FOIA has exposed classified information recordkeeping systems to excessive distribution, and access beyond good security practices. In addition, it has created a serious problem that allows classified information to slip out accidentally, or be pieced together by skilled enemy agents, because of the great volume of classified documents that are reviewed for public release.

Needless to say, the loss of these sources is seriously damaging the ability of the intelligence agencies to do their job and, in turn, threatens the well-being of our country.

There are a lot of important things going on in the world today that are crucial for us to know about, but how are we going to know about them if we don't have anyone who is willing to let us know?

The intelligence agencies are having a hard time providing good intelligence information. One of our own laws makes it harder. This situation is so ridiculous that it would be funny if it were not so dangerous to our national security.

COSTS TO TAXPAYER

In addition, it costs the taxpayer $16 million a year to process FOIA requests, and I might say that the FBI alone employs 500 people who do nothing but look through these records. This figure is just for the intelligence agencies, not the entire Government. In effect, this is like a Government subsidy to those who make the requests, and I am not sure that this is fair to the other taxpayers who must pay for them.

NEED COMMONSENSE BALANCE

We have made ourselves the most public secret intelligence service in the world, and this has to be stopped. Some way has to be found to produce the proper, commonsense balance that does not deny the rights of citizens, while still allowing our intelligence agencies to do their job. The safety of our future depends on it.

This subject has been explored before. Both the Senate and House Intelligence Committees have held hearings.

There is no doubt about the need. The question is not: Do we need an exemption? Because we do. The question is: What kind and how to do it? These hearings will help provide the right answers.

I was pleased to join Senator Chafee as a cosponsor of this bill. This is a situation that has bothered me for a long time and just cannot be ignored any longer. I commend Senator Chafee for taking this first step.

As we examine this serious problem during these hearings, it will not take long to know that we have an emergency situation in the intelligence community. If the Congress does its job, it will put a stop to this dangerous nonsense.

Senator Chafee, I apologize for starting a little early, but we are going to have a tough one today with votes. Do you have a statement that you would like to make?

OPENING STATEMENT OF SENATOR CHAFEE

Senator CHAFEE. Thank you, very much, Mr. Chairman. I am delighted that you are holding these hearings today on the Intelligence Reform Act of 1981 (S. 1273), which you and I introduced on May 21 of this year.

When President Johnson signed the Freedom of Information Act into law on July 4, 1966, he stated that, "A democracy works best when the people have all of the information that the security of the Nation permits." I agree with that statement, and I would suggest that our job here today, the job of this committee and of this Congress, is to weigh the need for an informed public with the need of the intelligence community to protect legitimate national security secrets.

It is my hope that the witnesses who appear before us today, Mr. Chairman, will assist us in this evaluation by providing us with the special insights and expertise that they bring to this important subject. I must say, Mr. Chairman, that there is something wrong with a Freedom of Information Act which permits the KGB to ask the CIA for information and requires them to supply it.

Mr. Chairman, I look forward to hearing the witnesses today, and I ask that my full statement be inserted into the record.

[Prepared statement of Senator John H. Chafee follows:]

PREPARED STATEMENT BY SENATOR JOHN H. CHAFEE

Mr. Chairman, I want to thank you for holding these hearings today on the Intelligence Reform Act of 1981 (S. 1273), which you and I introduced on May 21st of this year. I also want to add my support for your remarks regarding the application of the Freedom of Information Act to the Intelligence Community.

When President Johnson signed the Freedom of Information Act into law on July 4, 1966, he stated that "a democracy works best when the people have all the information that the security of the nation permits." I concur fully with this statement, and would suggest that our job today—the job of this Committee and of this Congress—is to weigh the need for an informed public with the need of the Intelligence Community to protect legitimate national security secrets. It is my hope that the witnesses who appear before us today will assist us in this evaluation by providing us with the special insights and expertise they bring to this important subject.

1981 appears to be the year the Congress will review the Freedom of Information Act. Both the House and Senate have scheduled extensive hearings on this subject this month, and I understand that there are over 20 bills regarding the Freedom of Information Act (FOIA) which have been introduced this year. The Intelligence Reform Act of 1981 (S. 1273) is just one of these.

The purpose of S. 1273 is to amend Section 6 of the Central Intelligence Agency (CIA) Act of 1949 so that the CIA and other intelligence agencies and components of the U.S. Government are no longer subject to expensive and capricious requests for information under the provisions of the FOIA. Basically, this bill will provide relief to the CIA and to other components of the intelligence community from the burden of responding to certain types of FOIA request. At the same time, it allows U.S. citizens and permanent resident aliens to request information on themselves.

The language of this bill is virtually the same as that in Section 3 of S. 2216 which was introduced by a bipartisan group of Senators in January of last year. While I am not wedded to the specific language of this bill, I believe it is important for the Senate Intelligence Committee to continue the process of evaluating the impact of the FOIA on the intelligence community. It is my hope that this bill will give us a useful point from which to proceed on this important albeit controversial task.

In offering this bill, it should be clearly understood that I support openness in government and public access to official information. However, five years of experience with the 1974 amendments to the FOIA have shown that the application of a statute to provide openness in government to agencies whose work is necessarily secret has created problems which the Congress neither foresaw nor intended.

Any act that permits the KGB to inquire about the CIA's activities and requires the CIA to respond, obviously needs some overhaul. Why should Congress reconsider the existing Freedom of Information Act?

First, the mere existence of FOIA has had a negative effect on existing and potential sources of intelligence information both at home and abroad, and has led a number of allied intelligence organizations to reduce the flow of vital intelligence information to our own intelligence agencies. This point was made by Mr. Carlucci, Deputy Director of Central Intelligence, in testimony before the House Intelligence Committee, when he said in 1979:

"* * * a foreign intelligence source from a communist country broke off a productive association with us specifically because of fear of the consequences of disclosure under the Freedom of Information Act. Subsequently he failed to use established means for reviving contact with the Agency despite the asset's renewed residence outside his native land. We can only assume that he is lost as a source of foreign intelligence.

"The FOIA also has had a negative effect on our relationships with foreign intelligence services. Recently, the chief of a major foreign intelligence service sat in my office and flatly stated that he could not fully cooperate as long as CIA is subject to the Freedom of Information Act. In another case, a major foreign intelligence service dispatched to Washington a high ranking official for the specific purpose of registering concern over the impact of FOIA on our relationship."

Second, the processing of FOIA requests in the intelligence community draws highly-skilled officers and agents away from their primary intelligence tasks, and saddles them with a massive administrative burden which wastes their time, energies and skills. Last year, FBI Director Webster testified that his Bureau employed approximately 300 persons in order to comply with FOIA requests, while Mr. Carlucci of the CIA stated that his organization devoted 115 man-years to this activity. I am told that the Defense Intelligence Agency required the use of nine people for ten months on one FOIA request!

The FBI receives over 60 FOIA requests per day, while the CIA receives closer to 20 per day. The CIA has used a full-time employee for 17 months to respond to a single FOIA request, and they have spent over four man-years and $300,000 to respond to a series of requests from a single individual.

At a time when we are trying to reduce the costs, waste and inefficiency of government, I find it appalling that the American taxpayer is picking up the tab for these extravagant requests.

Third, the search of compartmented files, and the thorough review of sensitive information therein, of necessity breaks down the intelligence community's carefully constructed system of secure storage, and increases the risks of compromise of sensitive sources and methods. The CIA, for example, has over 20 different records systems, each of which may be searched in order to respond to a single request. Bringing together information from these different compartmented systems defeats the very purpose for which the systems were set up—namely, to limit individual access to sensitive intelligence information.

Fourth, the FOIA of 1966 was amended into its current form by the Congress in 1974 in response to the perceived need for greater public accountability of all branches of the U.S. government, to include the American Intelligence Community. The House and Senate Intelligence Committees were subsequently established in 1976 with a mission to provide Congressional oversight of the various intelligence agencies of the government. The establishment of these Committees, and the requirement that they be kept "fully and currently informed" by the agencies they oversee has eliminated the need for the burdensome and expensive system of so-called "public accountability" provided by the FOIA. Furthermore, the experience of the last five years has shown that the broadly based provisions of the FOIA cannot be equally applied to the Intelligence Community as well as to other less-secretive and less-sensitive branches of the government without substantial adverse effects.

One of the most difficult things a free and open society can do is to balance the need for an educated and informed public with the need for the government to preserve and protect legitimate national security secrets. There will always be tension between these two conflicting needs and, in my judgment, this tension is best maintained if there is an equitable balance between these two competing interests.

In recent years, I believe that this delicate balance has been upset. The American Intelligence Community has been subjected to an unprecedented and highly damaging publicity which threatens its effectiveness and security. Last year, for example, when a high-level Soviet defector was asked what his government thought of the restrictions which have been placed on U.S. intelligence agencies since 1974, he responded:

"They are most happy about it. The more U.S. intelligence is restricted, the more opportunities or possibilities the KGB or GRU have to do whatever they want because the only power in this country, or in any other country, to face the KGB are the intelligence agencies. In the United States, this is either the CIA or the FBI. And the more they are restricted in their activities, the less they can do against the Soviets. So, Soviet intelligence was very happy to see that the image of the CIA went down because of a campaign against the CIA in the United States." (Chicago Tribune, Nov. 8, 1980.)

The idea of providing the Intelligence Community some sort of relief from the broad provisions of the FOIA is not a new idea. The Carter Administration supported this concept as early as 1979, and the Republican Party Platform for 1980 called for an amendment to the FOIA "to reduce costly and capricious requests to the intelligence agencies."

My purpose in introducing this bill was to begin the process of examining the impact of the FOIA specifically on the Intelligence Community. It is my hope that the Senate Intelligence Committee hearings on the subject will help us begin to develop a legislative formulation which will provide our intelligence agencies with some relief from the pernicious effects of the FOIA while, at the same time, meeting our own standards for public accountability and the rights of the individual citizen.

Mr. Chairman, in closing, I would like to thank you for holding these hearings on S. 1273, and applaud you for your leadership in this area.

The CHAIRMAN. Thank you, Senator.

Senator Moynihan's opening statement will be received for the record.

[The prepared statement of Senator Daniel Patrick Moynihan follows:]

PREPARED STATEMENT OF SENATOR DANIEL PATRICK MOYNIHAN

I wish to commend my distinguished colleague, Senator Chafee, for taking the lead in the Committee's examination of the impact of the Freedom of Information Act on the CIA and other intelligence agencies. We welcome this opportunity to consider the need for his bill, S. 1273, which would broaden the FOIA exemption from intelligence sources and methods. In the last Congress, I introduced S. 2216, one of whose sections was similar to S. 1273. Unfortunately, the press of work on other matters prevented the Committee from reaching any conclusion. I sponsored that legislation in the same spirit as Senator Chafee has offered his bill—as a basis for considering how we might better strike the balance between requirements for security of the intelligence community and the public's right to know.

It has been suggested that subjecting our clandestine services to a compulsory public disclosure statute is an absurdity. I am not prepared to accept this proposition. Rather, I would offer this alternative thesis: that the applicability of the freedom of information concept to our intelligence community is a paradox—that is to say—while seemingly a contradiction in terms, in reality it expresses a great truth. It is a truth reflected in our Constitutional tradition of balancing the requirements of secrecy in national security matters with First Amendment rights of free speech and press. We see this balance manifested in the extent of Congressional oversight of our intelligence community which is unique in the world. The accountability of our intelligence agencies to standards of conduct stipulated in a public Executive Order is equally singular.

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The FOIA is in keeping with this tradition. It is an effort—perhaps an imperfect one—to strike a prudent balance between the value of openness in government, which emanates from the First Amendment, and the need for secrecy. Thus, Congress in effect exempted our intelligence agencies from FOIA, but only to the extent thought necessary to protect sources and methods and properly classified and other sensitive information.

So I urge my colleagues and our witnesses to keep the American character of our intelligence service in mind as we study the important issues raised in the FOIA debate. I would further suggest that any broadening of the exemptions for the intelligence agencies should be commensurate to the need as demonstrated by the evidence. We will have the benefit of the views of an excellent array of witnesses and I will weigh their testimony carefully.

The CHAIRMAN. Our first witness is Adm. Bobby Inman, Deputy Director of the Central Intelligence Agency. Admiral, you may proceed as you wish.

STATEMENT OF ADM. BOBBY R. INMAN, DEPUTY DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY ERNEST MYERFIELD, GENERAL COUNSEL

Admiral INMAN. Thank you, Mr. Chairman. It is a pleasure to have the opportunity to put on record my views about the impact of the Freedom of Information Act on the U.S. intelligence community and my absolute conviction that the Congress needs to enact changes to right the difficulties that we have. I have a formal statement and with your permission I will submit that for the record.

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

HIGH POINTS

Admiral INMAN. If I may informally go through the high points. As Senator Chafee has noted, the Freedom of Information Act was enacted in 1966. At the point in time of its enactment, it was not foreseen that there would be major impact on the intelligence agencies. From 1966 until the act was amended in 1974, in going back through the historical record, I do not find that major impact occurred on the day-to-day functioning of the intelligence community, or the Central Intelligence Agency, or the National Security Agency.

In 1974, you will well recall, the time that the Freedom of Information Act was amended, the intelligence community had begun to be subjected to substantial interrogation and investigation of its activities over the past 25 years. In that climate, getting amendments to protect the foreign intelligence agencies was simply not achievable. There is now 7 years of practice to document the impact.

That documentable impact I believe should be sufficient to compel the Congress that fundamental change in the act is required. There are major problems of security, and there are major problems of diversion of assets that could be used far more effectively. I believe that fundamentally, Mr. Chairman, there is the basic question of applicability of the Freedom of Information Act statute to the U.S. intelligence agencies.

Beginning from the experience of World War II, the United States consciously decided it needed secret intelligence agencies as part of its national security fabric, and in the laws enacted from 1947 forward

there is a long record of both executive branch and congressional support for the need of this country to have a healthy, viable intelligence structure.

What we did not have in the early part of that time was a viable means to insure proper oversight of those necessary secret activities. While everyone will point to the turmoil that we all endured in the middle 1970's, a very strong result in my view is the establishment of the two select committees of the Congress whose purpose is to provide oversight not only for the legislative branch but for the public to insure that the actions undertaken by the intelligence agencies in secret are in keeping with the law and the Constitution and are dedicated to the national needs of this country.

I submit that it is fundamentally incompatible that you would use a freedom of information approach as the means to achieve oversight of the functions of the intelligence agencies whose conduct must be secret. Beyond that fundamental conflict, the diversion of assets to deal with a steadily burgeoning number of cases is real and it continues to grow. There were 1,212 new freedom of information cases logged at CIA in 1980. The 257,420 actual man-hours of labor or 144 man-years were devoted to the processing of Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation as compared to 110 man-years of effort in 1979.

With the adequacy of congressional oversight available from the select committees, it is neither necessary nor wise to divert the assets committed to this action away from the collection, processing, and reporting of foreign intelligence where, as you know from our classified hearings, we have critical shortfalls.

COMPLIANCE, SUITS, COST

Even with the best of review systems, there are hazards in trying to comply with the Freedom of Information Act process in an open environment. First, you must take the most qualified intelligence analysts, collectors, operators to review the materials that are being processed. You cannot hire a clerk to do that job. Even by using the best talent, from time to time there will be accidents or materials will be inadvertently released.

If there was a major national interest that was being served, if there was no other way to insure oversight, then I would before this committee support that the advantage should go toward the oversight. In this instance, taking the hazard that any information will be inadvertently released is an unnecessary risk to sources and methods.

You may have noticed in the morning's paper that we had a major court decision yesterday, the U.S. district court on the subject of freedom of information. It captures both in the nature of the case and in the judge's views much better than I can the problems which we face and the remedy that we urgently need as provided by the legislation introduced by Senator Chafee.

Phillip Agee who is surely known to the committee brought a lawsuit under the FOIA against the CIA, the FBI, NSA, the Department of State and the Department of Justice seeking all records in the possession of those agencies concerning the Agee case. Last Friday the

Honorable Judge Gerhardt Gisell of the U.S. District Court of the District of Columbia ruled in favor of CIA with regard to all determinations concerning national security matters in over 8,000 documents withheld.

I would like to share a part of his opinion with you. The judge said,

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

The following footnote is inserted here:

> As of January 1981 the Director of Operations of the CIA where 92 percent of the documents were retrieved had expended approximately 25,000 man-hours on the request involving salaries totaling $327,715 and computer costs of $74,750. The costs now far exceed the sum. Under the statute these costs cannot be charged to Agee in whole or in part.
>
> Nonetheless the Court conscious of its responsibility to apply the act as presently written and interpreted has diligently sought to assure itself that under the exacting standards laid down that the CIA has complied in good faith with Agee's extraordinary request.

Mr. Chairman, I urge quick and prompt action on the proposed legislation to provide the requested exemption for the intelligence agencies with full confidence that the interests of the country in oversight of the intelligence community will be fully and effectively served by the congressional bodies which have been established to do that role, and that we should cease this needless expense of dollars and of manpower and put them to far more productive use on behalf of the country's security.

I would be happy to try to answer any questions that you have.

The CHAIRMAN. Thank you. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

Admiral Inman, the arguments on the other side are obviously going to be that this is a wealthy country and what is $300,000 in order to preserve to the greatest extent possible an open society. This is argument 1. Argument 2 is that the CIA, when it has gone to court to prevent the release of some documents that it felt were harmful to the security of the United States, has always prevailed. I do not know whether argument 2 is true or not.

CIA IN COURT

When the CIA has gone to court, has the CIA always prevailed?

Admiral INMAN. The CIA has gone to court frequently. That has driven up the size of our legal staff substantially. The Deputy General Counsel, Mr. Myerfeld, can explain in much greater detail. We have been successful to date, but there is a case in court now in the District Court here in the District of Columbia in which for the first time a judge has raised the prospect of his trying to make determinations on whether or not material is properly classified.

To this point in time, the reason that we have prevailed is that the executive branch's basic right to decide whether something is properly

classified has always been accepted. Absent this legislation, we now have the prospect, if we are not successful on appeal, that we will have an entirely different and much more troubling standard that you will have to apply.

Senator Chafee, I think that that argument really does go back to the basic question of how this country having decided in the post-World War II environment that as a fundamental part of its national security structure it must have intelligence agencies which must operate in secret to protect sources and methods and that that process cannot flourish when you also have legislation that looks to a process of openness in Government in dealing with those institutions.

It is not the case of trying to hide fraud, waste, abuse, mismanagement, but rather a fundamental question of the necessity to protect sources and methods which have proven to be extraordinarily fragile over time.

FOREIGN INTELLIGENCE RELUCTANCE

Senator CHAFEE. In the testimony delivered on the House side 2 years ago by your predecessor, Mr. Carlucci, it was pointed out that foreign intelligence services are extremely reluctant to deal with us because of the fear of disclosure under the Freedom of Information Act. He gave specific examples in that testimony, and I ask that we include those examples in this record.

My question to you is, Have you found any negative effects from the existence of the act as far as the willingness of foreign government agencies, or foreign government sources, or foreign government agencies themselves being willing to deal with us?

Admiral INMAN. Senator Chafee, I have found that it is not myth, it is a reality, and it continues to this day. I would be happy to provide details, specific details, to the committee in closed session. There was a case only a couple of months ago where we specifically wanted information, information that would be of substantial value to this country, the country who we asked to provide it declined. They declined to provide it on the basis that they would be afraid that they would ultimately read about it in the newspaper, and that it would reveal techniques that they considered vital to their own national security which they might well need to use again.

Senator CHAFEE. Was this because of potential leaks in our system or because of the existence of the Freedom of Information Act?

Admiral INMAN. It is a combination. Obviously, the whole question of leaks is one that is troublesome to us all, but there have been instances of release of information through the Freedom of Information Act where foreign governments have concluded that sources and methods of their own were endangered. It does not take a lot of these. The mere prospect that it may occur serves as a very substantial bar to their willingness to provide information to us in a free manner.

Senator CHAFEE. You have run into specific instances on this yourself?

Admiral INMAN. Which I would be happy to provide for the record in closed session.

Senator CHAFEE. One final question, Mr. Chairman.

Admiral, you have compartmentalization in the storage of your records in the CIA. Now, when someone submits a freedom of informa-

tion request, presumably that compartmentalization must be broken down so that individuals or an individual who is doing this research goes into all of the different compartments, is that correct?

Admiral INMAN. Out of necessity it occurs in the certainty that you have fully responded with the requirements of law.

Senator CHAFEE. That itself must present the danger that, careful though you might be, information which you wish to guard, and which you are permitted to guard under the Freedom of Information Act itself, inadvertently goes out. That is a problem, is it not?

INADVERTENT RELEASE

Admiral INMAN. There is always the problem of the inadvertent release, but what it really drives you to do in trying to insure against it, Senator Chafee, is using the most highly qualified people to examine to guard against that; those who are already exposed to various compartments, who ought to be busy managing collection operations, you in fact divert them to work in this process simply trying to hold down the prospect of the inadvertent release.

The question of an inadvertent release is not again a myth held up to scare the Congress into action. Unhappily, there have been some mistakes in the process. They have been of enormous concern to foreign governments in cases where they have occurred. In at least one case, there is potential that the source's life could have been in danger.

Senator CHAFEE. I did not hear that.

Admiral INMAN. Where a source's life could have been in danger. Much more damaging over the long term has been the impact on some of our closest friends and collaborators, on whom we are very dependent in this decade where we have drawn down so much of our own intelligence resources, where through inadvertent disclosure details have been released of their intelligence programs which they continue to maintain are and should remain classified.

There is both the danger of inadvertent release and even a greater problem as you try to backstop against that of diverting your most talented and experienced people who ought to be used for other functions that are simply much more productive for the country's interest.

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

QUESTIONS ON FOREIGN REQUESTS

The CHAIRMAN. Just a few questions, Admiral.

Can foreign nations acting under the Freedom of Information Act get information?

Admiral INMAN. Yes, sir, they can. The KGB can ask, and if in fact we do not reply within the proper days, they can also appeal and take us to court under the provisions of the law. They could take us to court to compel us to release it.

The CHAIRMAN. And make you give it.

Admiral INMAN. Yes, sir.

The CHAIRMAN. Are foreign requests given the same consideration as requests from American citizens?

Admiral INMAN. There is no provision in the law, and again I defer to my distinguished colleague here to correct me anywhere along the

way if I have made a mistake, there is no provision in the law that lets us discriminate against any applicant, so we must take the requests in the order in which they come. A foreign government or a criminal element would get every bit as much priority as a normal citizen.

I should have underlined in my opening statement that we are not seeking through this legislation to modify the Privacy Act. We support the continued effectiveness of the Privacy Act to the point that any individual who has concern that they may have been the subject of any kind of collection or reporting activity by the intelligence agencies may request that information and we will respond.

If it is classified, we may not provide them the information, but at least we will respond that there is a file and then tell them they may use all of the procedures that follow. We are not making any effort, and certainly we would never intend to make the effort, to deprive the Privacy Act portions under this legislation.

The CHAIRMAN. Then what you are saying is that if we had a recognized enemy country, they could get information from this source?

Admiral INMAN. By law we are required to comply.

The CHAIRMAN. Even though we might be at war with that country?

Admiral INMAN. Technically, the answer is yes.

The CHAIRMAN. That is true?

Admiral INMAN. Yes, sir, it is true.

The CHAIRMAN. That is a heck of a fix.

Senator CHAFEE. What was that one again, Mr. Chairman; if we are at war with another country, they could submit a request through the Freedom of Information Act?

Admiral INMAN. The chairman's question was if a country that we recognize as hostile asked us the question, would we have to comply. Under the current law as it is, one would indeed comply. I defer again to the general counsel for the practice of emergency procedures in wartime. I believe that we did operate for a good period of time under President Truman's declarations during the Korean war in which the applicability of some laws were waived, at least personnel and promotion laws.

Mr. MYERFELD. I am not certain, but the act itself does not provide for an exception in the case of war. Theoretically, even an enemy country could make a request and we would be obliged to answer it.

The CHAIRMAN. I do not believe that our intelligence agencies should have to process any Freedom of Information Act requests from foreign nationals, and I doubt that that was the intent of the law.

Do you want to comment on that, either one of you two?

Mr. MYERFELD. There was some discussion of this problem in the course of the legislative history before the enactment, and there is a statement in there which would give rise to the thought that the Congress specifically intended to include access by foreigners to Government information under the act.

The CHAIRMAN. That is quite revealing.

I have no further questions. Thank you, very much, Admiral. It is always a pleasure to have you here.

Senator CHAFEE. If I could ask one.

In my opening statement, I said that we have an existing situation where it is perfectly possible for the KGB to request information now.

There is no dispute about that. Forget the wartime situation. You do not have to be a U.S. citizen or a registered alien to request information under the Freedom of Information Act; do you?

Admiral INMAN. You do not have to be.

Senator CHAFEE. It could be anybody.

Admiral INMAN. It can be anyone.

Senator CHAFEE. Mr. Brezhnev could submit a request, and then we would have to meet that request.

Admiral INMAN. Right.

Mr. Chairman, if I might summarize with two thoughts. From my previous 4 years of experience with the National Security Agency, we were less burdened than the Central Intelligence Agency and the Federal Bureau of Investigation largely because we had a court decision in the Ninth Circuit which ruled that we did not have to release information accepting the basic State secrets privilege, but we were not relieved of the requirement to search the records even though we knew that eventually we would not have to release it.

That was a waste of manpower to do that then and now that continues to be very irritating to me as a taxpayer as well as a manager. Looking at the problems that the CIA encountered, and I have spent a lot of time looking at them to persuade myself that I thought that this legislation could, in fact, be enough, and I found that the bill that Senator Chafee enacted last year which gave a partial exemption supported by the administration, and I raised the question why are we seeking a total exemption this time if we were willing to settle for less than that before.

I find that the simple answer is that that was the most that one could get the executive branch to agree to even though it was the intelligence community's very strong desire then as now for a total exemption. As you know, the administration has not yet finished putting together its final view on all the revisions of the Freedom of Information Act which might be necessary, but we have been given strong support by the Justice Department in our specific desire that CIA and NSA should be given a full exemption from the FOIA.

Thank you.

The CHAIRMAN. Thank you, very much Admiral, it was a pleasure to have you here.

[The prepared statement of Adm. B. R. Inman follows:]

PREPARED STATEMENT OF ADM. B. R. INMAN, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Mr. Chairman, Members of the Select Committee on Intelligence, I am pleased to have this opportunity to appear before you today to discuss the Freedom of Information Act's impact on the Intelligence Community. I have been giving considerable thought to the particularly serious problems being experienced by the Central Intelligence and National Security Agencies under the FOIA. I am convinced that there is an inherent contradiction in the application of a statute designed to assure openness in Government to agencies whose work is necessarily secret, and that the adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit. Mr. Chairman, I believe that it is time to reexamine the fundamental question of whether it makes sense for the FOIA to be applicable to our Nation's two most sensitive intelligence agencies.

The Freedom of Information Act was first passed in 1966. President Johnson described the Act as stemming from the principle that "a democracy works best

when the people have all the information that the security of the Nation permits." The declared purpose of the Act was to broaden access to government information connected with activity impacting upon the public, with certain exceptions in areas in which Congress believed exemptions were warranted in the national interest. During the post-Watergate period of pressure for more openness in government, amendments to the FOIA were enacted over President Ford's veto against a background of allegations that Federal agencies were frustrating the intent of the Act through delaying tactics, the unreasonable assessment of fees, and the wholesale invoking of exemptions. The Supreme Court's decision in *EPA* v. *Mink*, however, was the key impetus for the amendments. The Supreme Court had ruled that an agency must examine classified documents before invoking the FOIA exemption permitting such documents to be withheld from disclosure, but that it was not for the courts to rule on whether the classification itself might be unwarranted.

Prior to the 1974 amendments, the Central Intelligence Agency had received virtually no FOIA requests, and no litigation had been initiated against the Agency in connection with any denial of release of information under the classified documents exemption. The 1974 amendments made several fundamental changes in the Act, the most notable of which were:

(1) Reasonably segregable portions of a document not falling under the Act's exemptions were required to be provided to the requester; and

(2) The courts were given authority to review agency determinations that records were withholdable under the Act. This has resulted in an increasing tendency on the part of the courts to second-guess the judgment of professional intelligence officers that information is properly classified in order, for example, to protect the identity of intelligence sources.

These amendments lead to an explosion in FOIA requests directed at the CIA, and a corresponding increase in associated litigation. Resources and manpower devoted to FOIA matters have, of course, increased tremendously since the mid-1970's. The CIA's latest annual report on its administration of the Act contains the following statistics for calendar year 1980:

1212 new FOIA cases were logged during 1980.

257,420.5 actual man-hours of labor (or 144 man-years) were devoted to the processing of Freedom of Information Act, Privacy Act. and mandatory classification review requests, appeals, and litigation, as compared with the 110 man-years of labor devoted in 1979. More than half of these resources were devoted to the processing of requests for subject matters information under the FOIA.

Over $3 million was expended in personnel costs for processing, appeals, and litigation related to these requests. About two-thirds of this amount was spent on FOIA cases.

Mr. Chairman, the money and manpower currently being devoted to FOIA matters could certainly be utilized more productively in substantive intelligence pursuits, but I want to be sure that it is understood that gross personnel and resources figures, as significant as they are, are not the most important aspects of the FOIA problem for the intelligence agencies. Other government agencies may receive more FOIA requests, spend more time and money, and devote more manpower to FOIA, but they are not intelligence agencies. The problems besetting CIA and NSA under the Act are unique because their missions are unique, and these problems cannot be solved by an infusion of money or manpower to deal with FOIA requests.

The search and review of records in response to FOIA requests poses a special set of problems for the Central Intelligence Agency. The CIA's records systems are an integral part of the Agency's security system to protect sensitive intelligence information. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Because a primary CIA mission is to gather information, its records systems are constructed to support that mission, and thus, the search for records in response to an FOIA request becomes uniquely difficult. These records, which number hundreds of millions of pages, are compartmented and segregated along operational and functional lines. Several components have multiple records systems. Thus, the search for information responsive to an FOIA request is a demanding and time-consuming task. A relatively simple FOIA request may require as many as 21 Agency record systems to be searched, a difficult request over 100. The "need to know" principle, also, means that CIA employees normally have access only to information necessary to per-

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form their assignments. Thus, in the process of searching for documents in response to an FOIA request, people who would otherwise never have access to compartmented information necessarily see such documents.

But, Mr. Chairman, it is not the quantity of time and effort devoted to this process that is the ultimate concern to us. It is rather the level of employee who must become involved in the review process. By this I mean the types of people who must participate in FOIA processing and the impact which this involvement has on the ability of these intelligence officers to carry out their intelligence collection or analytical assignments.

When we surface information in response to an FOIA request, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld, in accordance with applicable FOIA exemptions, in order to protect matters such as the security of CIA operations or the identities of intelligence sources. In most other government agencies the review of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources who could be jeopardized by the release of information in which their identities might be exposed. In some circumstances mere acknowledgment of the fact that CIA has any information on a particular subject could be enough to place the source of that information in danger.

It must be remembered that the primary function of the CIA is intelligence gathering, an activity which frequently takes place in a hostile environment, and which must take place in secrecy. The mere disclosure that the CIA has engaged in a particular type of activity or acquired a particular type of information can compromise ongoing intelligence operations, cause the targets of CIA's collection efforts to adopt countermeasures, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive information if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of CIA information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve participation in, or management of, vital programs of intelligence collection and analysis for the President and our foreign policy-making establishment. Experienced operations officers and analysts are not commodities which can be purchased on the open market. It takes years to develop first-class intelligence officers. Again, let me emphasize that these reviewing officers are not FOIA professionals, they are intelligence officers who are being diverted from their primary intelligence duties. This diversion is impacting adversely upon the ability of the Agency to fulfill its vital intelligence mission.

Mr. Chairman, efforts to fulfill our intelligence missions while subject to the provisions of the FOIA have placed the CIA in a vicious cycle. Intelligence information must be processed and analyzed quickly if the President, the Cabinet, and the Congress are to receive the latest and most accurate assessments of foreign developments. The need for up-to-the-minute information frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act. This results in the Agency being sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process. The defense of such suits, as well as those that are brought because of a denial of the information requested, requires the time and effort of numerous personnel, including intelligence officers directly concerned with the request in question. Thus, these intelligence officers are again diverted from their primary intelligence duties and put even further behind in reviewing other FOIA documents. Therefore, despite an increase in the manpower devoted to FOIA review in 1980, the backlog of unanswered requests increased by 400 cases. Mr. Chairman, when the work of senior intelligence officers is diverted to FOIA concerns because information must be reviewed, or because court affidavits must be prepared under strict time constraints to justify a delayed response or a previous denial of information, the ability of our Nation to formulate an informed and successful foreign policy suffers. This is not a healthy situation. The diversion of senior management time and attention from primary tasks to FOIA matters, particularly in connection with litigation, is of especially great concern to me.

The CIA has been sued for denying information in response to FOIA requests in 198 lawsuits. The conduct of this litigation involves not only an enormous amount of lawyer time at the Agency and the Department of Justice but since the factual submissions must be presented by substantive intelligence officers by way of affidavits and depositions and the like, the litigation process places an enormous burden on people who should be doing other things. Yet all this activity in court has, with almost no exception, resulted in a judicial affirmance of CIA and NSA claims of national security exemptions. However, the fact remains that judges with no expertise in the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. My colleague, Lieutenant General Faurer, is addressing this problem in some detail. In one case involving CIA records a district court judge has specifically overruled a CIA classification determination and the Court of Appeals has upheld this ruling. A petition for a rehearing on this case is now pending.

While we are proud of our excellent record in court because it illustrates both the seriousness of our attitude toward compliance with the FOIA's provisions and the quality of our legal work, we cannot be certain that we will continue to be as successful in the future as we have been in the past. However, our litigation record has been achieved at an enormous cost in the kind of quality resources which I described earlier. I cannot help but wonder, Mr. Chairman, how much better our intelligence product might have been in some key areas had the time and effort devoted to FOIA litigation by senior intelligence officers been focused instead on crucial intelligence missions.

Mr. Chairman, I would like to add one other point which is related to the FOIA process. The Freedom of Information Act currently contains exemptions for classified documents and other matters that are set forth as exempt from disclosure. These exemptions have generally been adequate to protect sensitive national security information. But, even with the kind of quality resources we devote to the review process, human error is always a possibility. Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive CIA and NSA information. These unintentional disclosures are constant reminders of the risk which will be present so long as these agencies are subject to the Act. The handling of FOIA requests involving CIA and NSA information by other agencies has also resulted in some serious compromises of classified information relating to intelligence sources and methods. Compounding these problems are attempts by requesters to gain additional classified information based upon these compromises.

Mr. Chairman, the FOIA further impedes the CIA's ability to do its job through the perception it has created overseas. While the perception of CIA's inability to keep secrets may be caused by leaks, unreviewed publications by former officials and the like, it is the FOIA that is viewed as the symbol of this problem. Individual human sources and foreign intelligence services are aware of the Act, and view it as a threat to the Agency's ability to maintain the confidentiality of its sources, and to protect the information they provide. An intelligence agency cannot operate effectively under such conditions. Human intelligence is as important today as it has ever been in the history of this Nation. To obtain this intelligence it is vital that there be confidence in the ability of the United States Government to honor assurances of secrecy.

It must be remembered that many individuals who cooperate with the intelligence efforts of the United States do so at great personal risk. Identification as a CIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture, or death. We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to maintain such commitments, despite our explanations that the Act provides exemptions which allow for the safekeeping of sensitive information. The concept of an intelligence agency being subject to an openness in government law is not uniformly understood by individuals and intelligence services abroad. It has been necessary to spend a great deal of time attempting to convince foreign intelligence services that they should not discontinue their liaison relationships with us because of the FOIA. The very fact that CIA files are subject to search and review for information which is releasable is extremely disturbing to our sources. There have been many cases in which individuals have refused to cooperate with us,

diminished their level of cooperation with us, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. What we will never know, Mr. Chairman, is how much valuable information has been lost to the United States due to the reluctance of potential human sources to even begin a relationship.

Mr. Chairman, I believe it is absolutely clear that the FOIA is impairing our nation's intelligence efforts. The minimal benefit accruing to the public from application of the FOIA to the Central Intelligence and National Security Agencies is simply not worth the cost to the effectiveness of these agencies. Let us ask ourselves some basic questions about the FOIA's application to the intelligence agencies.

First, does the application of the FOIA to CIA and NSA fulfill the Act's fundamental purpose of giving the American people greater access to information about the workings of government which affect their daily lives? The answer to this question is no, because our intelligence activities are focused on the acquisition of information abroad and its analysis for foreign policymakers.

It might be asked whether the application of the FOIA to CIA and NSA serves a useful informing function. Again, the answer is no. Information which is released under the Act is generally extremely fragmentary and it can often be misleading. Mr. Chairman, I would note that certain organizations have published lists of books and articles said to be of public interest which supposedly were based on information released by intelligence agencies under the FOIA. The argument is made that these materials could not have been published without the FOIA. I believe that such claims are grossly exaggerated. The FOIA has not resulted in the revelation of fundamental information but has instead been used to garner additional details about subject matter which was originally either revealed by one of the intelligence agencies on its own, or in the course of investigations such as those conducted by the Rockefeller Commission or the Church Committee.

Mr. Chairman, one of the purposes of the Freedom of Information Act is to provide the American public with a mechanism by which they can know how government agencies are carrying out their functions. This leads to another question: Isn't the FOIA needed to provide public oversight of the intelligence agencies, in order to ensure that the abuses and excesses of the past do not recur? Mr. Chairman, the FOIA has never been an effective oversight mechanism for the CIA or NSA, and the idea that it should apply to these agencies for such purposes ought to be laid to rest once and for all. The fragmentary information obtainable under the FOIA has not, cannot, and will not ever remotely compare in value with the congressionally established oversight responsibility which lies with this Committee and its companion committee in the House. These two committees are specifically responsible for overseeing the funding and operations of the various intelligence agencies. I believe that it is fair to say that no other agencies in the Government are subject to such close congressional scrutiny on a permanent, ongoing basis. It is this system of vigilant and effective congressional oversight, along with extensive Executive branch review mechanisms, which provides the means through which the American people are assured that the operation of their intelligence agencies is in accordance with applicable law.

Mr. Chairman, the President has stated his determination to enhance the Nation's intelligence capabilities, and I have pledged to work toward achieving that goal. To do this, the CIA and NSA must be able to focus their energies on the timely and accurate gathering and analysis of information in a manner which insures the secrecy of the sources and content of that information. For the reasons I have stated, I believe the current application of the FOIA to the CIA and NSA is inappropriate, that it is detrimental to the accomplishment of intelligence missions and that is is unjustified by its insignificant public benefit.

Mr. Chairman, what is to be done? I want to make clear that I am firmly convinced that CIA and NSA problems under the FOIA cannot be substantially alleviated by strengthening the grounds upon which information can be withheld from public disclosure under the Act. Senator Chafee's Bill, S. 1273, takes a different, more promising approach in its effort to seal off certain categories of files from the entire FOIA process, including search and review. I believe that Senator Chafee's Bill, if enacted, would have a major positive impact. But Mr. Chairman, I also believe that the time has come for the Congress to face the issue squarely and definitively, and to recognize that only a total exclusion of records created or maintained by the Central Intelligence Agency and the Na-

tional Security Agency from all of the Freedom of Information Act's requirements can, by completely eliminating the need to search and review records in response to FOIA requests, end the wasteful and debilitating diversion of resources and critically needed skills, eliminate the danger of court-ordered release of properly classified information, and regain the confidence of human sources and foreign intelligence services.

Mr. Chairman, I would like to add one footnote to my testimony before you today. Nothing which I have said should be construed to indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them, and to obtain this information when security considerations permit. I wish to state categorically that CIA and NSA would continue full compliance with the Privacy Act even if these agencies were to be totally excluded from the FOIA.

The CHAIRMAN. Our next witness will be Lt. Gen. Lincoln Faurer who is the Director of the National Security Agency. You may put your prepared remarks in the record, if you care to, and then comment or proceed in any way that you care to, General.

STATEMENT OF LT. GEN. LINCOLN FAURER, NATIONAL SECURITY AGENCY, ACCOMPANIED BY DANIEL SCHWARTZ, GENERAL COUNSEL

General FAURER. Thank you, Mr. Chairman.

I would like to do that, provide a somewhat longer statement for the record, and provide you at the moment a somewhat shorter summary statement. I have sitting with me at the table Mr. Daniel Schwartz, our General Counsel.

FOIA IMPACT ON NSA

Mr. Chairman, members of this committee, I certainly appreciate this opportunity to discuss with you the impact of the Freedom of Information Act on the National Security Agency. Although NSA has not received the volume of requests that other agencies have, we do receive over 400 requests per year and have about 13 FOI cases in litigation at the present time.

As you know, NSA has two missions; the communication security mission and the signals intelligence mission. We obtain intelligence data only from a single especially sensitive and fragile source, foreign electromagnetic signals. In addition, both signals intelligence and communications security use the same cryptologic information methods and techniques.

Congress has provided special statutory protections for such cryptologic information methods and techniques including protections for both unclassified and classified information and special requirements for access to such information. The Freedom of Information Act since the 1974 amendment presents special risks of disclosure for cryptologic information and some special problems in protecting such information.

While we have been fortunate in never having lost a FOIA case, we have been forced to place far more information concerning our activities on the public record than we believe to be prudent or required. Thus, over the years, the open affidavits that we have been forced to place in the public record to justify withholding materials under FOIA have grown considerably.

We are also routinely required to file with courts increasingly detailed classified affidavits to be considered in camera. The damage that could occur from compromising these affidavits is considerable since we are required to put individual documents in context to justify withholding them. Nonetheless, we have been forced on occasion to seek relief at the appellate level to protect against disclosures of these in camera affidavits.

In one such case, the court would have required the disclosure of all but two paragraphs of a highly classified in camera affidavit. In another case, the court would have required release of the information and on remand would have permitted access to the classified in camera affidavit by plaintiff's uncleared attorney.

In our view, some of our difficulties in litigation have arisen from the substantial departure that courts have taken from the Congress intent as expressed in the 1974 amendment to the Freedom of Information Act. Congress provided that certain categories of classified information already protected by statute be provided a higher threshold of protection under the paragraph (b)(3) exemption of the act. This would have eliminated the more detailed de novo review by the courts of records claimed to be exempt from release under (b)(1), the exemption under the FOIA, that applies solely because the records are classified.

Section 798 of title 18, United States Code, which protects classified cryptologic information, was specifically cited by the Congress as a statute to which the (b)(3) exemption applied. Yet the courts have consistently moved toward applying the (b)(1) criteria to (b)(3) exempted records requiring a fuller justification for withholding the material and the placing of more information on the public record.

In light of the sensitivity of these materials, we are also particularly disturbed by disclosures, breeches of security, and possible compromises that have occurred in the administrative handling of classified cryptologic information subject to FOIA requests and the litigation of cases justifying the withholding of materials.

Such activities require large numbers of people who have access to sensitive NSA materials. Many times these people are not sufficiently tutored to handle sensitive, classified information properly and mistakes, unfortunately, have occurred. On at least two occasions, extremely sensitive classified cryptologic information was released to the public by other agencies without consulting with NSA.

On several occasions involving litigation, highly classified in camera affadavits were not properly protected, were reviewed by uncleared court personnel, or otherwise mishandled. In this latter case, the Department of Justice and NSA have moved to tighten security procedures. However, even with stringent procedures, we cannot completely avoid risking under FOIA the security of highly sensitive information. I question whether this damage can be justified since the courts ultimately have never found NSA to have improperly withheld production of information under FOIA and never required NSA to reveal such information.

Finally, the FOIA does not provide a useful or an exclusive means of oversight over NSA activities. Many of these activities, particularly

those related to U.S. citizens, are regulated under the Foreign Intelligence Surveillance Act and procedures issued pursuant to executive order. In addition, more effective forms of oversight are provided by this committee and the House Permanent Select Committee on Intelligence, particularly under the oversight requirements of the Intelligence Authorization Act for Fiscal Year 1981.

Other forms of oversight include required reporting to the Intelligence Oversight Board and the Attorney General. Classification oversight is assured through a number of classification review programs independent of the FOIA that are far more effective and that subject sensitive cryptologic information to far fewer risks of compromise while assuring proper classification.

I appreciate this committee's initiative in examining this serious problem and hope that some form of relief from the FOIA can be fashioned. I would be pleased to respond to any questions you may have, Mr. Chairman.

The CHAIRMAN. Thank you, General. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

General, in the court activities with which you have been involved, these in camera procedures, have affidavits ever been lost or misplaced?

Also, in your testimony you stated that some disclosures have taken place or that some personnel who are handling documents are inexperienced. Do these personnel have to be cleared?

HANDLING AFFIDAVIT REQUESTS

General FAURER. Unfortunately, as I said in the testimony, there is the opportunity for uncleared people to be handling them, and while we cannot say that any have been lost, I guess that it is fair to say that they have been misplaced because it has taken some effort sometimes to recover them. Certainly, mishandled is the most appropriate way to describe the lack of care in some instances.

Senator CHAFEE. What about the storage of them; do those documents stay in the courts in perpetuity or are they reclaimed?

General FAURER. No; they are reclaimed, but the storage on occasion has been inadequate for the level of classification of the document; simply because inadequate arrangements and storage facilities are available in some of the instances.

Senator CHAFEE. Under the statute when you go forward to protest a disclosure, is there a particular court that you go to in the district, or do you go anywhere in the Nation, or to any court in the district?

General FAURER. We can be sued in any number of courts. The bulk of our cases have occurred in district courts, but we might find ourselves encountering litigation in any court.

Senator CHAFEE. Any district court anywhere in the United States?

General FAURER. Geographically, any place.

Senator CHAFEE. Any Federal district judge could handle these materials?

General FAURER. That is correct.

Senator CHAFEE. They would not be subjected to any clearance?

General FAURER. No; and I think that a point worth making and intimated in my testimony is that not only are they not cleared, but

with the best of intent or the purest or personal records, they simply are not familiar enough with the nature of our material and the reasons that it should be most carefully protected.

Senator CHAFEE. In order to defend yourself in these suits, it is necessary for you to submit this most highly classified information in connection with the affidavits; is that correct?

General FAURER. That is correct. We have been successful so far in doing that in camera, but that does not obviate all of the risks as I have suggested.

Senator CHAFEE. Thank you, Mr. Chairman.

QUESTIONS ON SECURITY RISKS

The CHAIRMAN. General, reading from a previous statement before this committee, I would like to have you comment on this:

The National Security Agency receives sophisticated FOIA requests such as inquiries concerning photographic communication security equipment, information from specified computer systems, or particular comparisons of Soviet-U.S. defense spending, or information so precisely identified that to confirm its existence or nonexistence would reveal highly classified information in and of itself.

Would you like to comment on that?

General FAURER. Yes, Mr. Chairman, you correctly identify in your question a problem of concern to us—how does one respond to the request without disclosing either by affirming or denying more than we would care to do? So we find ourselves frequently in that difficult position where any response at all contributes to some disclosure. Even if it is a negative response; some disclosure of our capabilities occurs, or, of equal significance, of our lack of capability.

The CHAIRMAN. You touched on that a bit on page 2 of your testimony and I read:

In light of the sensitivity of these materials, we are also particularly disturbed by disclosure, breeches of security, and possible compromises that have occurred in the administrative handling of classified cryptologic information subject to FOIA requests.

Does that pretty much verify the statement that I have?

General FAURER. Yes, sir.

The CHAIRMAN. You answered Senator Chafee that some of these people are not necessarily cleared to handle this information.

General FAURER. That is correct, Mr. Chairman.

Quite frequently, we are encountering court personnel who are not cleared. I would say that is often the case. What is in effect happening over time is a growing number of people who are exposed to what we have treated for years and would much prefer to continue to treat as highly sensitive security information. So there is a growing number of people to whom, through pursuit of this litigation, we have been forced to expose information.

The CHAIRMAN. One of the complaints heard is that FOIA has exposed classified information recordkeeping systems to more distribution and access beyond good security practices.

Would you care to comment on that?

General FAURER. Certainly, as a continuation of the answer just given, it increased the number of people with insight into our capa-

bilities, our lack of capabilities, the kind of information that we possess, and by inference, therefore, the nature of what we are attempting to acquire and some implication of capabilities, and so on.

The CHAIRMAN. I thank you, General. Senator Moynihan.

Senator MOYNIHAN. I have no questions.

ALL INFORMATION AVAILABLE

Senator CHAFEE. Mr. Chairman, I have one question for the general.

Let me see if I understand this system correctly. Do I understand that anybody from anywhere in the world can write and ask you, your agency, to give them all information on any subject that possibly falls within your jurisdiction?

General FAURER. That is correct.

Senator CHAFEE. In other words, the request can have nothing to do with the person involved himself. But he can merely ask, please give me all the information you have pertaining to overhead satellites.

General FAURER. The request could come in that way. We would then attempt to dialog with the requester to refine it to something that we would argue with the requester was reasonably satisfiable. The answer to the essence of your question is yes.

Senator CHAFEE. Suppose that question came in, and then you would write back and say well, that is a pretty broad request, please be more specific.

General FAURER. That is correct.

Senator CHAFEE. Suppose the answer came back, I have got a pretty broad interest, and I do not intend to be more specific, then what?

Suppose he said, I am in Rumania and I am deeply interested in these subjects, and then, p.s., please give me all information on all cooperative efforts you have made with other nations on satellite activity.

General FAURER. What train of action would be set in motion by that hypothesis is an enormous research effort on our part, an expenditure of a great many hours of compilation of material that satisfies that broadly stated question. Because of the nature of NSA information, we would then be required to proceed to deny the provision of it, and we would find ourselves, quite conceivably in the courts attempting to justify why that mass of information or large portions of it cannot be provided.

CHARGE TO QUESTIONER

Senator CHAFEE. Does the questioner have to pay something for this; is it a fixed fee or is it by the hour, how do the charges work?

General FAURER. We did not start charging fees at NSA until just a year ago, July 1980. We have been charging fees since then. There are some grounds for waiving the fee depending on the public interest in the information connected with the request, but I think of significance is the modest way in which the fees are assessed. We have estimated that the research in support of FOIA has run about $500,000 a year for us. In the year since last July, we have recovered in fees some $3,500.

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Senator CHAFEE. Maybe you are not charging enough.

Can you charge anything that you want?

General FAURER. We are complying with the DOD scheduled rate or fee charging in a FOIA context. It just is not possible to recover at a level commensurate with the resource commitment that is required to assemble this data.

Senator CHAFEE. Thank you.

The CHAIRMAN. We will get a record of those charges to know who is getting you know what.

[The prepared statement of Lt. Gen. Lincoln D. Faurer follows:]

PREPARED STATEMENT OF LINCOLN D. FAURER, DIRECTOR, NATIONAL SECURITY AGENCY

Mr. Chairman and Members of the Committee, I appreciate the opportunity to address the Senate Select Committee on Intelligence concerning the impact of the Freedom of Information Act (FOIA) on the National Security Agency. Although NSA has not been required to devote the enormous resources to FOIA processing that are required by the volume of requests received at FBI and CIA, there are, in my opinion, adverse consequences flowing from the FOIA that significantly endanger the cryptologic processes of the United States. I would like to limit my focus today to two aspects of the FOIA processing scheme which illustrate these dangers. The first concerns the fact that FOIA requests to NSA usually focus, either directly or indirectly, on extremely sensitive cryptologic information. The second is the very real risk of disclosure of this sensitive cryptologic information resulting from processing and litigating FOIA matters.

This Committee recognizes that NSA has only two missions—the acquisition of foreign intelligence information through exploitation of foreign electromagnetic signals, and the protection of the communications of the United States. The unique sensitivity of both of these missions is easily understood and has long been recognized by Congress as reflected in various statutes affecting NSA. For example, the National Security Agency Act of 1959 provides, in part, that no law ". . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of . . . the activities . . . any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." Section 798 of Title 18, U.S. Code further recognizes the extreme fragility of cryptographic information by setting out special criminal penalties for the unauthorized disclosure thereof. These special protections afforded by Congress are entirely appropriate because virtually the entire range of information generated by NSA is necessarily classified in the public interest. Whether specific NSA information relates to signals intelligence (SIGINT) or communications security (COMSEC), its inherent fragility requires that it be protected, and potential disclosures pursuant to the FOIA pose a significant danger to the national security.

It is axiomatic that disclosures of information concerning U.S. communications security procedures could render U.S. government communications vulnerable to foreign exploitation. It takes little reflection to appreciate the fact that virtually all confidential information of the United States, whether military, diplomatic or economic, is transmitted at some time by secure communications facilities. As you are aware, Mr. Chairman, the value of communications security is virtually inestimable. Just as aware, however, are foreign intelligence officials who would go to great lengths to frustrate U.S. communications security measures in order to exploit the underlying signals. Indeed, we know that large sums of money have been offered by foreign powers for delivery of COMSEC equipment or materials.

Signals intelligence, as this Committee is well aware, is the opposite side of the coin. It is the exploitation of foreign electromagnetic signals. By this medium the United States gathers significant information not available by any other means. It would not be prudent for me to discuss the value of signals intelligence in this public forum, but in any case that value is well known to you, Mr. Chairman, and to the members of this Committee. What is important to consider, for today's purposes, is the fragility of both signals intelligence and communications security. A single inappropriate disclosure could expose our capabilities, identify

targeted channels of communication, reveal policy-level intelligence tasking, make vulnerable U.S. communications or cause severe harm to U.S. foreign relations.

In light of this extreme fragility, the risk under the FOIA to the NSA enterprise becomes apparent. The mission of NSA is such that nearly all intelligence information possessed and responsive to an FOIA request would have been derived from a foreign communication and must therefore be withheld from disclosure. To either inadvertently disclose such information or to respond with the information requested would obviously reveal sensitive information about the Agency's abilities and interests, including such specific information as, for example, the communications channel intercepted. In some cases, even to admit the possession at NSA of requested documents would reveal sensitive information, especially when a particular communication, or information passed over specified channels, is requested. Moreover, there is no way of assuring it is just the requester who would gain this knowledge. Obviously those who sent or received the requested communications, any intermediaries and any other power who intercepted it would know of the communication(s) and could determine NSA's ability to intercept that communication. If the message was encoded, the ability to exploit the code would be revealed. It would even be possible to learn information about NSA's technical ability to acquire, process and report such information. Of special concern is the danger of revealing policy-level intelligence tasking, especially if certain subject matter possessed by NSA can be associated with a specific, targeted communications channel.

An inappropriate disclosure which would reveal these intelligence secrets can have unfortunate and immediate consequences. Foreign targets may avoid the channel targeted; they may upgrade codes or other methods of securing their transmissions from exploitation; they may view the disclosure as an opportunity to construct and transmit misleading information; they may also receive sufficient information to indicate an optimal direction in which to channel their own signals intelligence research and development efforts.

In light of the enormously fragile but important nature of NSA's information, any risk of compromise is, in my view, unacceptable. Unfortunately, experience shows that this risk is very real.

Fortunately, NSA has never "lost" a case in court so as to be required to disclose documents it sought to protect pursuant to FOIA disclosure. However, in the course of defending Agency withholdings under appropriate exemptions, NSA has been forced to construct increasingly longer and more sophisticated affidavits—both open and in camera—to justify the Agency position. The depth of detail contained in these affidavits is alarming. Not only are we required to discuss the information immediately involved, and to admit on the open record the possession of certain information deriving from signals intelligence, but in order to illustrate its significance, we are invariably forced to reveal in the in camera affidavit information about policy-level tasking, targeted communications channels and sensitive technology. The documents required to defend withholding under FOIA therefore become significantly more sensitive than the underlying information itself because of the need to place in context and explain the withholding of individual documents. At the same time, the cumulative effect of the open record admissions increasingly reveals NSA activities. This problem is exacerbated by courts which seem to believe that each succeeding case requires that more about NSA be disclosed than has been previously placed on the open record. This has led some courts to refuse to even consider in camera evidence until more is stated on the open record. Sworn statements that further public record disclosures would reveal classified information have been of little avail.

Our concern about the increasing sensitivity and detail of the classified affidavits, has been heightened by the risk we have faced many times that they will be revealed in whole or in part. For example, one district court ordered the disclosure of all but two paragraphs of one such affidavit, a move prevented only by prompt filing of a motion to reconsider in light of a recent appellate court decision.

Other problems have also developed in the course of FOIA litigation. The 1974 Amendments to the FOIA, which permitted de novo review of the classification of information, were passed, in part, on the understanding that the sworn statements of Agency officials would be given great weight in these considerations. Yet, some courts have been reluctant to believe these Agency affidavits despite the clear, contrary Congressional intent. Certain courts have openly and pointedly factored this distrust into their written decisions. One court, for example, refused to give substantial weight to an NSA affiant—a high Agency official expert in the activi-

ties of the Agency and the consequences of releasing Agency documents—because he had not personally read each of the 500,000 pages being withheld. Other courts have drawn conclusions adverse to the Agency's position from extraneous Congressional hearings and cases unrelated to the instant litigation, and concluded that Agency affidavits concerning the sensitivity of the subject matter involved had to be incorrect. Nothing could have been less correct, yet this perception—drawn not from the evidence before the court but from an unfounded distrust of that evidence—resulted in orders to disclose that fortunately were rescinded on subsequent appeal or motion for reconsideration.

Similarly, the Congressional provision for in camera proceedings is apparently viewed with great disfavor by some courts, one court even equating such proceedings with a Star Chamber. That court refused to receive or read an in camera affidavit and awarded summary judgment to the plaintiff because the government's proof was not, therefore, in evidence. Courts which perceive a dilemma in these ex parte, in camera procedures have been giving serious consideration to solving it by permitting plaintiffs or their attorneys to participate in a "classified" hearing to consider the Agency's in camera submission.

Part of our difficulty under the FOIA has been caused by what I believe to be a clear departure by the courts from the original intent of the Congress concerning the 1974 amendments to the FOIA. Although Congress clearly intended to subject classified information to stricter review by the Courts through the (b)(1) exemption covering information classified pursuant to executive order, the Congress also clearly intended that certain categories of classified information already protected by statute be provided a higher threshold of protection under the (b)(3) exemption. This information was not intended to be scrutinized under the same kind of de novo analysis expected when information is protected only under the (b)(1) exemption because Congress has already made the threshold decision that information falling within (b)(3) statutes must be protected.

Among the statutes listed by the Congress in the Conference Report on the 1974 Amendments as section 798 of title 18, U.S.C., the statute protecting classified cryptologic information. The Conference Report stated that:

". . . communication[s] information (18 U.S.C. 798) . . . for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subject to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law."

In a number of cases, however, courts have not deemed it sufficient to identify the information as coming within the categories specified by section 798, and currently and properly classified. Further, such courts have elected to go beyond the affidavit, to examine the records themselves, to require detailed individual justifications for each record and to subject even section 798 material to a review, normally expected only for the (b)(1) exemption, thus negating Congressional intent with respect to the (b)(3) exemption. In fact, since the 1974 amendments, only two courts have even ruled on the application of section 798 because a (b)(1) analysis, thought to be required for information falling within this statute, made unnecessary a (b)(3) analysis. Both of these courts held that section 798 applied to the (b)(3) exemption but also applied the (b)(1) exemption.

The problems we have encountered in litigation of FOIA cases are great, but there are many more dangers inherent in the more routine administering of FOIA requests. These dangers begin when a request for information is received. As I have previously mentioned, because of the unique and limited role of NASA, nearly all information produced by NSA is classified. Both Congress and the Executive have long restricted access to classified information to those persons whose responsibilities included operational use of or need for that information. That historic safeguard of classified information is lost under the FOIA. The administrative process requires that many who would not ordinarily receive it be given access to the information responsive to a request. This begins with technicians who retrieve the materials, and proceeds through various administrative elements, the FOIA unit and, finally, Agency attorneys. Few, if any of these individuals will have prior knowledge of the subject matter sufficient to instill an immmediate appreciation of the importance of its many facets; often, they would not see the information under normal "need to know" criteria. This defect becomes even more acute when the process originates at another agency where the information is retrieved and handled by persons without any real knowledge

of the fragility of signals intelligence or communications security information. All too often we have found that persons at other agencies handling NSA material in this referral process are not appropriately cleared. In some cases other agencies have released highly sensitive information either because they did not recognize it as NSA information or because, out of naivete or ignorance, they have ineffectively attempted to sanitize and release it themselves.

It is, of course, axiomatic that the potential for compromise rises with increased exposure. I am therefore extremely concerned with the ripple effect generated by the FOIA within the intelligence agencies, even though those personnel are usually cleared for at least some level of classified data and receive constant security reminders. I am even more concerned, however, over the increased exposure required when an FOIA requester institutes litigation. This requires that a Department of Justice attorney or an Assistant U.S. Attorney represent NSA. Obviously that attorney and at least one supervising attorney must then be cleared for access to the information. Often the case will outlast the tenure of the government attorney assigned, thus requiring yet additional persons to gain access to the information. In addition, since we can rarely defend an FOIA withholding exclusively on the public record, NSA usually must prepare a detailed in camera affidavit which invariably is even more sensitive than the actual information withheld, because it contains the rationale for withholding information, usually including an explanation of targeting and the technical processes involved.

Several government attorneys must then be given access to this even more sensitive information. There has developed within the main Justice Department a cadre of attorneys experienced in and able to deal with classified information. There is more of a problem, however, with the staffs of U.S. Attorney's Offices around the county. This latter group of attorneys is handling an increasingly larger percentage of cases involving classified information; unfortunately, they do not, as a rule, have a background which would aid in comprehending the significance or fragility of the information. Nor do they have the constant and continuing security reminders afforded those who have continued access to the government's most sensitive information. We appreciate the hard work and very able representation we have received from the Department of Justice attorneys; in many cases, their efforts on our behalf are truly excellent and completely understanding of our concerns. Nonetheless, the lack of sensitivity of some other of our assigned representatives in dealing routinely with classified information has resulted in some serious breaches of security procedure, and contributed in at least one instance to disclosure of information we sought to protect. We have been informed that the Department of Justice will deal with this problem by restricting the number of attorneys in Washington with this access, but of course this is of little value for cases arising remote from the District of Columbia.

Cases which do arise in courts remote from the Washington, D.C. area pose additional problems concerning the storage of classified affidavits, which problems go beyond the handling of classified information for simply FOIA purposes. Only a few U.S. courthouses are equipped to store highly classified NSA information, yet Courts often require ready access to the affidavits. Moreover, Federal judges are sometimes even less sensitive to the concern for protecting such information.

In various types of litigation we have discovered, for example, that because of the Court's requirement for continuing access, Top Secret Codeword affidavits were stored in insecure areas and held by individuals without either a clearance or a need to know. In one of these, the Court's uncleared clerk was given access to the affidavit despite the fact that the District Judge had been advised that this should not be permitted. In one appellate court, several uncleared clerks of the court were permitted to view Top Secret Codeword documents. In still another case a Top Secret Codeword document, having served its purpose, was stored in the office safe of an uncleared Department of Justice attorney.

We have raised these general concerns over classified handling procedures with the Department of Justice and are gratified to find that steps have been taken to ensure that current procedures should prevent administrative, though not necessarily judicial, abuses of this type. I am not convinced, however, that any amount of increased care can completely eliminate the kind of mistakes that have occurred, resulting from the proliferation and widespread dissemi-

nation of sensitive information required by compliance with the FOIA. In my view, the risks of compromise are so great that the public should not have to tolerate the kind of understandable, inadvertent but unfortunate human errors that FOIA processing and litigation have fostered, thus endangering the national security.

Mr. Chairman, Members of the Committee, I have tried to keep my remarks to you brief and illustrative of the dysfunctional aspects of FOIA processing on the National Security Agency. The extremely sensitive NSA functions and activities have been made vulnerable by the FOIA in all stages of its administration. The Congressional determinations mandating special protections for cryptologic information have been rendered ineffective. It is further illustrative to note that the original purpose of the Act—to make public the processes of government—really has little, if any, application to NSA where the only assigned missions are classified in the public interest and information concerning them must normally be denied the FOIA requester. Thus, what is revealed or compromised comes through inadvertence, error or mistake.

Although strong supporters of the Freedom of Information Act allege that it provides for constant oversight of intelligence activities, including the classification and declassification of information, this is not true at least with respect to cryptologic information. Stringent long term protection is required for cryptologic information and has been provided for by both the Congress and the Executive. Moreover, NSA is subject to numerous, more effective forms of oversight that include access to the classified information denied to the FOIA requester. Department of Defense Directives provide for an Information Security Policy Officer to govern Agency classification programs. These programs are audited on a periodic basis by the Information Security Oversight Office and aperiodically by the General Accounting Office. Executive Order 12065 provides for mandatory classification reviews and access by historical researchers. Executive Order 12036 provides for an Intelligence Oversight Board and Inspector General and General Counsel supervision and reporting requirements, and the Attorney General is directly involved in reviewing questions of legality or propriety. Additionally, the Privacy Act provides individuals with substantial safeguards and access to Agency records indexed or filed under their name or other individual identifier. Further, the Foreign Intelligence Surveillance Act of 1978 and executive order procedures provide strong protections for U.S. citizens and preclude the production of information concerning them except pursuant to court order or Attorney General approval. Finally, this Committee and the House Permanent Select Committee on Intelligence provide far more effective mechanisms for thorough oversight of intelligence activities than the Freedom of Information Act, without the risk that classified information will be compromised.

Mr. Chairman, I would like to conclude by stating again my appreciation for this opportunity to testify today. I would be pleased to receive any questions you might have.

The CHAIRMAN. Thank you, very much, General. It has been a pleasure to have you. Let me announce that the record will be held open until Friday, July 24, for statements from those who have been invited to provide statements. We have a list of those people and some of them have not arrived as yet, so they will have until the 24.

The next witness now will be Maj. Gen. Richard Larkin, Deputy Director, Defense Intelligence Agency. You may proceed as you care to, General. You can either submit your statement for the record and brief it or do as you want to.

STATEMENT OF MAJ. GEN. RICHARD X. LARKIN, DEPUTY DIRECTOR, DEFENSE INTELLIGENCE AGENCY

General LARKIN. With your permission, Mr. Chairman, I would like to make a short oral statement and submit a statement for the record.

DIA IMPLEMENTATION OF FOIA

I appreciate the opportunity to represent the Defense Intelligence Agency in the absence of General Tighe, the Director, concerning the experience of the Defense Intelligence Agency in implementing the Freedom of Information Act. I think that in order to put my remarks in the proper perspective that it is necessary to emphasize that the DIA is involved in collection, processing, and analysis of foreign intelligence for the Department of Defense and other national decision-making authorities.

We are deeply concerned about the chilling effect on our ability to collect information due to the fear of even our closest allies that such information would be released under the Freedom of Information Act. This has greatly hampered our ability to carry out our intelligence mission. We are equally concerned about the potential revealing of our sources and methods.

No matter how carefully we may handle the requirements under the currently available exemptions to the Freedom of Information Act, much can be collected by requesters which is very detrimental to our mission. It is naive to assume that any intelligence information can be disclosed without revealing something of its sources and much about the techniques of collection. It is also naive to assume that a disclosure of sources and methods will not result in some counter move by the target of the collection effort.

Under the Freedom of Information Act, foreign nationals are as equally entitled to information as is any U.S. citizen. The act authorizes any person to seek and obtain the agency records. This openness to foreigners has caused a serious chilling effect on the previously open exchange of information from even our closest allies. Additionally, our allies are well aware that occasionally it becomes necessary in in camera proceedings to reveal to the court highly classified information that may have been furnished by foreign government sources.

Where voluminous documents must be carefully reviewed to see if there is a continued classification requirement at the time of the request, in the process of reasonably segregating out material that may not be classified there is always a real possibility that the remaining information will, although not classified in and of itself, reveal data that is detrimental to the intelligence process.

General Tighe appeared on similar matters before the Senate Select Committee on Intelligence when they were holding hearings on S. 2284 in March of 1980. At that time, he said:

> It is my view that each component of the intelligence community should be exempt from provisions of any law which requires the publication or disclosure or the search or review in connection therewith, of files directly relating to analysis and production of foreign intelligence or counterintelligence and all information collected, analyzed and produced as a result of those actions and operations.
>
> This would include all foreign intelligence information pertinent to intelligence and security matters. It is my view that the Defense Intelligence Agency and the entire intelligence community should be exempt from the provisions of any law which requires the disclosure as indicated above. This would include intelligence records relating to raw intelligence, finished intelligence, and intelligence in the process of transition from raw to finished intelligence.

To expand on General Tighe's statement, my position is simply that the intelligence community is in sore need for relief from the Freedom of Information Act.

We have no argument with the general proposition that democracy works best when its citizens have access to all governmental information that the security of the Nation permits. Through exemptions to the present act, Congress has already recognized that public interest and national security would not be well served by the release of certain categories of information.

However, even with the present exemptions, practice has proven that a threat not contemplated by the original drafters of the legislation is present in that some information which is not exempt could provide valuable intelligence to those opposed to our American efforts and ideals. The intelligence community needs exemption from such mandatory disclosure.

In summary, Mr. Chairman, we in the business of collecting information and of producing intelligence have already experienced some adverse effects of the law; mistrust, suspicion, and a reluctance to assist us in our efforts, however unjustified. We are deeply concerned that with no relief, with nothing to assure our friendly counterparts that what is conveyed in confidence will remain in confidence, that the potential for even more serious damage to our intelligence collection efforts and to our foreign relations exist.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, very much, General.

Senator Moynihan, do you have some questions?

Senator MOYNIHAN. Mr. Chairman, I have a statement that I would like to put into the record.

The CHAIRMAN. It will be placed in the record at the opening.[1]

Senator MOYNIHAN. I would like to ask General Larkin a question that we could have addressed to any of the witnesses, his colleagues. Perhaps it is one that you would not find easy to be precise in responding. About 20 years ago, when Presidential memoirs began to appear. They used to appear about every 8 years; they now appear about every 3 years. Secretaries of State also started writing about things that they knew and heard.

RELUCTANCE TO RECORD

It began to be said, I do not know if it began to be observed, that people did not put things on paper the way they had formerly done; that it was a very careful Assistant Secretary of State who told the Secretary of State what he really thought because if he were wrong or if it was not sensitive, he would have to expect to read what he had written one day soon while he was still in midcareer.

I think that this has had an effect in the executive branch at the policymaking levels. One is careful of what one puts on paper. You never write down something that you are not prepared to see in print from friendly or unfriendly observers and commentators. A great deal of the time you write down things that are necessarily so in the hopes that they will be found out later to your advantage.

For example, I can imagine there have been a number of memoranda written describing how "I" put together the Camp David agreements at the critical moment when they were collapsing.

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[1] Senator Moynihan's opening statement appears on p. 5.

Do you find that in your activities there is hesitancy to put down on paper things that subsequently might be obtained from a Freedom of Information Act request by, for example, Senator Chafee's not so hypothetical Rumanian who just writes in with curiosity on the way that satellites work?

General LARKIN. Yes, sir.

Senator MOYNIHAN. That is a long way of asking if you record less out of concern that what you record will be revealed?

General LARKIN. Yes, sir; I think that we always have that in the back of our minds. This has been impressed upon us much more emphatically though in the attitude of our allies. Our allies have become unwilling to be absolutely forthcoming and especially in written communications because they know that there is a possibility that whatever they would give us in the way of intelligence information might either be exposed outside of the intelligence community to, for example, a judge in an in camera proceedings, and of course this Government has no idea that we would use that information that way.

This is what bothers our allies, so they are hesitant to be forthcoming with us. We, in our own case, will rely primarily on the classification procedures. If we are writing a document that is classified and properly classified and has an expiration date of 20 years or whatever the case may be, we would still attempt not to be withholding on it. We would attempt to be forthright.

I think that in the back of everyone's mind is the fact that at some date, maybe 20 years down the future, this might become unclassified and will appear in print.

Senator MOYNIHAN. Mr. Chairman, I think that the general purpose of the Freedom of Information Act is quite correct but there are reasonable concerns of whether it makes for more openness and better communications within our agencies.

The CHAIRMAN. I have got to agree with you and probably even extend it to some extent to the censorship that is applied to you gentlemen in uniform at the present time in anything that you want to write down, is that right?

General LARKIN. Yes, sir.

The CHAIRMAN. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

General, you noted that the act that is before us today and that we are considering does not apply to the DIA completely. In other words, it would have to be through the DCI that you would get your relief, and therefore, you seek relief in a broader form so that you would be included in the act specifically. Am I correct in that?

General LARKIN. That is correct, sir.

Senator CHAFEE. Then of course we would have the question raised before us, that because we do it for you, we should do it for every other agency which would not be specifically under the DCI. Under this act, it applies to the CIA and to other agencies for which the DCI might have coordinating responsibility. So as far as the FBI goes, presumably, it would extend to counterintelligence activity only. But you think that the DIA should be specifically named?

General LARKIN. Yes, sir, we would prefer to have an autonomous exemption. The Secretary of Defense, we believe, has certain respon-

sibilities which he in turn focuses on us for the conduct of intelligence activities for which he is responsible, and we believe that he ought to have the same exemption as would apply to any other agency in the intelligence community.

Senator CHAFEE. All right, thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Did we merely overlook the 13 different members of the family or did we purposively leave some out?

Senator CHAFEE. I purposely left them out because we had enough to wrestle with with those agencies of which we have more direct cognizance. Also, I suppose that there would be a concern that if we named them, then there would be referrals to several other committees. For instance, if we included the FBI, then we would get into the referral to the Judiciary Committee. If we put in the DIA, we would have a referral to the Armed Services Committee. My objective was to keep it within this committee's jurisdiction, and if the others want to do something, fine.

The CHAIRMAN. Let's explore it in our discussions.

Senator CHAFEE. I think that we have a full plate in front of us, Mr. Chairman, with what we now have.

The CHAIRMAN. On first blush, it does not seem right to do this for this agency and not for this agency even though this agency is not as prominent or as active as the other agency. The Rumanian still has a place to write, in other words.

Senator CHAFEE. That is right. We can consider that, but that was the reason.

QUESTION ON LOSS OF CONTACTS

The CHAIRMAN. All right.

I have just one question here. General, are American citizens traveling abroad who may come across intelligence information that might be useful to America reluctant to pass it on because of fear of public disclosure?

General LARKIN. Yes, sir.

There is a case in point. Well, there are several cases that I have in mind, but one in particular involves an American businessman traveling abroad whose relaying information to us was later exposed or later released under the Freedom of Information Act, and in fact, embarrassed him in his relations abroad with the foreign government. He was not warmly accepted back because the information was traceable to him as the source. This is from the businessman prospect which is a very important segment our American community abroad.

The senior politicians and the senior governmental officials are less reluctant to be withholding because they feel the obligation, I believe, more so than business does.

The CHAIRMAN. Is it not true that this source of information is used very extensively by other countries?

General LARKIN. Yes, sir, extensively.

The CHAIRMAN. Then you say that the same situation that I outlined applies to the American who is living and working overseas?

General LARKIN. Yes, sir.

The CHAIRMAN. Are there any other questions?

Thank you, very much, General. I appreciate your coming.
General LARKIN. Thank you, sir.
[The prepared statement of Maj. Gen. Richard X. Larkin follows:]

PREPARED STATEMENT OF MAJ. GEN. RICHARD X. LARKIN, DEPUTY DIRECTOR, DEFENSE INTELLIGENCE AGENCY

Mr. Chairman and Members of the Committee, I am Major General Richard X. Larkin, Deputy Director of Defense Intelligence Agency. I appreciate the opportunity to represent the Agency in the absence of Lieutenant General Eugene F. Tighe, the Director, concerning the experience of DIA in implementing the Freedom of Information Act. I think that in order to put my remarks in the proper perspective, it is necessary to emphasize that DIA is involved in collection, processing, and analysis of foreign intelligence for the Department of Defense and other national decision-making authorities.

We are deeply concerned about the chilling effect on our ability to collect information due to the fear of even our closest allies that such information will be released under the Freedom of Information Act. This has greatly hampered our ability to carry out our intelligence mission. We are equally concerned about the revealing of our sources and methods. No matter how carefully we may handle the requirements under the currently available exemptions to the Freedom of Information Act, much can be collected by requesters which is very detrimental to our mission. It is naive to assume that any intelligence information can be disclosed without revealing something of its sources and much about the techniques of collection. It is also naive to assume that a disclosure of sources and methods will not result in some counter move by the target of the collection effort.

Under the Freedom of Information Act, foreign nationals are equally entitled to information as any U.S. citizen. The Act authorizes "any person" to seek and obtain Agency records. This openness to foreigners has caused a serious chilling effect on the previously open exchange of information from even our closest allies. Our allies are well aware that it occasionally becomes necessary in "in camera" proceedings to reveal to the court highly classified information that may have been furnished by foreign government sources.

Where voluminous documents must be carefully reviewed to see whether there is a continued classification requirement at the time of the request, in the process of reasonably segregating out material that may not be classified, there is always a real possibility that the remaining information will, though not classified in itself, reveal data that is detrimental to the intelligence process.

General Tighe appeared on similar matters before the Senate Select Committee on Intelligence when holding hearings on S. 2284 in March 1980. At that time he stated his position. The following is from his statement:

"It is my view that each component of the Intelligence Community should be exempt from provisions of any law which requires the publication or disclosure or the search or review in connection therewith, of files directly relating to analysis and production of foreign intelligence or counterintelligence and all information collected. analyzed and produced as a result of those actions and operations. This would include all foreign intelligence information pertinent to intelligence and security matters. It is my view that the DIA and the entire Intelligence Community should be exempt from the provisions of any law which requires the disclosure as indicated above; this would include intelligence records relating to raw intelligence, finished intelligence and intelligence in the process of transition from raw intelligence to finished intelligence."

To expand on General Tighe's statement, my position gentlemen, is simple . . . The intelligence community is in desperate need of some relief from the Freedom of Information Act.

We have no argument with the general proposition that democracy works best when its citizens have access to all Governmental information that the security of the nation permits. Through exemptions to the present act, Congress has already recognized that public interest and material security would not be well served by the release of certain categories of information. However, even with the present exemptions, practice has proven that a threat, not contemplated by the original drafters of the legislation, is present in that some information which is mandatorily released could provide valuable intelligence to those

opposed to our American efforts and ideals. The intelligence community needs exemption from such mandatory disclosure.

You are aware, of course, that modern intelligence techniques often involve a systematic analysis of thousands of disconnected bits of information to arrive at a finished product of use.

Even the mere confirmation of an item's existence through a legitimate denial under the present act can be informative to the requester. News leak investigations are an example. An intelligence agency which declines to release information on a news leak investigation to a FOIA requester has confirmed, in essence, that the media item does in fact contain classified information and that an investigation was conducted.

From the operational standpoint, one area of DIA's intelligence assets is the Defense Attache System. The Attache is an open acknowledged collector of information. His access in great measure is due entirely to the trust and confidence built between him and his counterparts. It is watchfully guarded by the security elements of the country to which he is accredited and is further affected by the parameters laid down by the Ambassador of that Mission. Acting within these "rules of engagement," the Attache's relationships make him a unique and one of the most singular intelligence collection resources possessed by the Defense Department. Through FOIA disclosures this trust and confidence can be immediately jeopardized and the Attache rendered completely ineffective or used as the focal point for a diplomatic confrontation.

In one instance the disclosure of Attache activities in a particular country, obtained through access to a former public figure's documents, has resulted in that country's serious limitations on our Attache's abilities to develop high quality political/military information. In this case, when this became known, our Attaches were told they would be so limited because "you Americans are fond of not only revealing secrets, buts also names."

Instances have been reported wherein information collected by an Attache and later placed in the public realm has prompted terminations of relationships and resulted in a loss of access that it took years to build.

Coup plots and rumors of coups together with personalities involved are essential to the United States. However, this information, given to the Attache, in confidence even at a later point in time, if exposed can seriously affect our relationships with the country involved and again result in the ineffectivenes of our collection effort.

In another case, a country with whom the United States is developing excellent relations is extremely sensitive about photography of its military installations. It was understood that the Attache would not engage in this activity. However, a FOIA request asking for release of Intelligence Information Reports on that country produced several years ago surfaced some photography. Should this be revealed to the country involved, it would even now destroy the current Attache's credibility and would give rise to potential setbacks in our developing relationship.

DIA provides a central point for and is directly responsible for a number of services of common concern to the Military Services intelligence activities which involve intelligence sources and methods. Any revelations in this area can result in serious damage to the on-going effort and may well result in the elimination of sources. Once the word is out that there is even a chance for exposure, our collection effort becomes minimal or "chilled" to say the least as sources fear disclosure or suspect a lack of integrity.

Still another serious area of concern relates to Americans who remain categorized as "prisoners of war" or "missing in action." DIA's PW/MIA Branch is charged with obtaining information relating to Americans still unaccounted-for in Southeast Asia as well as providing assistance to the U.S. Government's efforts to obtain an accounting for personnel lost as a result of the hostilities in Southeast Asia.

Over the past few years, a PW/MIA-related request for information, under the FOIA, was submitted through the use of a form letter. This standardized request was submitted on approximately 800 occasions and thousands of man hours were expended to respond to these requests.

In addition to these an ancillary request was received under the FOIA for material provided by sources during the U.S. involvement in Southeast Asia which reported information on U.S. personnel missing in Indochina but not specifically identified. DIA, as the central point of contact for PW/MIA intelli-

gence matters, coordinated, assembled and reviewed the information which was not correlated to any specific U.S. missing-in-action personnel, the complied material required for disclosure by this ancillary request constituted 4116 documents and photographs which equated to 9601 single pages of information. This material was declassified and/or appropriately classified segments excised for denial within the provisions of the FOIA. Responding to this one request required the use of nine people for approximately 10 months at a total cost of almost $95,000. Approximately 500 copies of this uncorrelated PW/MIA-related material were disseminated to interested members of Congress, the media, private individuals and organizations.

In 1979, a single request was received, under the FOIA, for information provided by Indochinese refugees who reported live sightings of Americans still remaining in Southeast Asia. This one request resulted in the release of over 1500 pages of information which had been reviewed for release. Since that time several individuals have requested copies of these 1500 pages. Due to the humanitarian nature of these requests, it was decided by DoD that no fee would be charged to the requesters in responding to any of these queries.

The release of these large volumes of information could provide the Southeast Asian communist governments with the means to gauge the extent of our efforts and any success we might achieve in the analysis of this information and shows a confirmation of the methodology employed in the collection and evaluation of this information. It is also important to protect the intelligence contained in these reports because of actions the communist governments of Souheast Asia might take to bring harm to any surviving American who might still be detained there. Additionally, it might enable them to counter any future demarche our government might make. The released material may be used by the Indochinese Communist Security Services to harass persons who formerly cooperated with U.S. forces in Indochina and to discredit U.S. intelligence services in the eyes of potential sources of information. Although such risk is inherent in any of the numerous FOIA releases, the large volume of intelligence information which has been released in these packages will facilitate such exploitation.

DIA, while complying with the provisions of the FOIA, has expended thousands of man hours of effort in responding to these PW/MIA-related requests. This manpower could have been more effectively and efficiently utilized in the intelligence research and analytical effort necessary to press the Southeast Asia-Communist Governments for an accounting for U.S. personnel missing in Indochina and in our determination to ascertain the ultimate fate of these individuals.

In addition to the complexity of many of the requests, an alarming "sophistication" has been noted in the types of intelligence material requested. This is quite evident in a number of individuals who submit requests on a regular basis. (In 1980, two such individuals submitted 16 and 10 requests, respectively). Consideration must be given to the probability that this Agency's compliance with the Act may itself have generated this "sophistication." To state this in other terms, the release of certain intelligence material will inevitably lead to the discovery and possible exposure of other information. A discussion of a number of requested documents will provide insight into this problem. For example, intelligence reports are considered to be legitimate records under the FOIA. Even when these forms are not filled in, they indicate a crucial method of intelligence reporting. If the Intelligence Reports reflect only unclassified information, they still reveal sources, methods, and areas of reporting interest. These revelations can generate subsequent FOIA queries for classified information. Whether classified or unclassified, Intelligence Reports provide "raw" intelligence data rather than Agency policy. However, if released in full or in part, they may be construed as representing policy. Again, I emphasize a major concern is that public dissemination of these Intelligence Reports can and does materially jeopardize the collection capability of the reporting officials.

Similar situations exist with evaluations, appraisals, or estimates of an intelligence nature. In these instances, analysts, are generally expressing personal opinions and judgments based upon their assessments of information and situations. The ultimate purpose of all of these materials is to provide policymakers with information for consideration in the decision-making processes. However, public disclosure through FOIA can damage the potential effectiveness and usefulness of these materials. Furthermore, a few candid comments appearing in one of these documents can generate a myriad of FOIA requests and again foster the possibility of subjecting additional classified information to disclosure.

Another point which should be mentioned is the fact that when any classified intelligence document does become subject to a releasability determination under the FOIA, it is often difficult to isolate so-called "reasonably segregable portions," while at the same time, endeavoring to protect other information. From these "reasonably segregable portions," a discerning requester may be able to gleen the substance of the other information. Moreover, due to the disclosure pressures placed upon this Agency by the FOIA, a conscientious reviewer may inadvertently release certain material that should have properly remained classified. Additionally, references to classified documents that appear in previously released documents very often themselves become the subjects of subsequent FOIA requests.

My comments have described how increasingly sensitive intelligence information becomes endangered by the current FOIA disclosure process. The Act has also created underlying problems that are likely to have devastating effects upon the quality of future intelligence products. There have already been expressions of concern on the part of foreign sources to the disclosure problems created by the Act. It is likely that these sources will become increasingly reluctant to provide us with vital intelligence data in the future. It is simply not enough to try to assure our sources that their information will be protected by one or more of the current FOIA exemptions. The mere fact that intelligence organizations are subject to the Act is justifiable cause for their concern. The Act is not only providing a means to possible release of their information, it may literally endanger their lives.

For our own collectors and analysts, the FOIA has brought about an atmosphere of disheartenment and frustration. Intelligence personnel have been instilled with the necessity and responsibility of protecting classified information. Careful attention has been given to properly classifying information and to determining appropriate review and downgrading instructions. Because of the current FOIA requirements, information must be reviewed before the specified date. Thus, the very purpose of our classification and review procedures is being defeated.

Of additional concern is the attitude of our own intelligence collectors and analysts alike who are becoming wary of, and inhibited in reporting and producing intelligence of a substantive nature for fear that the information may possibly be released. Without relief from the FOIA disclosure provisions, this trend within the intelligence community will probably become more intensified, resulting in serious detriment and difficulty to our intelligence operations.

As written, the FOIA does not require a requester to either provide information concerning his or her identity or to state the reasons for requesting specific information. It is natural for personnel engaged in FOIA processing to speculate about the activities of some of the requesters and about how the released information will be used. There is nothing to prevent hostile agents from attempting to gain access to highly classified material through the FOIA. Or, such agents can cultivate an individual to act as the requester.

Additionally, the availability to foreign nationals of information through the FOIA is reviewed with grave concern. Approximately 90 such requests from known foreign nationals were received by DIA in 1980. It is ironic that through the FOIA, foreign nationals have possible access to material that, in all probability, they could not obtain through their respective governments. It is not unrealistic to consider the intention of terrorism, sabotage, and disinformation which may initiate some of these requests.

There are some instances of requesters using the Act for commercial purposes. These individuals have used intelligence information which they received through the Act to either publish articles themselves or provide to a potential publisher for monetary gain.

We fully support the legislation being considered for the Director of Central Intelligence. However, as the intelligence staff officer for the Secretary of Defense and the Joint Staff, and to continue to fulfill our mission to ensure the satisfaction of the foreign intelligence requirement of the Secretary of Defense, we strongly recommend that the Secretary of Defense and/or his intelligence arm receive the same power and authority. We cannot continue to use the DCI authority as a sometime palliative for our own specific and often unique requirements which chance being misunderstood and overruled. We need the capability to protect our sources and sub-sources and our reporting and reviewing officers. There should be permanent protection of files on intelligence sources and im-

proved protection for information received from foreign sources, to include that not specifically covered by formal exchange agreements. As the Department of Defense is charged with the conduct of collecting intelligence information it should also have commensurate capabilities to protect itself and its components.

We believe that the language of S. 1273 should be broadened to include the Secretary of Defense, and/or his designated representative where the DCI is specifically delineated would be appropriate. We have observed that S. 1273 (1) alludes to the ". . . utilization of scientific or technical systems for the collection of foreign intelligence . . ." While we agree that these are important and must be covered, DIA is especially concerned that that foreign intelligence information collected by or from human beings appear to be only obliquely referred to. We ask that this subsection be amended by removing "technical" and "scientific" and using the term "systems" or " all systems and activities." What we need in DoD is a clear, definitive set of exemptions, applicable equally to the member agencies of the intelligence community as a whole especially in the area of sensitive sources and methods. Comparable authority must exist among the members and comparable responsibilities must be assigned for compliance.

It is hoped that this discussion will lend some justification to why the intelligence community should obtain relief from the FOIA. The current Act does not recognize the particular sensitiveness inherent to the successful operation of an intelligence agency. The consequences of subjecting intelligence information to the FOIA were not perceived by the proponents of this legislation. Fortunately, there are those in policy-making positions who are now aware of the demonstrable harm which can result in the process.

In summary, we in DIA have expended considerable manpower and resources on the FOIA that might have served the national interest better elsewhere. We in the business of collecting information have already experienced adverse effects of the law—mistrust, suspicion and a reluctance to assist us in our efforts—however, unjustified. We are deeply concerned that with no relief, with nothing to assure even our friendly counterparts that what is conveyed in confidence will remain in confidence, the potential for even more serious damage to our intelligence collection efforts and to our foreign relations is eminent!

The CHAIRMAN. I have learned that Mr. Lewis is trying to catch a plane at 1:30 p.m., and if the other panelists did not object, we could ask Mr. Lewis who is chairman of the FOIA committee of the Society of Professional Journalists and if he cares to have Mr. Low accompany him, if there is any connection. Mr. Low is the publisher of the Quincy Patriot Ledger, the American Newspaper Publishers Association. If you care to testify now to catch your plane, you are welcome to do it. There may be a strike before then.

STATEMENT OF K. PRESCOTT LOW, PUBLISHER, QUINCY PATRIOT LEDGER, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AND ROBERT LEWIS, CHAIRMAN, FOIA COMMITTEE, SOCIETY OF PROFESSIONAL JOURNALISTS

Mr. Low. Good morning, Mr. Chairman.

My name is K. Prescott Low and I am publisher of the Patriot Ledger, a newspaper published in Quincy, Mass. I am also the chairman of the government affairs committee of the American Newspaper Publishers Association which I represent here today.

In the interest of keeping the proceedings moving, I would like to ask that a copy of the full remarks be included in the record and I will try to abbreviate.

The CHAIRMAN. That will be done.

Mr. Low. Mr. Chairman, we welcome the opportunity to offer our views on various legislative proposals which would affect the Federal Freedom of Information Act as it applies to the intelligence com-

munity. First, ANPA is a nonprofit trade association with more then 1,400 member newspapers representing more than 90 percent of the daily and Sunday circulation in the United States. Many nondailies are also members.

With me today is Mr. Robert Lewis, chairman of the freedom of information committee of the Society of Professional Journalists, Sigma Delta Chi. The Society is the oldest, largest, and most representative organization of journalists in the United States. Founded in 1909, the society has more than 28,000 members in all branches of the news media including print and broadcasting.

Speaking on behalf of these major journalistic groups, we are representing the vast majority of journalists and newspaper publishers in this country, and while there may be wide variance in the editorial positions and the political persuasions of those that we represent here today. I can say with certainty that we raise an unified voice in opposition to any congressional or governmental action which threatens the principle of access to information in a free society.

CONCERN AND DISAGREEMENT

Last year I expressed similar concerns before Senator Sasser's subcommittee on intergovernmental relations. Mr. Chairman, we feel that several of the proposed bills which you are examining today would unnecessarily restrict access to public information. The language in S. 1273 sponsored by Senator Chafee and S. 1235 sponsored by Senator D'Amato, both of which you have cosponsored, could have the practical effect of exempting the Central Intelligence Agency from the scope of the Freedom of Information Act.

We realize that there is disagreement on the interpretation of the scope of these bills. However, we are concerned about the potential breadth of the language and especially about the fact that S. 1235 would eliminate the opportunity for judicial review, thereby prohibiting the courts from ordering the CIA to release anything that it chooses to keep secret.

In our view, the legislation could be interpreted too broadly and is unnecessary in light of the existing exemptions in the Federal FOIA. It is important that you understand that the members of our organization believe that the Government's intelligence gathering ability must function with a degree of secrecy in order to remain effective. We believe that the public's right to know must be very carefully balanced with the Government's need for secrecy as well the individual's right to privacy.

In our opinion, today's act provides that balance. Among the protections for the CIA which currently exist in the act is exemption 1 which covers information specifically authorized under, "An Executive order to be kept secret in the interest of national security or foreign policy." Under the current classification order, Executive Order 12065, the CIA and the President have ample discretion to protect our national security.

Exemption 3 of the act which precludes disclosure of information specifically exempted by another statute also provides broad protection for the CIA. As Mr. Edward Coney of the Dow Jones

Publishing Co., testifying on behalf of the American Society of Newspaper Editors pointed out last week in hearings before the House Subcommittee on Government Information and Individual Rights, exemption 3 has been consistently construed by the courts to cover section 102(b)(3) of the National Security Act which provides, "That the Director of Central Intelligence Agency shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

This exemption has also been held by the courts to protect the names of CIA sources and the nature and type of information supplied. Mr. Chairman, the collective effort of these two exemptions working in conjunction with Executive Order 12065 is to provide a protective and carefully sequestered environment within which the CIA can operate. The act in our opinion is working. It has not resulted in the CIA being forced to fling open its doors and its files to a full public scrutiny.

In fact, as former CIA Director Adm. Stansfield Turner told the 1980 convention of the American Society of Newspaper Editors, "Thus far we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released."

Amendment of the FOIA would be especially disturbing in the light of several recent occurrences at the CIA. Among these is the recent closing of the CIA's public information office, the cessation of unclassified background briefings which occasionally were given to reporters covering the CIA, and the recent allegations of wrong doing by two top CIA officials. If we once again wish to grant the CIA the ability to operate in complete and total secrecy, passage of legislation similar to S. 1235 certainly will lead us in that direction.

Mr. Chairman, in closing, we urge that you proceed very carefully and very cautiously with these legislative proposals. There may be problems with the act, but solutions to such problems must be carefully considered and, carefully drawn, and narrowly drawn. We believe that the loss of public confidence in the Government which could result when accountability of its institutions wanes would be a grave loss in our democratic society.

The Federal Freedom of Information Act is one of the most effective tools to insure accountability. It is working and the principles that it embodies must not be impaired. Thank you for the opportunity to testify, and I would be happy to answer any questions at the end of Mr. Lewis' testimony.

The CHAIRMAN. Thank you, very much.

Mr. LEWIS. Thank you, Mr. Chairman, for this opportunity to participate in these hearings on the relationship of the Central Intelligence Agency and the Freedom of Information Act. My name is Robert Lewis and, as Scott Low has mentioned, I appear this morning as chairman of the National Freedom of Information Committee of the Society of Professional Journalists, Sigma Delta Chi. I am a Washington correspondent also for Newhouse News Service.

I am pleased to be here with Scott Low who has so thoughtfully set forth the views of the American Newspaper Publishers Association, views which I might add that the society is in complete accord. With us also is Bruce W. Sanford, a partner in the law firm of Baker & Hostetler, who is the society's counsel.

Mr. Chairman, the society has been an active proponent of the FOIA since its inception. In recent years we have funded the lion's share of the Freedom of Information Service Center, located in Washington, which has assisted hundreds of journalists in using the act. This last week the society's representatives Bob Schieffer of CBS News and Steven Dornfeld of Knight-Ridder Newspapers testified on behalf of the act before the House and Senate committees, respectively.

FOIA IS VALUABLE TOOL

I am here to state in no uncertain terms that the FOIA has been and should continue to be a valuable tool for journalists to gather and report newsworthy information about the CIA to the public. At the same time, journalists recognize that the cause of freedom of information cannot be served at the expense of the security of our Nation. We believe that this concern was anticipated and effectively dealt with by Congress when it drafted the FOIA in 1966 and amended it in 1974.

Congress crafted a workable statutory framework that carefully balances the public's need for information about the CIA with the concomitant necessity that Government gather intelligence information efficiently and effectively. Indeed, the CIA has not argued that the act has resulted in the disclosure of classified information detrimental to the national security.

Rather, the agency in the past has relied on the alleged perception of American allies and others abroad that the FOIA somehow forces the Agency to disgorge information that would otherwise be confidential. It is somewhat ironic, Mr. Chairman, that proponents of the FOIA application to the CIA, such as myself, should discuss perceptions which is a peculiarly 20th-century word born of the age of mass communication. The press, perhaps more than any other profession, is acutely aware of the awesome importance of perceptions and the ubiquity of symbolic events, or symbolic statements, or symbolic laws to define a complex situation or a complex reality.

We are also aware, however, that perceptions must truly reflect reality, and that any institution, be it the press or CIA, will be perceived accurately only so long as it portrays an honest and realistic view of itself to the public, both here and abroad. With respect to the legislation before you today, we ask that you judge the CIA's perception of the perception abroad by careful reference to reality.

Initially, we ask you to consider the fact that even the minimal access to CIA information provided by the FOIA has permitted the press to render what we consider a valuable service to the American people. According to a recent study by the Congressional Research Service, a variety of questionable and possibly illegal CIA practices has been made public because of the FOIA, and I understand that it has been made public without harming the national security.

In 1979 files were released that revealed that CIA experimenters during the cold war suggested using gas chambers or airtight rooms to interrogate suspected spies and defectors. Through the FOIA Americans have learned of illegal CIA surveillance of U.S. citizens on American soil, of drug experimentation on unwitting subjects, and of mind control experiments. Mr. Chairman, we would ask you to consider the fact that national security has not been endangered by the qualified access right granted under the FOIA.

The fact is that in the 6 years since the FOIA was last amended not a single line of information, as we understand it, has been released without the consent of the CIA. Every court case involving a CIA refusal to disclose information under the FOIA has been won by the Agency, and each case has illustrated a fact of life in American courts and indeed American life.

That is that judges no less than any of us are deferential, respectful of the CIA and any suggestion that national security may be compromised. But reality also tells us that the current statutory scheme of the FOIA gives the CIA ample discretion to protect our Nation's secrets. Exemption (b)(1) of the act, as you know, currently exempts information classified by Executive order as affecting national security from the act's disclosure requirements.

You have heard testimony this morning that our intelligence agencies are afraid, despite the protections that now exist, of inadvertent disclosure of national security information—that this might actually take place. It seems somewhat implausible, Mr. Chairman, that agencies with the sophisticated capability of evaluating information would have this problem.

The FOIA, as currently drafted, is designed to complement the current classification order, Executive Order 12065, not to override it. FOIA exemption (b)(1) insures that classified documents will be reviewed by the agency when the typical 6 year initial classification period lapses. This procedure, as I am sure you are aware, permits proper classification for as long as 30 years. Indeed, the President retains the broad authority to extend even that time by further executive order. The FOIA in no way limits the ability of the CIA to withhold classified material from public view.

We would respectfully suggest, Mr. Chairman, that the antidote to the problems of perception encountered by the CIA is, as former Congressman Richardson Pryer suggested last year, that the agency educate its sources that they are protected specifically and completely under the FOIA in its current form. Disclosure of classified information does not stem from the FOIA but from, let's face it, deliberate leaks made by Government employees or other reasons.

It is leaks like the disclosure of the Stealth system last year during the election campaign that arguably compromises national security, not the limited access to information provided by the FOIA. We think you are possibly going after the wrong target in this legislation. The society cannot accept as plausible the suggestion that people are lining up in Tehran or Dubrovnik to work for the CIA as soon as the agency gets large categories of information exempted from FOIA, nor do we believe that Congress or the administration can conduct the Nation's business based on the misperceptions of people abroad.

In sum, Mr. Chairman, the society believes that Senate bills 1235 and 1273 address a problem that does not exist, at least to the extent that it is being portrayed to you this morning. The FOIA does not threaten national security. We believe it enhances national security by building a well-informed electorate. The FOIA does not endanger the CIA's intelligence gathering operations. Apparently it is an annoyance for the CIA at times, but public servants often find public accountability annoying, just as retailers sometimes find customers

annoying, ranchers may find their cattle annoying, or reporters may even find editors annoying on occasion, or vice versa. The CIA commands power and respect on Capitol Hill, but the society and the public could respect the Agency's professionalism a bit more if it would cease the bureaucratic overreaching that has characterized its attempts in recent years to obtain what is a virtual exemption from the FOIA.

COST TO GOVERNMENT

You have heard much about cost this morning, and the society has not argued—could not argue—that openness and accountability in government is a free ride. Openness does cost money. We recognize the burden on the Treasury from complying with these requests. Our only reaction to that is that we think it is well worth the investment in public confidence in our Government that comes from having openness in government. And we might add that when we spend over $100 million a year on military bands, it doesn't seem unreasonable to spend that much or even more to insure that Americans have access to information kept by Federal agencies. This information may not always be as stirring as a march by John Philip Sousa, but it will frequently be more valuable in preserving democratic principles.

In the last analysis, Mr. Chairman, the CIA is an arm of the Government of the United States, responsible both for the national security and to the citizens that it is charged to serve. It is a political agency directed by political appointees. As recent events demonstrate, the public and its surrogate, the press, are obliged no less than Congress to scrutinize the activities of those who are entrusted with maintaining national security. The FOIA, far from making the latter task impossible, we believe strikes a careful balance between the citizens' need for an open society and a safe one. As Chief Justice Burger wrote in last year's landmark *Richmond Newspapers* case, and I quote:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Thank you.

The CHAIRMAN. Thank you very much. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

I think that was an eloquent statement which these gentlemen made, and of course, what we are involved in here is always trying to obtain this difficult balance.

I would point out that the Nation got along for some 190 years without the Freedom of Information Act, so it is not something that is carved in stone in our Constitution.

The difficulty is the contradiction of having an organization which by its very nature is meant to be secret, and making it available through the Freedom of Information Act to disclose that information.

Now, you have listened to the testimony that the generals gave here earlier, not just on the chilling effect, but also on the facts of this situation. These were facts which they stated, and facts which were given by Mr. Carlucci a year ago in testifying before the House. He said sources were cut off.

Now, if we are going to have Intelligence Committees, as we have, greatly strengthened, that we did not have in the past, it seems to

me that the protection for the people that you are discussing is provided for.

So, Mr. Chairman, I found the information and the testimony of these gentlemen helpful but not persuasive.

The CHAIRMAN. Senator Moynihan?

Senator MOYNIHAN. Well, maybe I could take a tangential course because it seems to me that Mr. Low on behalf of the Newspaper Publishers Association has raised an important point, which is that all these events take place in a larger context. As Senator Chafee knows, the bill he has introduced is, as he said very generously, virtually the same as the bill a group of us introduced last year.

CHANGE OF ADMINISTRATION AND ATTITUDES

But the administrations have changed and certain attitudes have changed. The public information office has been closed down, and background briefings—which I think, have been on the record briefings—have been stopped. The atmosphere of cooperating with inquiry, I am sorry to tell you, is not what it ought to be.

Now, for the past 2 days, as the chairman knows, and I don't want to implicate the chairman in this at all, we have been urgently trying to find out whether or not the Director of the CIA has been involved in activities that would make him unfit to hold his office. We did not raise the issue. We did not call for the resignation of Mr. Hugel. We certainly would never have called for his appointment. But he resigned. And now we have been given the job of looking into these matters.

One member of this committee, sir, on my side has already in effect called for the resignation of Mr. Casey. We call the White House, and we call the White House, and we call the White House, and nobody answers.

I called the Attorney General and I have called the Attorney General and I have called the Attorney General. He does not answer. [General laughter.]

I do not know whether he is afraid to talk with me or doesn't know who I am or doesn't know what goes on up here or doesn't think it matters. If this administration wants Mr. Casey to stay in office, they had better start answering the phone calls of Mr. Blake and Dr. Shulsky. If they are going to cover up, they are going to lose themselves a Director of CIA right fast.

I have not said a word about this until now. I have been absolutely silent. But it is outrageous, Mr. Chairman. They will not answer our phones, as if our calls don't matter. They will find out that it matters a very great deal what they do to this committee. They should know.

Previously, Mr. Low, I would have been much less sympathetic to your view, because I think we have been a pretty open country. This is a pretty open country that lets Rumanians write letters to our intelligence agency and say give us everything you know about satellites or cryptography. Or, as another example of our openness, last year I put the supposedly confidential National Intelligence Estimates into the Congressional Record. This was not the NIE's that were to be sent to this body; they hadn't gotten to this body yet. Instead, I put in the

version that appeared in the New York Times, and the corrected version that appeared in the Washington Post, then the still further corrected version that appeared in the Los Angeles Times, then the New York Times story saying they all have it wrong. You know, we are not exactly an impermeable tissue, a membrane.

Still, this administration is taking a very curious view to what the public needs to know, and even what the Congress needs to know. If they are not even going to help us establish the fact that the Director of the Central Intelligence Agency should not resign, then the result will be he will resign. And they had better learn that there is such a thing as openness in government, or they are not going to succeed very much in their purposes.

And I think in this context, what you had to say, Mr. Low, impresses me in a way it might not have done a year ago.

Thank you for your testimony.

The CHAIRMAN. I think your statement presents a side of this question that is a real problem, how far do we go to protect our intelligence gathering and maintain what you gentlemen would consider freedom of the press, and I want to assure you that in the preparation of this legislation for floor consideration that we will give your stand every consideration.

Thank you very much for coming, gentlemen.

Mr. Low. Thank you, sir.

Mr. LEWIS. Thank you, sir.

[Prepared statement of Mr. K. Prescott Low and Mr. Robert Lewis follow:]

STATEMENT OF K. PRESCOTT LOW, PUBLISHER, THE PATRIOT-LEDGER, QUINCY, MASS., ON BEHALF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AND ROBERT LEWIS, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE, ON BEHALF OF SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

Mr. Chairman, we welcome this opportunity to offer our views on various legislative proposals which would affect the federal Freedom of Information Act as it applies to the intelligence community.

My name is K. Prescott Low and I am publisher of the Patriot-Ledger in Quincy, Massachusetts. I also am the chairman of the Government Affairs Committee of the American Newspaper Publishers Association, which I represent here today.

ANPA is a non-profit trade association with more than 1,400 member newspapers representing more than 90 percent of the daily and Sunday circulation in the United States. Many nondaily newspapers also are members.

With me today is Mr. Robert L. Lewis, chairman of the Freedom of Information Committee of the Society of Professional Journalists, Sigma Delta Chi. The Society is the oldest, largest and most representative organization of journalists in the United States. Founded in 1909, the Society has more than 28,000 members in all branches of the news media—print and broadcast.

In speaking on behalf of these major journalistic groups, we are representing the vast majority of journalists and newspaper publishers in this country. And, while there may be wide variance in the editorial positions and political persuasions of those we represent here today, I can say with certainty that we raise a unified voice in opposition to any Congressional or governmental action which threatens the principles of access to information in a free society.

Mr. Chairman, we feel that several of the proposed bills which you are examining today unnecessarily would restrict access to public information. The language in S. 1273 sponsored by Senator Chafee, and S. 1235, sponsored by Senator D'Amato, both of which you cosponsored, could have the practical effect of exempting the Central Intelligence Agency from the scope of the Freedom of Information Act. We realize there is disagreement on the interpretation about

the scope of these bills. We are concerned about the potential breadth of the language, and especially by the fact that S. 1235 would eliminate the opportunity for judicial review—thereby prohibiting the courts from ordering the CIA to release anything it chooses to keep secret. In our view, the legislation could be interpreted too broadly and is unnecessary in light of existing exemptions in the federal FOIA.

It is important that you understand that members of our organization believe the government's intelligence-gathering ability must function with a degree of secrecy in order to remain effective. We believe that the public's right to know must be very carefully balanced with the government's need for secrecy and an individual's right to privacy. In our opinion, today's Act provides that balance.

The federal FOIA was carefully drafted to create an environment in which our intelligence agencies could successfully operate. Among the protections for the CIA which currently exist in the Act is Exemption 1, which covers information specifically authorized under "an Executive order to be kept secret in the interest of national security or foreign policy." Under the current classification order, Executive Order 12065, the CIA has ample discretion to protect our national security. Exemption 1 ensures that classified documents will be reviewed by the agency when the typical six-year initial classification period lapses. This procedure permits proper classification for as long as 30 years, and the President retains the authority to extend the period even further if necessary.

Exemption 3 of the Act, which precludes disclosure of information specifically exempted by another statute, also provides broad protection for the CIA. As Mr. Edward Coney of Dow Jones Publishing Company, testifying on behalf of the American Society of Newspaper Editors, pointed out last week in hearings before the House Subcommittee on Government Information and Rights, Exemption 3 has been consistently construed by the courts to cover Section 102(d)(3) of the National Security Act, which provides: "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

This exemption also has been held by the courts to protect the names of CIA sources and the nature and type of information supplied.

Mr. Chairman, the collective effect of these two exemptions, working in conjunction with Executive Order 12065, is to provide a protective and carefully sequestered environment within which the CIA can operate. The Act is working. It has not resulted in the CIA being forced to fling open its doors and files to full public scrutiny. In fact, as former CIA Director Admiral Stansfield Turner told the 1980 ASNE Convention, "Thus far, we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released."

We have been outlining for you the public "facts" about the Federal Freedom of Information Act and its effect on the CIA. Unfortunately, some of the main proponents of amendments to the Act are dealing not with "facts" but with "perceptions." Potential informants in foreign countries allegedly perceive a certain sieve-like quality in the United States because of the existence of FoIA, and, therefore, are reluctant to come forward with the information which could greatly aid the CIA's operations.

We are in no position to either confirm or deny whether this perception is true; however, we are in a position to question whether such a "perception" justifies what could a near blanket exemption from FOIA for the CIA—an action which clearly would create a perception in this country that the Government is stepping away from its commitment to govern openly and to remain fully accountable to the people who are being governed.

This action would be especially disturbing in light of several recent occurrences at the CIA. Among these are the recent closing of the CIA's public information office; the cessation of the unclassified background briefings which occasionally were given to reporters covering the CIA; and, the recent allegations of wrongdoing by two top CIA officials. If we once again wish to grant the CIA the ability to operate in complete and total secrecy, passage of legislation similar to S. 1235 certainly will lead us in that direction.

Mr. Chairman, we urge you to proceed very cautiously with these legislative proposals. There may be a problem with the Act, but solutions must be very narrowly drawn. We believe the loss of public confidence in its government which could result when accountability wanes, would be a grave loss in our democratic society. The Federal Freedom of Information Act is one of the most effective

tools to ensure accountability. It is working and the principles it embodies must not be impaired.

Thank you for the opportunity to express our views.

The CHAIRMAN. Now, let's get back on schedule.

Mr. Mark Lynch and Mr. Allan Adler of the American Civil Liberties Union.

Gentlemen, you may proceed as you care. If you have prepared statements, we can put those in the record.

But you go ahead.

STATEMENT OF MARK LYNCH AND ALLAN ADLER, AMERICAN CIVIL LIBERTIES UNION

Mr. LYNCH. Yes, Mr. Chairman. My name is Mark Lynch. I am a staff attorney with the American Civil Liberties Union. Appearing with me is Mr. Allan Adler, also an ACLU attorney. We have a prepared statement and some supporting materials which we would like to be made part of the record. However, I think that the best way for me to proceed would be to respond to what I think are the three essential points made by Admiral Inman.

Before I do that, let me say that I am appearing on behalf of the American Civil Liberties Union, which is a nationwide membership organization devoted to the protection of the Bill of Rights, and the organization has determined that the Freedom of Information Act is an effective way to implement the freedoms protected by the first amendment.

Turning to Admiral Inman's statement, I think he presented three different points in favor of removing the Agency from the reach of the Freedom of Information Act, although I note that he specifically said that he did not want to remove the Agency from the reach of the Privacy Act. The first point is the perception problem; the second is the diversion of personnel or the burden on the Agency problem; and the third point is a very fundamental philosophic concern as to how oversight of Government institutions ought to proceed in a democracy.

PERCEPTION PROBLEM

Now, with respect to the perception problem, I would like to try to put that into a little bit of perspective, and I think Mr. Lewis, who had preceded me, had begun to do that effectively. I am willing to stipulate for the purposes of these hearings that in fact there are foreign sources and possibly foreign services who are hesitant to provide information to the U.S. intelligence services. But why would that be?

I listened very carefully to Admiral Inman and he stated that within the past 2 months there was a country that declined to furnish information because they were afraid they would read it in the newspaper. Well, there are lots of ways that information gets from the CIA into the newspapers, and I submit that the Freedom of Information Act is the very least of the potential ways in which information gets out of control after it has been furnished to the CIA.

First of all, our intelligence services exist to provide information to our policymakers. Our policymakers in our Government are spread

widely across the executive branch. Typically, information from the CIA will be furnished to components of the Defense Department, components of the State Department, the people in the White House, and of course to members of congressional committees.

Now, a great many of the people who receive this information are political people. They come in and out of the Government. They are not intelligence professionals. In fact, there is a position, an important position at the State Department, which seems to be the "New York Times" chair. Both in this administration and in the last administration, the Director of Political and Military Affairs was a former "New York Times" reporter.

And this is probably a good thing. We have this back and forth between academia, between Government and the press, between the private sector. So people who have access to intelligence information in our Government are apt to come and go back into all facets of American life. So that is one reason why a foreign government might be hesitant in the first instance to provide information to us.

Second, there of course is the problem of leaks. This committee has conducted extensive investigations of leaks, and I do not need to belabor the issue. But the fact of the matter is, Government officials, for a wide variety of reasons, leak information to the press. And that is another reason why, as Admiral Inman said, foreigners may be hesitant to furnish information to the CIA.

Third, there are lapses in security. There has already been reference to the Hugel problem, so I do not need to belabor that. But at the other end of the spectrum, there was the Kampiles case a couple of years ago, where a very low-level CIA official was able to walk out the door with a manual for a very sensitive surveillance satellite. So we have security problems, security lapses, from top to bottom. And that no doubt disinclines foreigners from cooperating with the CIA.

Fourth, former officials can write memoirs, and even though CIA memoirs are reviewed by the CIA, they are reviewed under essentially the same standards that a Freedom of Information Act request is reviewed, consequently, there is as much danger that information will be disclosed in the republication review process as there is in the FOIA review process. That is another disincentive to a foreign country.

So we have all of these problems, none of which anyone is prepared to deal with in a decisive way. We are not going to start running our Government the way the Russians do. We are not going to say that people in policymaking positions can never do anything else or that they can never write their memoirs. We are not going to hand our Government over to intelligence professionals only, so that we can be sure we hang onto the information.

We are not going to clamp down on the press. We are going to let the press continue to vigorously seek out stories and to publish them, unless they involve extraordinary harm to the national security.

And hopefully, we will see an improvement in the security practices of the intelligence community, but unless we adopt really draconian, bolshevik type security practices, there is always going to be some risk that there will be leaks and other unauthorized disclosures.

Now, the Freedom of Information Act, it must be stressed, is of all the things that threaten the disclosure of information is the one that

the CIA has the greatest control over. It has been emphasized throughout the hearings that the Agency has never lost a Freedom of Information Act case concerning classified information. Not one single classified word has been revealed over the opposition of the CIA by our court system.

There is a case pending in the U.S. Court of Appeals for the District of Columbia Circuit where the district judge ordered disclosure of the CIA information. An appeal was taken. A three-judge panel of the appellate court upheld the district judge's determination, and the CIA has now filed a petition for rehearing before the entire court en banc. And I suspect that if the decision of the panel is upheld, the CIA will take the case to the Supreme Court. Incidentally, the district judge in this particular case, who ordered disclosure of a few fragments of information, was Judge Gerhard Gesell, who was also the author of the Agee opinion that Admiral Inman cited with great approval earlier this morning. Judge Gesell can go both ways. He is a reasonable man on these things.

So there is no chance of a judge willy-nilly disclosing information. If a district judge decides that information is going to be disclosed, the Agency can get a stay while they pursue their appellate remedies. If for any reason the appellate court should reach an incorrect decision, there is recourse to the Supreme Court. And the act has been functioning now for 6 years, and there is a very, very clear record: The CIA always wins.

So I think this perception problem has to be put into perspective. There really are far many more factors, far more important factors, far more weighty factors than the Freedom of Information Act that lead a foreign service or a foreign source to decline to cooperate with the CIA. The Freedom of Information Act in my view is at the bottom of the barrel of problems in this perception area.

DIVERSION OF AGENCY RESOURCES

Now, the second significant point that Admiral Inman made is the diversion of Agency resources that is required to respond to freedom of information requests. I think that this problem can be addressed by very careful study of the administrative procedures that are followed, both at the Agency level when requests are made and at the court level when requests are litigated. I think that there is the potential for devising procedures that would minimize the burden on the Agency.

We have a case in litigation at the moment where we are experimenting with the CIA in what we call an oral Vaughn procedure. The courts have required the CIA to file very specific affidavits to justify the withholding of information, and the preparation of these affidavits is no doubt a time-consuming process.

What we have done in this case on an experimental basis is to have informal discussions with the CIA. These are not depositions on the record. No one is under oath. But the people at the Agency who are responsible for processing Freedom of Information Act requests come in and they explain on an informal basis why they have withheld the information. And this takes much less time than the written Vaughn procedures and it has proved to be very effective.

It is more persuasive as well, I might add. There have been a number of instances where we have been completely persuaded during the oral Vaughn proceeding that there is good reason to withhold the information.

Now, another area of burden is the processing of initial requests. My understanding is that the greatest expenditure of resources occurs when a request focuses on a body of information that the Agency is convinced it will not be able to release. For example, they predict that 100 responsive documents are all going to be exempt.

But under the way the procedures work now, agency personnel have to go through each one of those documents and make a determination. It seems to me that one of the ways that this burden might be alleviated is to resort to a random sample procedure. If, for example, a request is made for an extremely sensitive subject and it appears to the experts at the Agency that no information or very little information in this area can be released, they could focus on just a random sample of the documents and base their position on the random sample. If the requester was not satisfied at that point, he could litigate over the random sample. This I think would reduce an enormous amount of the administrative burden.

I have become persuaded that the CIA is in a different position than many other agencies, because only certain people can effectively review certain documents. I think that the Agency's point is well taken in that regard. There are documents concerning certain sorts of operations, and only people who have been involved in those operations can intelligently determine what can be disclosed and what must be withheld.

So there is a resource problem, a manpower problem there. But I think the random sample approach to processing particularly sensitive requests might alleviate that substantially. So rather than rush into a legislative solution amending the act, I think that the questions of manpower allocation and diversion could be better addressed through a careful and cooperative approach by all parties concerned to examining the administrative procedure to see if it cannot be streamlined and made more effective.

I would also point out that, while I am thankful that the Agency is not suggesting that they should be exempted from the Privacy Act, the continued applicability of the Privacy Act is going to have some of the disadvantages that they now point to under the Freedom of Information Act. For example, this burdensome lawsuit that Philip Agee brought requesting all documents about himself, the one that Judge Gesell decided a few days ago could have been able to bring under the Privacy Act just as easily as under the Freedom of Information Act, and the proposal that the Agency has made this morning would not alter that situation.

There are other ways, by the way, I might suggest, there are other ways that the act might be fine tuned to take care of the problem that was present in the Agee case. There, as Judge Gesell pointed out, you had a request that went to records that were part of an ongoing counterintelligence investigation.

Under exemption 7(A) of the act the FBI has a total exemption for ongoing law enforcement investigations. If a law enforcement investigation is ongoing the Bureau and other law enforcement agencies do not have to go through the request document by document.

They can make a generic showing under certain court interpretations of exemption 7(A).

One of the anomalies of the act is that the CIA, since it is not a law enforcement agency, as specifically spelled out in 50 United States Code section 403(d)(3), cannot avail itself of the 7(A) exemption. If there is a need for some fine tuning, I would suggest that a broader exemption for ongoing counterintelligence investigations would solve a lot of the problems, and I could not quarrel with that. It is the same kind of exemption that the FBI has right now. But it is a long way from the total sweeping exemption that the CIA has proposed.

INCONSISTENT WITH AGENCY

Now, Admiral Inman's final argument, is that the Freedom of Information Act is fundamentally inconsistent with an intelligence agency. He recognizes the need for some sort of oversight in a democracy over an intelligence service and he suggests that this committee and its House counterpart should serve as the surrogate for the public and that no other oversight is appropriate.

This is a novel theory of government. I can think of no support in literature on Congressional oversight that supports the proposition that a committee's oversight of an executive branch agency completely preempts the field and that no other oversight by the press or the public at large is appropriate.

I think at this point we just have a fundamental philosophic difference with Admiral Inman. I must say that this is a fairly new argument that the Agency is relying on this year. I do not think it is an argument that was put forward last year, the idea that the committees act as the completely preemptive surrogates of the people.

And I would suggest that this committee think very long and hard and reflect back over the history of congressional oversight of the CIA and of other agencies as well, that at times it has not been as vigorous or as effective as the oversight which this committee has achieved in the past 3 or 4 years. Congressional oversight has its ebbs and flows. Sometimes it is good and sometimes it is not so good.

I think the principle that a congressional oversight committee should be the only oversight in a democracy is a very dangerous idea, and that this committee should think long and hard about before it accepts that notion.

In closing, I would like to hearken back to a hearing that took place in September 1977, when Mr. Blake was the Deputy Director of Administration at the Agency and was in charge of administering the Freedom of Information Act. At that time he told another Senate subcommittee that the act had been a traumatic experience for the intelligence professionals at the CIA, but that the Agency had made the adjustments necessary and that in his judgment at that time the Agency was better off for having the Freedom of Information Act. In fact, Admiral Turner made some statements around that time period to the same effect.

The ACLU still share's in that judgment. We think that the Agency can live with the act. It is difficult, there is no doubt about that. But the case has not been made for a total exemption. And most important of all, at least from our perspective, the public is very much better off for the Freedom of Information Act applying to the CIA.

Thank you, Mr. Chairman. I appreciate the opportunity to be here. I would be happy to answer any questions you or your colleagues have.

CONGRESS RESPONSIBILITY

The CHAIRMAN. No questions, just a comment. Again, you bring out the same part of the problem that the newspaper people bring out. We are not attempting to blow something clear out of the water. We want to bring some order to it.

Now, when the act was originally passed I do not think there was any disagreement with the act. And as time went on the intelligence family began to find problems. Now, we have an oversight committee, for the first time in the history of this country. It is not just for the purpose of our overseeing what the intelligence family does, but it is part of our duty to listen to the intelligence family as to what they think would be helpful.

And as members of the legislature, we try to do what we can to help. They have their feelings, as you have heard Admiral Inman and others express, and they feel very strongly about them, just as you feel very strongly, not in the opposite direction, but somewhat contrary.

So our job is to come up with something that is pretty close to the middle, that will retain some of the advantages but not the disadvantages. For example, you may disagree with me. I am not in agreement that our intelligence service should be the wide-open thing that it is. I do not even like to have an Intelligence Oversight Committee. I do not think that it is the business of FDIA what intelligence does, because we live—our future, our peace is all wrapped up in what we can find out about the enemy.

So I want to assure you that your testimony has been well taken, well received, very well presented. When we get down to the nitty-gritty of arguing what we are going to do, we will certainly give you every consideration.

Now, we have Senator Inouye, who was the first chairman of this committee. Dan, do you have anything you would like to talk about?

Senator INOUYE. I am sorry I was not here earlier. We had a reconciliation conference.

The CHAIRMAN. We missed you. Aloha.

Senator INOUYE. But I will be reading the transcript of the prior testimony.

The CHAIRMAN. I know that Senator Durenberger wants to make a statement, but you go ahead, Pat.

Senator MOYNIHAN. Well, Mr. Chairman, sometimes you say things you do not really mean. [Laughter.]

And those of us who know you and love you sometimes have to extend your remarks. You believe there should be an Intelligence Committee. Down deep you know it's right. [Laughter.]

But you want to make our intelligence system work and our institutions work. And they do so in a unique setting. I think we are the only nation in the world that has an intelligence agency that you would know about from looking in a Government directory. We certainly are the only one whose headquarters is marked for roadmaps and where signs say, this way to the CIA.

The CHAIRMAN. I do not have to agree with that.

Senator MOYNIHAN. You do not have to. But I mean, you would agree that you would be hard-pressed in Paris to find the building that says, French Central Intelligence Agency.

The CHAIRMAN. That is why they have a good intelligence agency.

Senator MOYNIHAN. I do not disagree. I do not disagree. We work in a very special setting. And therefore, I think all of our considerations should begin with the fact of the openness of our arrangement, an openness which the British would never tolerate, the Canadians, the Australians, persons to whom we are closest to in our institutions, would not think proper.

So that is where we start out. And you know, it is a little bizarre that a Hungarian journalist, at the request of the KGB, can write a letter to the CIA saying, tell us what you know about matters of interest to the KGB, and they get an answer.

Suppose one of those ladies and gentlemen at the press table wrote the KGB and said, would you tell us the latest information you have on satellites. Well, they might take it as an offer to get in touch for other purposes, but they certainly would not spend much time going through their files and saying, well, do we really want to send them this.

Judge Gesell said something important in the Agee case. He said that it is amazing that a rational society tolerates the expense, the waste of the resources, and the potential injury to its own security involved when a man who in effect has defected from the agency and openly seeks its impairment can ask that very agency to cooperate in the enterprise. This is a concern to this committee.

We are concerned with the points that you raised, too. I think that what the chairman said reflects the spirit of this committee, which is that we were for that original act. But it has been in place long enough that the committee should see if some adjustments are not in order. That is what we are basically seeking here.

But thank you for your testimony. It is welcome and listened to with the respect it deserves.

Mr. LYNCH. Thank you.

[Prepared statement of Mark H. Lynch and Allan Robert Adler follows:]

STATEMENT OF MARK H. LYNCH AND ALLAN ROBERT ADLER, STAFF COUNSEL, ACLU PROJECT ON NATIONAL SECURITY, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Select Committee: On behalf of the American Civil Liberties Union, we want to thank you for inviting us here today to discuss S. 1235 and S. 1273—two current legislative proposals which, if enacted, would exempt almost all CIA records from the disclosure requirements of the Freedom of Information Act and would insulate the CIA's determinations from judicial review.

The ACLU, through its Center for National Security Studies, has carefully analyzed the arguments put forward by the CIA for exemption from the FOIA. That study leads to the following conclusions: [1]

[1] The Center for National Security Studies, a project of the ACLU Foundation and the Fund for Peace, has prepared a detailed analysis of the CIA's arguments in favor of narrowing FOIA access to Agency records. Although produced in response to legislation proposed in the last Congress, the Report is both timely and relevant with respect to the two bills that the Committee is considering today. We ask that this Report, which is attached to our prepared statement, be made part of your hearing record.

The intelligence community has ample authority under the current FOIA to protect classified information and intelligence sources and methods. Indeed the CIA has used the Act effectively and to date not one sentence has been released to the public under a court order in circumstances where the CIA has argued that release could injure the national security.

The problem as the CIA candidly admits is really one of "perception" or "misperception" on the part of foreign intelligence officers and foreign sources of information that secrets are not protectable under the FOIA. But this misperception cannot be solved by amending the FOIA since the perception is also based on the reality of leaks, lapses in security, congressional oversight, the publication of CIA memoirs (censored and uncensored), civil lawsuits, CIA abandonment of its agents and allies in Vietnam and elsewhere, and other factors having nothing to do with the FOIA. In light of all of the ways in which CIA information is from time to time actually compromised, it is unwarranted to focus on the phantom factor that federal judges will irresponsibly reveal information.

More important, the CIA understates the adverse impact of the exemption on the public's right to know. Considerable amounts of information regarding CIA and other intelligence operations have been released by the CIA under the FOIA. Through the FOIA, the public has learned more about the Bay of Pigs invasion, mind-drug experiments, and CIA spying on Americans. Much of the information was not included in congressional reports on the CIA and some of it makes clear that CIA operations were more extensive than official investigations had indicated.

Congressional oversight is no subsitute for public accountability of the CIA under FOIA. The CIA says it is willing to give all information to the Congress for purposes of oversight and that this is further reason for granting the exemption. Yet disclosures under the FOIA have shown that the CIA did not turn over all information about past operations to the Congress and congressional committees have not always made relevant information available to the public. The FOIA has independently added to the public record of the agencies.

Let us turn now to the importance of the FOIA in enabling public interest groups like CNSS to better monitor the activities of the CIA.

The ACLU, primarily through the Center for National Security Studies, has made extensive use of the FOIA in seeking to learn about the activities of the CIA and other intelligence agencies and to supplement the information provided to congressional committees and made public by those committees.

On February 19, 1975, when the 1974 amendments to the FOIA went into effect, CNSS filed some 5 requests with the CIA. A few months later, CNSS filed four lawsuits for documents withheld by the CIA and other agencies. Since then we have made more than 50 requests and filed some 15 lawsuits on behalf of CNSS and other groups through our litigation project, the ACLU Project on National Security. We regularly review documents released by the CIA and other agencies to determine what new information they contain. Summaries are printed in the CNSS monthly, "First Principles," and in a CNSS report, "From Official Files," which is regularly updated and widely reprinted.

We also make use of documents released under the FOIA in litigation and in testimony which we present regularly at the requests of a number of congressional committees including this Committee and its House counterpart. The documents are also used in CNSS reports and in books and articles written by the CNSS staff.

Put simply, the FOIA is essential to the activities of CNSS and the ACLU Project on National Security. The amendment proposed in S. 1235—indeed any amendment which did not provide for full judicial review—would be fatal to the effective functioning of CNSS and we believe to all efforts on the part of citizen groups to monitor the activities of the CIA and to participate in the process of developing charters and monitoring compliance with them.

Let us explain.

Prior to 1975, the CIA was essentially exempt from the FOIA. When we or others made requests to the Agency, we were told that all of its files were classified and were exempt from disclosure by statute. The Agency was essentially free to determine what to release and what not to release. What it released was essentially self-serving.

For example, in one of his few public statements, CIA Director Richard Helms told the American people that the CIA did not spy on Americans; he repeated the same information before the Senate Foreign Relations Committee. When he made those statements there was no way that anyone could test their accuracy.

One of the first documents which CNSS requested was the so-called Vail Report prepared by William Colby, then the CIA Director for President Ford, describing the CIA's surveillance of Americans in light of the New York Times story reporting what it called a massive illegal surveillance program. After the CIA refused to release a word of the report or its appendices, the Project filed suit. On the eve of a deposition of a senior CIA official, the entire report was released.

When asked at the deposition why the CIA had believed that it could withhold the entire report, the CIA official explained candidly that it was the "policy" of the agency not to discuss its activities in the United States or its surveillance of Americans. That "policy" ended that day. It would, we suggest, be reinstituted the day that Congress passes the kind of sweeping amendment that the CIA seeks.

One of the things which suggests that the CIA would revert to its old ways is its continued refusal to release material related to the surveillance of Americans unless it is specifically demanded under the FOIA. One very recent example will suffice.

Executive Order 12036, under which the CIA conducts surveillance of Americans, requires the agencies to develop implementing directives and secure approval for them from the Attorney General. The CIA drafted such guidelines and they were approved in August of 1979. Yet despite the fact that the guidelines are unclassified, the CIA neither made them public nor even announced they existed. When asked to release them, the agency declined to do so until a formal request was made under the FOIA. Even then the agency did not release all of the guidelines—a matter we are continuing to explore with the agency.

The importance of the FOIA to supplement the reports of congressional committees can be illustrated by the information which has been released under the FOIA related to the CIA's use of academics. The Church Committee discussed current CIA practice only in the most elliptical manner while calling upon universities to establish guidelines to control what the committee described as a threat to the integrity of American universities. Our FOIA cases have pried loose some additional details about the program of secret relations with university professors to assist the CIA in recruiting foreign students. We believe that we are entitled to know much more about these programs and have two cases pending in the courts. But even what has been released so far has been of great value in alerting professors and universities to the issues and in enabling them to participate in the current debate about whether such use should be prohibited in the intelligence charter.

Finally, Mr. Chairman, we wish to underscore the essential role which judicial review plays in the process. It is not that courts will often or even perhaps ever order the Agency to release material. Rather it is that the knowledge that a judge may examine material in camera leads the Agency, its attorneys, and the Justice Department attorneys, to take a hard look at the requested material and to decide if its withholding is really justified. In requiring such judicial review in 1974, Congress took a great step forward. The record since then amply demonstrates the importance of that change in the law and there is nothing in the record to show that it has harmed the national security.

As a result of the 1974 amendments, we believe that the CIA is a better institution and that it is more responsive to the dictates of the Constitution. In September 1977, Mr. John Blake, who was then the Deputy Director for Administration and was responsible for the implementation of the FOIA, told the Senate Subcommittee on Administrative Practice and Procedure that the Agency had made the necessary adjustments to make the Act work and that he thought the Agency was "better off for it." We share that judgment and stress that the public as well is better off for it. We do not believe that the case has been made for rejecting Mr. Blake's 1977 judgment, and therefore we urge you not to change this Act. The law should, in our view, be left as it is and the agency should be urged to more fully comply with its letter and its spirit.

We would now be happy to respond to any questions you may have.

The CHAIRMAN. Senator Durenberger?

Senator DURENBERGER. Yes. I would like to ask that my statement in full be made a part of the record.

The CHAIRMAN. It will be done.

STATEMENT OF HON. DAVID DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. And I want to make the observation, Mr. Chairman, that I think I have been at this process now for 2 years and the only thing in my life experience that I can find comparable to dealing with this subject is the taking of a Rorschach test. You know, the blot never changes, but everybody's perception of the blot comes out differently, and it makes our job of putting this thing in perspective much more difficult.

It is not a simple matter, deciding conflicts of rights, which actually do exist when you get into this kind of a problem. It is very, very difficult. And so besides putting my statement in, I would like permission to have the statement of Steven R. Dornfeld of the Knight-Ridder Newspapers, who was referred to earlier, made part of the record.[1]

The CHAIRMAN. It will be done.

[The prepared statement of Senator David Durenberger follows:]

PREPARED STATEMENT BY SENATOR DAVID DURENBERGER

Today's hearing on the Intelligence Reform Act of 1981 begins this Committee's first systematic consideration of whether the legitimate needs of America's intelligence agencies warrant relief from the Freedom of Information Act. This is a question that is easy to pose, but very difficult to answer. It brings important rights into conflict. And it lends itself to sweeping claims of harm that are difficult to prove because they are based upon either hypothetical arguments or highly sensitive information. Much of the Intelligence Committee's job will be to keep the issues clear amidst the clouds of rhetoric.

The importance of the issues at stake should be understood by both sides. On the one hand, the problems caused by FOIA to which the intelligence community attests touch the wellspring of our good life and freedoms—the nation's security. On the other hand, the Freedom of Information Act touches the wellspring of what makes our nation worth saving—an open system of government that serves the people, rather than holding itself above them. Should we decide, moreover, that the intelligence agencies need some relief from FOIA, the nature of that relief could well influence not only the public's access to information from those agencies, but also the larger debate on the costs and benefits of the Freedom of Information Act as a whole.

The Committee should examine very carefully the arguments raised for and against change in FOIA. Has FOIA led to dangerous disclosures? A recent paper by the Congressional Research Service states:

"The burden placed on intelligence agencies by the FOIA has not been the court-ordered disclosure of intelligence information but rather the necessity to search and review records and justify their nondisclosure."

I am not yet convinced that there have been any dangerous disclosures that could not be handled better through administrative action.

On the other hand, has FOIA led to useful disclosures of information about intelligence agencies? Steven Dornfeld of Knight-Ridder Newspapers, testifying on behalf of Sigma Delta Chi before a subcommittee of the Senate Judiciary Committee last week, argued as follows:

"Experience demonstrates that the FOIA has been employed by responsible journalists to gain access to much useful information about this cruicial agency [the CIA]. As a result of these disclosures, the American people have had an

[1] See p. 71.

opportunity to develop a deeper appreciation of the effective bounds within which the agency must function."

CIA figures indicate that around 30 percent of FOIA requests result in some information being released. But the Committee lacks a good sense of the kind of information that is being provided. I would hope that we would get from both sides more concrete illustrations of what information the intelligence agencies provide to the American people as a result of FOIA.

More concrete information is also needed on the subject of whether the mere appearance of openness, which FOIA creates, has significant positive or negative effects. Does freedom of information really lead the American people to have more confidence that intelligence agencies do not violate people's rights? This would be hard to demonstrate, but important to consider. Does freedom of information really lead potential intelligence sources and foreign governments to draw back from cooperating with U.S. intelligence agencies? This, too, is difficult to demonstrate, especially when leaks, unsanctioned memoirs, personality conflicts and U.S. foreign policy may be more important factors leading to the same results. If the case can be made, however, then it will be important to consider.

When the facts are in, the Committee should consider many possible remedies. Senator Chafee has noted that he is "not wedded to the specific language" of S. 1273, and that any remedy must meet "our own standards for public accountability and the rights of the individual citizen." This is a wise approach to such a complex issue. The courts have devised special means of handling FOIA cases involving intelligence agencies—giving special credence to agency affidavits and developing both *in camera* and *ex parte* procedures for examining agency affidavits and documents. So may Congress find that finely-honed instruments will do a better job than meat-axe "reforms."

I especially hope that any remedy for the intelligence agencies will not be a camel's nose in the tent of public accountability. The executive branch should not let narrow problems be justifications for broad exemptions.

Senator DURENBERGER. I would close with the observation that, while the task may be difficult, it is also an essential task. I compliment you and Senator Chafee and others who have undertaken the task, and pledge to you that I will help you redesign the blot if it is necessary, so that we can get as many common interpretations as possible.

The CHAIRMAN. Thank you very much, gentlemen.

Mr. Jack Maury, president of the Association of Former Intelligence Officers.

You may put your whole statement in the record or proceed as you care to.

STATEMENT OF JACK MAURY, PRESIDENT, ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, ACCOMPANIED BY JOHN WARNER, COUNSEL

Mr. MAURY. Thank you, Mr. Chairman. I will submit for the record a copy of our statement.

[Prepared statement of Mr. John M. Maury follows:]

PREPARED STATEMENT OF HON. JOHN M. MAURY, PRESIDENT OF THE ASSOCIATION OF FORMER INTELLIGENCE OFFICERS, REGARDING S. 1273, "INTELLIGENCE REFORM ACT OF 1981"

Mr. Chairman and Members of the Committee: I am especially grateful for the opportunity to appear here today. The issue addressed by S. 1273—the application of the Freedom of Information Act (FOIA) to our intelligence operations—is a serious one. I would like to speak of it on the basis of 40 years of military and civilian service in the area of national security. These include 28 years in CIA, chiefly in Soviet operations, followed by a stint as Assistant Secretaly of Defense. But today I am here as President of the Association of Former Intelligence Officers (AFIO)—some 3000 veterans of the military intelligence services, the CIA,

the FBI, the NSA, the State Department and other intelligence entities. With me is AFIO's Legal Advisor and former General Counsel of CIA, John S. Warner.

As this Committee is well aware, the work of our intelligence agencies these days has never been more important, or their tasks more challenging. But what has this to do with S. 1273? Justification for S. 1273 was clearly documented by Senator Chafee in his remarks made on May 21, 1981 when he introduced this bill. I want to say at the outset that we support this effort to relieve the Central Intelligence Agency and other elements of the intelligence community of the serious concerns in complying with the Freedom of Information Act. But more importantly there is a need to repair the substantial damage already wreaked on our intelligence efforts by FOIA. There has already been direct testimony by CIA, NSA and the FBI that sources of information, agents, and foreign intelligence services have refused to cooperate because of their fears and lack of confidence that our intelligence agencies can keep such relationships truly confidential because of the Freedom of Information Act.

We think it most appropriate that this proposed legislation, designed to improve our intelligence activities, should be in the form of an amendment to that provision in the Central Intelligence Act of 1949 which implements further the proviso of section 102(d)(3) of the National Security Act of 1947. That proviso imposes on the Director of Central Intelligence responsibility for protecting intelligence sources and methods from unauthorized disclosure. Indeed, this proposed legislation will for the first time grant the DCI authority to carry out this statutory mandate. As such an amendment we would also like to suggest that the title in S. 1273, "Intelligence Reform Act of 1981" is not an accurate description of its thrust. As we view the bill it conveys a positive authority to intelligence enabling it to hold securely its legitimate secrets. The negative connotation of "reform" should be modified. We recommend that no title is necessary in a modest sized bill of this nature.

There are, however, three specific problems which we believe warrant consideration by this Committee. These are caused by provisions of the Freedom of Information Act which provide:

1. Unrealistic time limits;
2. Privileges to any persons and groups, including convicted felons and representatives of hostile intelligence services;
3. De novo review by the courts of Executive Branch classification.

I shall discuss each of these briefly.

As to time limits, the present FOIA provisions (such as the 10-day deadline for initial agency response) have proved so unrealistic as to make it virtually impossible for the agencies to comply. Failure of the agencies to meet these deadlines enables the requestor to file suit in a Federal District Court. The Courts have recognized the practical dilemma and on the whole have not penalized the agencies. Nevertheless, in many cases, the requestor has immediately filed suit. These requests are clearly designed to assure inability of the agencies to meet the ten-day deadline—the requestor obviously wanted to be in court at the earliest possible time. In any event, we believe patently unrealistic time limits should not be in law. Congressional action is overdue to modify a law with which most government agencies find it impossible to comply.

Second, the law extends to anyone the right to invoke Freedom of Information Act provisions. The legislative history of that Act makes clear that one of its major justifications was that the opportunity to obtain information is essential to an informed electorate. This is undoubtedly true, but why permit foreigners the privileges designed to foster an informed American electorate? It seems to us the ultimate absurdity to accord foreign agents the legal authority to demand information from our intelligence files. We do not believe it was the intent of Congress to authorize the head of the KGB to request documents from the CIA and then to file suit in U.S. courts to enforce his request. A substantial burden is also put on the FBI to deal with requests from convicted felons in prison. FBI testimony has demonstrated clearly serious damage to its ongoing investigations and informant network.

Third, de novo review by the judiciary was added to the law by the 1974 amendments in direct response to the Supreme Court's decision in *EPA* v. *Mink* which held that under the then-existing law, the judiciary had no authority to question or over-rule an Executive Branch determination that a matter was classified and could not be publicly disclosed. Primarily because of the de novo

review provision, the enrolled bill containing these amendments was vetoed by President Ford who said in his veto message that ". . . the bill as enrolled is unconstitutional and unworkable . . ." In current litigation, the Reverend Moon's "Unification Church", a corporation, has requested documents and the U.S. District Court, after trial and examination *in camera* of CIA documents and affidavits, has ordered the release of portions of five documents. No reasons were given by the judge in ordering release other than his bland statement that "In a few instances the Agency's claims are overly broad." In other words, the experience and expertise of the Executive Branch can be overruled by a Federal judge who simply disagrees. Intelligence respónsibility constitutionaly is reposed in the President as Commander-in-Chief and pursuant to his responsibility for foreign affairs. This de novo review provision is so repugnant to our Constitution that it should be removed from the law.

We have just discussed three most serious areas of concern which will not be reached by S. 1273. While the partial relief to be afforded by that bill would be a distinct improvement, we do not believe it is sufficient. In addition to the three specific areas discussed earlier, we would be left with the problem of the perception of informants, agents, and foreign intelligence services that while there has been some modification of the FOIA problem, it has not been solved. Thus, the damage already suffered by intelligence is not truly repaired.

The solution as we see it is to exempt CIA, NSA, FBI and such other components of the intelligence community as the President may designate from all the provisions of the Freedom of Information Act. You have heard from senior intelligence officials of the burden in time, man-hours, and money imposed on the agencies of the intelligence community by this Act. In this dangerous and difficult world, we believe the national interest would be better served if these resources were devoted to the collection of intelligence on our enemies rather than releasing information which may assist our enemies.

For those Americans who wish to know about files maintained on them, the provisions of the Privacy Act afford ample legal access. As to historians and scholars, the provisions of E.O. 12065 offer an appropriate mechanism to reach information needed for study and research. It has been asserted by certain organizations that there are long lists of books and articles of public interest supposedly based on information released by intelligence agencies under FOIA and could not have been published without that law. Analysis indicates that such claims are highly exaggerated, since most released information is fragmentary and not fundamental and cohesive.

We have given considerable study to the question of how to deal with the adverse effects on intelligence of FOIA. Clearly the Act itself needs substantial modification, but this Committee and we are primarily concerned with its impact on the intelligence community. It is our conclusion, after studying other proposals, that only S. 1273 attacks problems which FOIA creates for the intelligence community head-on by amending substantive intelligence legislation. We believe this is the approach best calculated to protect and enhance our intelligence capability. We have discussed above three areas of concern which would not be reached by S. 1273, as well as the fact that the perception of cooperating foreigners will not be sufficiently assuaged to repair the existing serious damage to our intelligence effort. On balance then, it seems that the best course to accomplish this purpose would be a simple exemption of CIA, NSA and the FBI, and such other intelligence components as the President may designate from the provisions of the Freedom of Information Act.

The gains for our intelligence effort from such an exemption would be extremely significant. Also, there would be an enormous saving of taxpayer dollars now devoted to non-productive and often fruitless effort.

In my experience in this field, Mr. Chairman, I can recall no period during which Soviet intelligence operations against us have been more aggressive or more audacious. There can be no doubt that in this effort our present Freedom of Information Act has given them substantial advantage. It is available not only to any American citizen, but it can equally be invoked by aliens, including known officers and intelligence agents of hostile governments. Perhaps more important, it is a symbolic reminder to individuals and organizations on whose covert cooperation we must depend that we are really not very serious about protecting them or indeed about protecting our own national security in the service of which we ask others to risk their freedom, and even their lives.

In conclusion, Mr. Chairman, what is at issue here is that basic secrecy upon which all intelligence operations must depend has not changed since General Washington wrote to Colonel Elias Dayton about an intelligence operation 204 years ago this week: ". . . upon Secrecy, Success depends in most Enterprizes of the kind, and for want of it, they are generally defeated, however well planned . . ."

Thank you for giving us this opportunity to be heard, Mr. Chairman. Mr. Warner and I will be glad to try to answer any question.

Mr. MAURY. I have with me here Mr. John Warner, who is the legal adviser of the organization of which I am the president, the Association of Former Intelligence Officers, made up of some 3,000 members, old intelligence hands from the military, the FBI, NSA, CIA, and the other Government intelligence agencies.

I would like to comment on this problem from the perspective of my own background of 40 years in the intelligence business, military and civilian, 28 of which were in the CIA, mainly in the Russian field, and more recently as Assistant Secretary of Defense.

INTELLIGENCE BATTLE

But I would say that the intelligence battle I do not think has never been waged more vigorously by our adversaries, nor do I recall a time when I think the stakes were higher. Because without good intelligence I think we are a blind man stumbling around through an uncharted minefield.

And in these circumstances I find that our ability to respond to this challenge is severely hampered by what I could only call the unilateral disarmament of our intelligence capabilities by imposing on them such burdens as the Freedom of Information Act.

We have already heard from witnesses regarding these burdens and the consequences, and of sources that have been drying up or evading us or are reluctant to cooperate with us. I recall the years of painstaking effort that it took to develop credible and confidential relationships with foreign intelligence agencies and private organizations, including private American business enterprises operating abroad, academic institutions, and individuals. Now we have got to start all over again in the wake of the hemorrhaging of information, much of which is resulting from the Freedom of Information Act.

Turning to the specific legislation, we applaud the purposes. We particularly applaud the fact that it is presented as an amendment to the basic intelligence legislation, going back a number of years, which imposes on the Director of Central Intelligence responsibility for protecting intelligence sources and methods, because throughout all these years he has never really had any effective means of discharging that responsibility. And I think S. 1273 is a step in the right direction in that regard.

However, we do have some problems with this legislation, Mr. Chairman. First of all, already referred to, are the totally unrealistic time limits of 10 days to respond to requests and 20 days to respond to appeals. This has proved unworkable and it seems to me has got to be abandoned or adjusted.

Second, already pointed out by previous witnesses, is the absurdity of making available to our enemies the opportunity to invoke this

existing Freedom of Information Act in order to extract secrets from us.

And third, we are concerned about the de novo review provisions for classification of intelligence material. We think this raises both a very serious practical question and also a serious constitutional question.

From the practical standpoint, it superimposes the judgment of a judicial authority over those who have qualifications in the intelligence business, a rather arcane and highly technical business.

And second, it raises, it seems to us, a very important constitutional question about the authority of the executive in areas of national security and foreign affairs vis-a-vis that of the judiciary.

PROBLEM

Mr. Chairman, there seems to me an irony in the problem presented by this whole freedom of information question. That is, it is advocated on the basis that the public needs to know what is going on in the international arena, needs to know what is going on in the intelligence business. But the more that the public has an opportunity to know what is going on, the less our leaders, who have to make the ultimate decisions, are going to be able to find out what is going on, because that very public access to detailed information about intelligence activities is going to destroy these sources which our leaders must rely on to make wise decisions in such a volatile and critical time in our history.

The perception has been mentioned here which foreigners and others who might be able to assist in the intelligence business have of the effects of this legislation, the Freedom of Information Act. That I think is something that cannot be exaggerated.

Because however much we may protest, as others have protested at this hearing, that indeed there has not been serious damage resulting from the act, the fact remains that as long as there is on the statute book an act that gives our adversaries access, or at least a means to seek access, to sensitive information, it is inevitably going to inhibit foreign individuals and organizations whose cooperation we very much need.

And as long as we permit that situation to continue, we are saying to the world we are not really very serious about our national security, the same national security which we ask other people to risk their lives in assisting us in protecting. It puts us in a rather impossible position, it seems to me, when we go out and try to recruit the people we need to help us get the information we need.

And finally, Mr. Chairman, I can just refer to some words of George Washington exactly 204 years ago this week, when he wrote in a letter to Colonel Elias Dayton:

> Upon secrecy success depends in most enterprises of the kind, and for want of it they are generally defeated, however well planned.

Thank you, Mr. Chairman. Mr. Warner and I will be happy to answer any questions.

The CHAIRMAN. Thank you very much.

Senator Inouye?

FOREIGN ACCESSIBILITY

Senator INOUYE. Mr. Chairman, throughout the discussion of the Freedom of Information Act one hears constantly about foreign agents or the KGB or foreign embassy officials using this route to get information. Mr. Chairman, do we have any evidence to indicate that any foreign agent or employee of any adversary or foreign embassy has sought information through this route?

The CHAIRMAN. We questioned Admiral Inman this morning. He said that he has cases from his previous service which, as you know, were not particularly open to that kind of use. But, under CIA I cannot answer that question. Maybe Mr. Maury can because of his connections.

Senator INOUYE. I know of only one instance. The librarian at the Polish Embassy called the CIA for information which had already been publicly released. It was already public information. And he was told to file a request under the FOIA.

I am well aware that the FOIA may be used by a foreign agent. But I am curious, do we have any evidence to show that it has been used by foreign agents? Because several witnesses have suggested that the FOIA has been used by foreign agents.

Mr. MAURY. Well, sir, I wonder though if a sophisticated intelligence service would use its own overt personnel to exploit this act. I should think they would be quite capable of covering their tracks through operating through a cutout of some kind. And I would suppose that is the way they would try to exploit the situation, if they did.

Senator INOUYE. In other words, there is always the possibility of such use, but we are not aware of whether it has actually been used?

Mr. MAURY. Well, I am somewhat out of date regarding what has been happening in the intelligence community recently, because I have been only on the fringes of it in recent years. But in the days when I was actively involved, I can assure you that they were using every rathole they could find to try to get at information, and if this was available to them they certainly would have used it then.

Senator INOUYE. My major concern with respect to the FOIA has not been touched upon by prior witnesses. I would like to ask you if you share this concern. I have been led to believe that as a result of the Freedom of Information Act members of friendly intelligence agencies, those with whom we have liaison relations, are becoming very reluctant to work or cooperate with us because of the possibility of disclosure through the FOIA procedure.

We have to depend, as you are well aware, on our liaisons overseas for much of the information we rely upon. Do you think this is a major concern?

Mr. MAURY. Sir, as I say, I have been out of the business of running agents and dealing with foreign services directly for several years. But from everything I have heard from those who are still active in the business, it is indeed a major problem.

Senator INOUYE. What do you suggest would be a reasonable and rational time period for complying with FOIA requests?

Mr. MAURY. A reasonable and rational time?

Senator INOUYE. Time limit.

Mr. MAURY. Time limit. Sir, I would have to defer to those who have actually been wrestling with this problem, the legal staff of the CIA or the DIA or the NSA. I am afraid I would have no basis, no experience on which to base a judgment in that regard, because I simply have not been involved in that aspect of it personally.

Senator INOUYE. Would you advocate a complete exemption for the intelligence agencies from the Freedom of Information Act?

EXEMPTION

Mr. MAURY. As it applies to the intelligence agencies, yes, sir. To put it differently, I believe I would say a broad exemption from the application of the act as far as the intelligence agencies are concerned.

Senator INOUYE. Are you suggesting that the people of the United States should be denied information such as was disclosed concerning the use of mind-controlling drugs?

Mr. MAURY. Sir, I would hope that that situation has now been corrected by the existence of this and the sister Committees of the Congress. Whether the Freedom of Information Act is the best way of preventing such abuses as have occurred in the past I seriously doubt, because it seems to me that while it is of great importance that the public's representatives as represented here on the committee have full access to all activities in the intelligence community, there should be some screening as to how much of this should be passed on freely to the general public.

And it seems to me that with responsible and enlightened leadership in the intelligence community, plus appropriate oversight within the executive branch of the Government, plus effective oversight by two committees of the Congress, we have the best means of making sure that we are guarding against abuses without throwing the baby out with the bath.

Senator INOUYE. I would pray that your assessment of the work of this committee and our sister committee is correct. But throughout our work, most sadly I must tell you, there have been instances when we have felt that we were not being given everything that we were deserving of.

Mr. MAURY. Well, sir, I can only say that I am and I am sure my organization would feel as strongly as you do if this committee is not being adequately informed of what is going on in the intelligence community, because not only do I feel that the committee has a responsibility for this and the public expects it, but also I feel that there are great opportunities for abuses, great temptations, great pressures on intelligence people, operating under the circumstances in which they operate. There are all kinds of opportunities for mischief. I am well aware of that.

And I think not only for the good of the public, but for the effectiveness of the intelligence operations of this country it is essential that the intelligence agencies maintain the highest degree of integrity. And if you say, and I have no reason to question it, that they have not lived up to that standard of integrity in dealing with this committee, I would say that my organization certainly would share your concern.

Senator INOUYE. I would like to modify that by saying that for the most part the intelligence community has been extremely cooperative. But there have been instances throughout the 5 years of the life of this committee where they have been less than candid.

Mr. MAURY. Well, when people are trained to be devious in the service of their country it is a little hard for them to change gears all of a sudden sometimes, sir.

Senator INOUYE. My final question, sir. If a member or former member of the agency feels that he has been wrongfully treated as an employee and wishes to study certain documents, personnel documents or work documents or worksheets relating to his performance as an employe, how would he get that information without the Freedom of Information Act?

Mr. MAURY. I defer to Mr. Warner on that. That is a legal question, sir. I do not believe I have an answer to you.

PRIVACY ACT

Mr. WARNER. Senator, the answer to that is by the provisions of the Privacy Act which deal with reports and records of people. It occurs to me that it provides a substantially similar remedy to the former employee.

As was mentioned here earlier, the individual such as the Agee could have filed a suit under the Privacy Act. It is not exactly the same kind of a lawsuit, but there are legal remedies available aside from the administrative remedies. Under the Privacy Act, this would afford Americans the information they needed on themselves.

Senator INOUYE. So this bill we are considering will not exempt the agency from the Privacy Act?

Mr. WARNER. Absolutely not. It would not touch the Privacy Act provisions in any way.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

I think that it is important to note the point that Mr. Warner made regarding the Privacy Act. The bill that I submitted does not carry an exemption from the Privacy Act. Now, it is true that the CIA has testified that they would—and General Larkin of DIA also testified—that they would like a complete exemption. But that goes further than the legislation which I have introduced.

I think there is another point to be made. This is not a question; this is a statement. The Congress itself is exempt from the Freedom of Information Act. Is it not curious that we levy these requirements on everybody else, but always exempt ourselves. We are exempt from OSHA, we are exempt from Equal Employment Act, and we are also exempt from the Freedom of Information Act.

I wonder if those who were so strongly in favor of the Freedom of Information Act, why do they not come around and press for freedom of information applied to the Congress? Perhaps they recognize they would not get very far.

Senator INOUYE. Would the Senator yield?

Senator CHAFEE. Certainly.

Senator INOUYE. That may be technically correct. But the fact that we have open meetings like this distinguishes us to some extent from the CIA or the DIA, which do not have open meetings such as this.

Senator CHAFEE. Yes; also, we have closed meetings, too. But that is not the point of these hearings. The bill I have introduced does not pertain to Congress one way or the other.

Thank you, Mr. Chairman. Thank you, gentlemen.

The CHAIRMAN. I am afraid we would be treading on ground that would keep us busy for the rest of our lives if we extended it to Congress.

Thank you very much. It is a pleasure to have you here.

And we have as our final witness Mr. Samuel Gammon, executive director of the American Historical Association, who has also had a very broad background in working with our Government and for our country around the wrold.

You may proceed in any way you care.

STATEMENT OF SAMUEL R. GAMMON, EXECUTIVE DIRECTOR, AMERICAN HISTORICAL ASSOCIATION

Mr. GAMMON. Thank you, Mr. Chairman. I am very grateful to the committee for permitting the American Historical Association to appear briefly on this subject.

My name is Samuel R. Gammon, I am a retired ambassador and the executive director of the American Historical Association, which is the oldest and largest professional historical association and learned society in this country. We were chartered by act of Congress in 1888, and our membership includes about 13,000 historians in every major college and university in this country.

I might also add——

Senator CHAFEE. I cannot hear very well, Mr. Chairman.

Mr. GAMMON. I might also add that between my first career and my present position I spent 27 years in the American Foreign Service serving and working closely in many posts with large CIA stations, as well as nearly 6 years on the seventh floor of the Department of State. I therefore think I can claim a broader perspective on the CIA and some of its operational requirements than most scholars.

OPPOSITION

The American Historical Association strongly opposes S. 1273 and S. 1235, which is very similar. We believe that it would have a damaging long-term effect on historical research and on the democratic process.

Let us be very clear about the effect and the intent of this bill. It would provide for the blanket exemption of all CIA documentary material from the operation of the Freedom of Information Act except for file material on individual citizens or admitted aliens which is directly requested by them under the Privacy Act. It is therefore a CIA and Intelligence Community Security Act to exempt the entire intelligence community from FOIA obligations.

The FBI does not possess such a direct exemption. The Department of State does not solicit such an exemption.

I might note parenthetically at this point that of the daily CIA top secret summary which goes to the President for his morning reading and has for 20 years or so, by their own diagnosis and analysis about two-thirds of its material comes from Department of State reporting and not from the intelligence community. So we are dealing with a very narrow portion of the intelligence, of the total intelligence-gathering facilities.

The Defense Department, except for DIA, would not have an exemption like that proposed by this bill. All these agencies deal daily in very highly classified and presumably sensitive matters. The committee may wish to explore with them what will happen to their sources and information suppliers if this measure is enacted, if it is effective as alleged by the supporting witnesses.

The Congress is in effect being asked in this bill to decree that the CIA is so sensitive in everything that it does, and presumably so responsible and patriotic, that none of its archival material and records need ever be subject to disclosure, except through the direct permission of the DCI.

Mr. Chairman, the American Historical Association and its membership—and I might add that historians, like diplomats, are very cautious and conservative people, recognize that sensitive government operations and archival material, if it is disclosed while it is still sensitive, is capable of damaging the national interest and therefore the interest of every citizen.

But we believe that the proper means of avoiding such damage is by a sane, sensible and well-organized classification system which protects material while it is sensitive and permits its declassification and availability for release thereafter. That system now exists and should continue to be used for the protection of legitimate secrets in the intelligence community, and indeed in all parts of the Government, while the need for secrecy exists.

CONCERN

The concern of the association which I represent is twofold: First, as citizens we are concerned to preserve the informational means by which the American people are able to hold their Government ultimately and publicly accountable for the actions which it takes in their name, and by which the public can obtain the information which an electorate in a representative government needs in order to make responsible choices in leadership and in policy.

Second, our more direct interest as historians is in ultimate access by our scholars to research material in the pursuit of truth, historical knowledge and accuracy. That ultimate access to intelligence community material could be wiped out by this bill.

I might also add that a very distinguished Senator, who was also Secretary of State earlier in our history, Senator and Secretary Daniel Webster, was on a secret intelligence retainer from the British Government during a large part of his career. That is of considerable historical interest. It is hardly damaging now either to Her Majesty's Government or to Mr. Webster, though it would clearly have been so at the time.

Under the proposed bill analogous material in CIA and intelligence community files could be locked up forever. That is not the kind

of government and society that historians would like to see being created.

As a former bureaucrat of some experience in these matters. I would have to say that, like all bureaucrats, one tends to regard the Freedom of Information Act as at best a nuisance and an expense both of resources and manpower. At worst, in the bureaucratic view, it is a handicap to the tranquil conduct of the Nation's, by which bureaucrats mean "our," business.

If I were the head of the Bureau of Fisheries and Hatcheries, I would welcome an exemption on these grounds. It is certainly understandable that my friend Admiral Inman strongly supports this. It would make life very much simpler and very much less expensive for the Agency of which he is the distinguished Deputy Director.

I believe, however, that the pursuit of historical truth, the pursuit of information by the press, by the American people, by researchers, is of very substantial value and very much in the national interest.

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

[Prepared statement of Mr. Samuel R. Gammon follows:]

PREPARED STATEMENT OF SAMUEL R. GAMMON AND EXECUTIVE DIRECTOR OF THE AMERICAN HISTORICAL ASSOCIATION

My name is Samuel R. Gammon. I am a retired Ambassador and the Executive Director of the American Historical Association, the oldest and largest professional historical association and learned society in this country. We were chartered by Act of Congress in 1889, and our membership includes 13,000 historians in every major college and university in this country. I might add also, that between my first career and my present position I spent 27 years in the American Foreign Service serving and working closely in many posts with large CIA stations, as well as nearly 6 years on the seventh floor of the Department of State. I therefore can claim a broader perspective on the CIA and its operational requirements than most scholars.

The American Historical Association strongly opposes S. 1273. We believe that it would have a damaging long-term effect on historical research and the democratic process. Let us be very clear about the effect and the intent of this bill. It would provide for the blanket exemption of all CIA documentary material from the operation of the Freedom of Information Act except for file material on individual citizens or admitted aliens which is directly requested by them. It is therefore a CIA and Intelligence Community Secrecy Act to exempt the entire intelligence community from FOIA obligations. The FBI does not possess such an exemption. The Department of State does not solicit such an exemption. The Defense Department (except for the Defense Intelligence Agency) would not have an exemption like that proposed by this bill. These agencies deal daily in very highly classified and presumably sensitive matters. The committee may wish to explore with them what will happen to their sources and information suppliers if this measure is enacted. Yet the Congress is being asked in this bill to decree that the CIA is so sensitive (and presumably so responsible and patriotic) that none of their archival material or records need ever be subject to disclosure.

Mr. Chairman, the American Historical Association and its membership accepts that sensitive government operations and archival material, if disclosed while it is still sensitive, is capable of damaging the national interest and therefore the interest of every citizen. But we believe that the proper means of avoiding such damage is by a sane, sensible and well organized classification system which protects material while it is sensitive and permits its declassification and availability for release thereafter. That system now exists and should continue to be used for the protection of legitimate secrets in the intelligence community, while the need for secrecy exists.

The concern of the association which I represent is twofold. First, as citizens we are concerned to preserve the informational means by which the American people is able to hold its government ultimately and publicly accountable for the

actions which it takes in their name, and by which the public can obtain the information which an electorate in a representative government needs in order to make responsible choices in leadership and policy. Second, our more direct interest is in ultimate access by our scholars to research material in the pursuit of truth, historical knowledge and accuracy. That ultimate access to intelligence community material could be wiped out by this bill. The fact that Senator and Secretary of State Daniel Webster was on a secret intelligence retainer from the British government is of considerable historical interest. It is hardly damaging now either to Her Majesty's government or to Mr. Webster though it would clearly have been so at the time. Under the proposed bill, analogous material in the CIA and intelligence community files could be locked up forever. That is not the kind of government and society we should become.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

As chairman of the Arizona Historical Foundation, which I believe mine is a member of your association, we appreciate your remarks very much, particularly those applying to the need for study for history.

John, do you have any questions?

Senator CHAFEE. Yes, Mr. Chairman.

As you know, we did not have a Freedom of Information Act in this country prior to 1966. Was historic research just an arid wasteland prior to that?

Mr. GAMMON. It did its best with the available material, Senator. I would add in this connection some statistics I have heard from various agencies. Probably 80 percent of FOI requests come from the journalists area, the various media, and probably only 20 percent by scholars, interested citizens pursuing a particular hobby or a particular professional interest.

It is obviously a very useful tool. It is also very expensive. It would seem to me personally that the act may well need some repair and some modification. It is obviously an anomaly that a foreign national can pursue truth and research just as inexpensively, at a subsidized rate, as American citizens.

There are many aspects in the broader act that may well need modification and certainly need the attention of the Congress.

HISTORIC RESEARCH IN ENGLAND

Senator CHAFEE. What about historic research in England? It seems to me if you look back, the best historic novels and some of the best history we have, with all due deference to your associates and your distinguished organization, comes from England. I think "The Man Who Never Was" was a British book, was it not? "Ultra" was a British book.

They managed to get all that information without the benefit of a freedom of information act. How do you account for that?

Mr. GAMMON. That is correct. I believe in both of those cases the principal authors concerned were former employees, former servants of the Crown, who were personally familiar with this organization and pursued their writing and research and clearance under the British system.

As I understand it, the British system of preservation for classified material sets an absolute 30-year rule on sensitive material, but also provides for extending some of it to 50 years. I have been told

that on "Ultra" and "The Man Who Never Was" and such subjects as that there was considerable hesitancy on the part of the intelligence community and the British Government over whether such devices should be released at that time or preserved even longer in order to preserve methodology and techniques and so forth.

Senator CHAFEE. Now also, under this act the normal declassification of material would proceed. So that declassified information would then be available. So you are not working in an absolute vacuum insofar as obtaining material from the CIA under the act as I understand it.

Mr. GAMMON. That is correct, Senator. And in fact that argument works either way. If the applicability of the FOI Act to the intelligence community remains in effect, when they get a request, they process it as though they were considering a systematic declassification at a certain point and say, is this sensitive now and can we let it out, and they make a decision, which is subject to appeal to the courts.

Senator CHAFEE. But there is a very profound difference. One is an ad hoc declassification as you proceed through a whole series of records and another is a declassification through some time limitation, which I consider very different. And Admiral Inman has mentioned, as he testified here earlier, that was where it presents a problem.

Mr. GAMMON. I think Admiral Inman mentioned particularly the staff time involved that had been——

Senator CHAFEE. But also the crossing of the compartmentalization, the fact that this becomes a sieve and inadvertently information goes out that would be of no consequence if you allowed the 30-year period or whatever it is to go by.

Mr. GAMMON. I am sure he is absolutely correct in terms of the demand on the senior people and compartments having to review requests. That does impose a burden. It is a manpower cost of substantial dimensions.

PROTECTION

We believe, however, that the principle of the Freedom of Information Act, within those safeguards and protections that are similar to the classification procedures to protect material while it is sensitive, is the proper means to tackle this question of preservation of vital interests, to balance it adequately against the interests of the American public and specialized groups such as my own in openness and in availability of information.

Senator CHAFEE. Well, Mr. Chairman, I just want to say this, that obviously we have got to do some balancing here. The Nation is engaged in a very serious undertaking in attempting to preserve its intelligence information and to acquire more. Without exaggerating it, we are confronted with potential enemies of considerable talent, unscrupulousness and tenacity.

We have had testimony from not one, but several officers of the national intelligence service who were involved in this, and who say this act is an inhibiting factor in their gaining and keeping information. Now, we balance that off against the desires of historians and newsmen who would like to get a look at things.

We set up two committees. Maybe we should not have the committees. Maybe we should not spend our time. But we established very, very broad rules to maintain oversight, in professional terms, on this agency. If we do not do our job, we ought to be thrown out.

Mr. GAMMON. Let me take a slight tangent in response to that, Senator Chafee. I served in numerous overseas posts. In one of them, which I prefer not to mention, the head of the KGB station attached to the Soviet Embassy exchanged cocktail party invitations with the head of the CIA station in our Embassy. They knew who they were, one another. Who were we kidding by keeping that type of information tightly locked up?

There are some materials which essentially could be in the public domain with little or no damage. So I think we do get into judgment factors in dealing with classified material. There are, of course, on unclassified materials, questions of timing. Material which would be damaging if released at one time would not have been damaging 2 years earlier.

During the time when our hostages were being held in Tehran, almost all material, historical material relating to relations between the United States and the Government of Iran during the period of the Shah was sensitive. It would have been very hard to judge what the impact and the possibility for damage to the lives and safety of the hostages would have been if that were released. Had it been released 5 years earlier it might not have been sensitive.

So there is not an absolute standard in assessing classified material, and one has to err, in the national interest, on the side of caution. But that is, we believe strongly, the proper way in which to protect sensitive material, that plus the services of distinguished committees such as the Senate Select Committee on Intelligence and its House counterpart in overseeing even the classified operations of sensitive agencies.

Senator CHAFEE. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Inouye?

ASSURANCES OF SECRECY

Senator INOUYE. I am just looking over Admiral Inman's prior testimony today, sir. And Admiral Inman said earlier, "To obtain this intelligence, it is vital that there be confidence in the ability of the U.S. Government to honor assurances of secrecy, assurances to our foreign sources."

Apparently there is a perception that the FOIA is responsible for much of the unauthorized release of information. What are your comments?

Mr. GAMMON. I would, I think in that respect, associate myself with the very perceptive comments of the distinguished representative of the ACLU. There are any number of factors that give a dog a bad name. One of them is the propensity for leaks, for whatever motivation. And it has been well said that the ship of state is the only vessel that leaks at the top.

Leaking and diffusion of information does make foreign contacts nervous. I can attest to that from personal experience. But that is not limited to this Government. One of our principal allies in Europe has a reputation among the professionals as being a fairly leaky government. A great many spy cases turn up there, more than any other. That is, one is aware of that, but that does not really inhibit exchanges with that government, so far as I know.

Similarly, in exchanges with intelligence officials and government officials of friendly, neutral, and even unfriendly governments, one is usually horse trading information. We are not going out and saying, tell us all about this. We get met by requests: Well, if I tell you that, will you tell me this?

So there is a certain amount of exchange of information. There are some matters of intelligence significance which are so sensitive that we will not even tell our closest allies about them, usually in methodology and scientific areas. That is in terms of a judgment of relative sensitivity. So it is alas, not a very precise field. We deal in shades of gray almost totally in considering things of that sort.

Senator INOUYE. In your closing remarks, you cited an experience you had where a KGB chief of station and the CIA chief of station knew each other socially and exchanged notes and went to parties together, and you remarked, so who is kidding who. I would suppose that our CIA station chief was known to the station chief and to those of that level. Do you think that this station chief's life should be made miserable and possibly dangerous by making his identity known to the general public especially in a country where our CIA is not looked upon with great favor?

Mr. GAMMON. That is certainly a factor to be weighed very carefully. Malignants, to use a very ancient term, who wish harm or damage to officials can usually find out high level officials, such as the station chief in a large station and even the deputy station chief, who are overt, declared, who do intelligence liaison with the host country. Even in many neutral countries, they are declared personnel.

Obviously they are at greater risk than those of their colleagues who are not declared. And at the most profound level, and using the classic term, an espionage agent would not be declared, would not even be known to the Ambassador, though the operation which he might be engaged in would be familiar to the Ambassador.

So there are levels of protection which arise in cases of that sort.

Senator INOUYE. Are you suggesting that these risks should be taken?

Mr. GAMMON. In some cases. If I may mount a hobbyhorse on the personnel side, it appears to me that we are rapidly approaching the time in which intelligence attachés might well come out of the closet in the same way that military attachés did a century ago and in the last century. A military attaché is essentially a legal spy. He exists. He has access to certain materials. His operations are carefully watched and if he transgresses the law he is declared persona non grata and shipped out.

I think we are coming close to the point where a certain number of top-level intelligence personnel might well receive this status, as intelligence attachés.

BRITISH VERSUS UNITED STATES SYSTEM

Senator INOUYE. What are your comments on the British system of setting aside material that is classified for 30 years, up to 50 years?

Mr. GAMMON. The 30-year limit in effect is designed to protect, as much as anything else, the effective career of a leading government official. When I was serving in Italy, we received a request at one point from the Department of State to obtain a courtesy clearance, from a gentleman who happened to be the President of the Republic of Italy at the time, on conversations which he had had 21 years earlier with the then American Ambassador. And since in the course of those conversations he took some slaps at a political party, a legal political party in Italy, he much preferred that that not come out. Well, 9 years thereafter that might well have been utterly harmless.

So that I think the British 30-year rule is calculated in terms of a generational period. There again, I would hate to see something like that decreed as an absolute, because there is much information which is classified which 2, 4, 5, 7 years later is totally nonsensitive and totally unclassified in its nature.

Senator INOUYE. Under the 30-year rule, Daniel Webster's extracurricular activities would have been made known, would they not?

Mr. GAMMON. He would have been covered during his lifetime, but it would have been known during the 1870's and 1880's.

Senator INOUYE. Do you favor the British system?

Mr. GAMMON. I think it is a little too inflexible for our purposes. But a reasonable rule might well be introduced for sensitive material of that sort. The Nixon and Ford administrations were seeking, with reference to the Department of State publication, the "Foreign Relations of the United States" series which has existed since the 1860's, to try and bring that forward to a 20-year time lag. That has proved pragmatically impossible. It is running about 27 to 28 years after the fact now in publication as the volumes come out.

Senator INOUYE. Prior witnesses suggested that the present 10-day time limit for responding to FOIA requests is unreasonable and should be extended.

Mr. GAMMON. Drawing on my prior experience, I would say that the time fuse is extremely short for practical operation. But I think the 10-day rule is for response effecting acknowledgments, in which you can go back to the requester and say, we have your request, we have logged it in, we are starting the search, we are digging in our files. And then I think there is a 30-day period for further information.

I think, practically speaking, those time frames are very often more rigid than is really practical for an agency.

Senator INOUYE. Is not more than just an acknowledgment required to be given within the time limit?

Mr. GAMMON. Pardon?

Senator INOUYE. I think a response beyond a mere acknowledgment is required, is it not?

Mr. GAMMON. Yes. There is an absolute time limit in which they have to come up with a response, or at least to arrive at an agreement that an extension may be given or so far we have only found this material. I think the very strict time limits reflect the period in which

the act was passed or last amended, at a time when distrust of the Government was unfortunately rampant.

Senator INOUYE. Does anyone here know what is required under the 10-day time limit?

Mr. BLAKE. Senator, if I may, a strict construction of the statute says 10 days. The reply has to be given, a substantive answer, or else denied. And then there are two periods, 20 days and 10 days, can be added, either way, to go through the appeal exercise before the matter goes to court for adjudication. The 10-day has to be the reply period unless it is denied. The 20 days is then left for the administrative appeal by the person who is seeking the information after that before you go to court.

Senator INOUYE. So a simple acknowledgment will not suffice?

Mr. BLAKE. Not under a strict interpretation of the law.

Senator INOUYE. Under those circumstances, would 10 days be sufficient?

Mr. GAMMON. I think it is highly difficult for most agencies, particularly if the subject is an abstruse and obscure one, to track something down or to give a very substantive answer. I would agree that there would be much merit in reopening those time periods on a reasonable basis.

Senator INOUYE. How would you deal with the use of this act by foreign agents or foreign citizens?

Mr. GAMMON. It would seem to me that the best means of tackling this issue—the question of identification of foreign agents, as the preceding witness indicated, might be rather difficult. He might operate through a cutout. But it would seem to me that the question there becomes one of cost figures.

Let us assume that the foreign national or our mythical Rumanian wants to know, not everything there is to know about satellites, but wants to know something about frequencies or some highly technical point, and he chooses to write to the CIA rather than to Comsat or something like that, for information. That might take a certain amount of time to run down.

Research costs are expensive when you start costing it out. Some of the figures that have been cited by Government witnesses are very impressive. The charge for reproducing the material which you decide to deliver at no compromise to the national interest, that is also strictly limited, I believe, by the executive branch. How much do you charge for a page of Xeroxed material? In every case, it is my understanding, it is below actual cost.

So we are dealing here with a question of how much subsidy should American citizens pursuing an interesting investigation or research be given, and whether that same privilege should be extended to foreign nationals or foreign governments, foreign embassies, et cetera.

Senator INOUYE. Thank you.

Senator CHAFEE. Is there nothing further? [No response.]

Well, thank you very much, Mr. Ambassador. We are delighted you could be here and share your thoughts with us.

The hearing this morning is concluded.

[Whereupon, at 12:20 p.m., the select committee adjourned.]

ADDITIONAL MATERIAL FOR THE RECORD

TESTIMONY OF STEVEN R. DORNFELD, WASHINGTON CORRESPONDENT, KNIGHT-RIDDER NEWSPAPERS, ON BEHALF OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI

INTRODUCTION

Thank you, Mr. Chairman, for this opportunity to participate in the opening day of legislative hearings on the Freedom of Information Act ("FOIA").[1]

My name is Steven Dornfeld, and I am a Washington Correspondent for Knight-Ridder Newspapers and National Secretary of the Society of Professional Journalists, Sigma Delta Chi. I am here today on behalf of the Society which, as you may know, is the oldest, largest and most representative organization of journalists in the United States. Founded in 1909, the Society has more than 28,000 members in all branches of the news media—print and broadcast.

Accompanying me today is Ted Capener, Vice President of News and Public Affairs for Bonneville Broadcasting Corp. in Salt Lake City, and Bruce W. Sanford, a partner of Baker & Hostetler in Washington, legal counsel to the Society.

THE PRESS AND THE FOIA

The Society has been an active proponent of the FOIA since its inception. Three of our members—Clark Follenhoff of the Des Moines Register & Tribune, Julius Frandsen of United Press International, and V. M. Newton of the Tampa Tribune chaired the Society's Freedom of Information Committee and were instrumental in forming a group of journalists that worked closely with Congress in drafting the Act. In recent years, the Society has funded the lion's share of the Freedom of Information Service Center here in Washington, which has assisted hundreds of journalists in using the Act. A copy of the Service Center's widely distributed publication, How To Use the Federal FOI Act, is submitted herewith to illustrate how the Society has devoted its resources to encouraging use of the Act.

Our experience at the FOI Service Center has confirmed the Society's expectation that the FOIA would prove a valuable tool for professional journalists in their efforts to gather and report newsworthy information to the public. In 1980, the Service Center answered some 300 telephone requests for assistance from journalists seeking access to government information. In the first half of 1981, the Center has already handled another 300 requests.

The burgeoning activity at the Service Center is just one indication that the Act is a widely employed tool of journalists.[2] Through formal requests or merely threatened requests under the Act, the public and the public's surrogate, to use Chief Justice Burger's term,[3] the press has been able to gain access to a wide range of information that has resulted in countless news reports of public interest. Without the FOIA, the public might never have received the news that:

Ten elderly patients at a private Philadelphia nursing home died in 1964 and 1965 while they were being used as subjects in a drug experiment.[4]

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[1] 5 U.S.C. § 552 (1976). Mr. Dornfeld will capsulize this prepared testimony in his appearance before the Subcommittee and Mr. Capener will testify briefly as to the use of the FOIA by local news media in one particular state, Utah.

[2] In recent years, critics of the Act, chiefly government employees who have everything to gain from dismantling the FOIA, have suggested that press usage of the Act is minimal. The Society knows otherwise. Journalists use the Act constantly, although statistics cannot measure the usage accurately since many, if not most, reporters do not identify themselves when making FOIA requests. Nor can statistics reflect the enormous amount of government information received from the mere presence of the Act on the books. Most agencies voluntarily disgorge information, sometimes reluctantly to be sure, at the mere mention of a possible FOIA request.

[3] Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2825 (1980) (Burger, C. J., announcing judgment).

[4] New York Times, Nov. 16, 1975, at 46, col. 1.

Approximately one-third of all small corporations regularly underpaid Federal income taxes in the late 1960's.[5]

Tests of drinking water near uranium mines in western New Mexico uncovered high levels of radioactivity and poisonous waste.[6]

Organizations that received Federal grants to help fight alcoholism misused the taxpayers' money to influence legislation.[7]

Colleges and Universities engaged in a widespread practice of sloppy bookkeeping and possible misuse of hundreds of millions of dollars of federal funds.[8]

A drug treatment center in Hawaii converted food stamps to make illegal cash payments to employees.[9]

No laundry list of news stories can do much more than symbolize the enormous public benefits that have been realized because of press access to information under the FOIA. Indeed, the press has found that the mere existence of the FOIA has led government agencies to disclose information freely and candidly without the need for formal requests. Russell Roberts, president of the American Society of Access Professionals and director of the FOIA/Privacy Division of the Department of Health and Human Services, recently confirmed that HHS personnel are encouraged to avoid formal FOIA requests by providing requested material voluntarily. "We figure that we don't want to give the press two stories when we mess up," Roberts explained to our staff people at the FOI Service Center. "If we try to withhold information, they hit us with one story about our mistake and another about how hard we made it for them to do the story."[10]

Mr. Chairman, the bureaucratic reverence for secrecy is as old as ancient civilization when Roman soldiers returning from battle were prohibited from informing the citizens of their occasional defeats. The Society believes it is the presumption favoring openness in government, the presumption favoring disclosure by the civil service, that, in a historical sense, strengthens our nation at a time when we rely as never before upon a federal bureaucracy to guide our destiny. The Reagan administration may well give us admirable improvements in the management and organization of the federal government. But the renovation cannot realistically alter the need for an Act which assures Americans the access to information about government operations which they need if they are to participate in the deliberations of a democracy. In short, the Act is a two-edged sword for all seasons: it gives the public a weapon to prevent a bureaucracy from overwhelming it and its sharp assurances of openness Lord knows how many public officials from contemplated abuses of authority. The Act has always been and will be a pain-in-the-side of public employees. It was always meant to be.

If the Act is amended to increase delays or costs or otherwise discourage use of the FOIA, the Society is convinced that the ramifications for the public would be devastating. Voluntary government disclosures would be both less frequent and less informative. Agency employees, now assured that corruption, waste and mismanagement can be legally exposed through the FOIA, would retreat to an underground system of leaks or would provide no information at all. Journalists would be relegated to cultivating such "underground" sources and would be totally dependent upon them for information. Unofficial statements and "leaks" would proliferate at a time when journalists are striving to rely more heavily on attributed documentation rather than unattributed allegations. Press organizations located outside the Washington, D.C.-Boston corridor, which now enjoy access to information equal to their east-coast colleagues, would be unable to gather information about the Federal government and would be forced to rely on journalists who serve different readers with different interests.

This was the world that existed in 1966 when the FOIA was enacted. As the Republican Policy Committee stated when it endorsed passage of the Act, "[I]n this period of selective disclosures, managed news, half-truths and admitted distortions, the need for this legislation is abundantly clear."[11]

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[5] New York Times, July 21, 1975, at 31, col. 6.
[6] New York Times, Aug. 20, 1975, at 18, col. 3.
[7] New York Times, Jan. 16, 1977, at 35, col. 1.
[8] New York Times, Jan. 8, 1978, at 1, col. 3.
[9] Honolulu Star-Bulletin, Sept. 1, 1979, at A1.
[10] Interview with Russell Roberts, Freedom of Information Service Center (May 1981).
[11] See Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160 (June 20, 1966), reprinted in Staff of Senate Comm. on the Judiciary, 93d Cong. 2d Sess., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 59 (Comm. Print 1974).

THE PROPOSED AMENDMENTS

A number of proposals for amending the FOIA are currently before this Subcommittee. Some of these amendments respond to agency complaints that compliance with the Act is too costly and time-consuming. Others are directed to claims by agencies that compliance hampers their effective operations. The Society believes that most of these agency concerns were anticipated and effectively dealt with by Congress when it drafted the Act in 1966. Congress crafted a workable statutory framework that carefully balances the public's need for information about its government with the concomitant necessity that government operate efficiently and effectively. In 1974 and again in 1976, Congress reaffirmed the essential soundness of that balance and cautiously engaged in legislative fine-tuning designed fully to achieve the original statutory purpose.

Additional fine-tuning may again be in order. Times change, needs change. We are well aware that private business and their legal counsel have been the major users of the Act, more than journalists, scholars and others seeking to disseminate information for public purposes. Taxpayers should not be required to foot the bill for private litigants to research their cases in government files. Indeed, as Deputy Attorney General Edward Schmults recently noted before the Second Circuit Judicial Conference:

> Just as the majority of requests under the Freedom of Information Act serve purposes other than the one for which it was enacted, those unintended uses significantly slow the processing of requests for information that would serve the goal of informing the electorate. Reducing the former would obviously allow us to speed up responding to the latter.[12]

The Society could support legislation designed to reduce the costs associated with use of the Act in private civil litigation. The original legislative purpose of the Act did not envision creating a government subsidized discovery vehicle for the antitrust bar. At the same time, any such legislation should seek to expedite the handling of requests made by persons who indicate that the information is sought for public purposes such as news dissemination.

To quote James Madison, as the draftsmen of the Act found so appropriate to do, "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both." [13]

Even if new legislation can reduce the costs associated with "private" use of the FOIA, the Society believes we should all frankly acknowledge that government responsiveness and accountability does cost something. A government that can spend $1.2 million to preserve a Trenton, New Jersey sewer as a historical monument can surely afford to spend many times that amount to ensure that the American people are able to oversee the operation of their government.

It is our understanding that the Department of Justice is currently undertaking a thorough review of the FOIA with an eye toward presenting Congress with a comprehensive package of reform proposals later this year. In the meantime, the Society is concerned that well-intentioned proposals to amend the Act will eschew laudable efforts at additional fine-tuning in favor of deceptively simple solutions that threaten the delicate balance that has undergirded the FOIA for 15 years. Prudence dictates that this Subcommittee await the Administration's proposal before embarking on piecemeal efforts to amend the FOIA. In presenting the Society's specific views concerning the proposed legislation currently before this Subcommittee, we express two hopes at the outset: first, that you will again solicit the views of the Society and other press groups once the Justice Department has presented its comprehensive study of the FOIA; and, secondly, that you will exercise restraint in considering any amendment or fine-tuning of the Act, performing any needed adjustments with screwdrivers, not crowbars. Any perceived problems should be corrected at their precise source,

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[12] See E. C. Schmults, The Freedom of Information Act—Is It Working Correctly? (May 9, 1981) (remarks of Deputy Attorney General Edward C. Schmults, Second Circuit Judicial Conference) (Antitrust Division of Department of Justice estimate that more than half of its FOIA requests were from actual or potential litigants in private antitrust suits).

[13] S. Rep. No. 813, 89th Cong., 1st Sess. 2, 3, (1974); 112 Cong. Rec. 13007 (1974) (remarks of Rep. King).

leaving intact the tools needed to fulfill the Act's primary purpose of providing ready access to governmental information for the public and the public's surrogate, the press.

TIME LIMITS

S. 587, introduced by yourself, Mr. Chairman, would extend the FOIA's time limits to permit an agency an additional 60 days to respond to requests for every 200 pages of documents no matter who makes the request.[14]

The Society is unconvinced that existing time limits pose an onerous burden on administrative agencies. Since 1976, it has been well-settled that courts will not require an overburdened agency to compile voluminous material at a moment's notice, absent some special need by the requester.[15] For example, it currently takes the FBI eight months to answer a typical FOI request. Or, as the Defense Department testified during 1977 oversight hearings, "[p]eople are not unreasonable. If you will call them and tell them that their request encompasses 100,000 documents, they will understand that obviously you are not going to be able to respond in ten days. From what I understand, the Defense Department has very little trouble in people voluntarily consenting to extensions." [16]

Most importantly, however, S. 587's time limits would apply not only to civil litigants, but also to journalists, scholars and others who seek the timely release of information for the public's benefit. Simply put, S. 587 would cripple the Act for the press. If Congress extends time limits to 60 days, experience suggests that some agencies will take six months. If extended to six months, some will take two years. Better training procedures and a greater commitment by the government to getting information out on time would serve us all in the way the Act was intended. In short, the current time limits are realistic for most requests, at least where the information is sought on behalf of the general public. For these requests, the current limits are needed as a cudgel to remind agencies that information delayed is information denied.

AN EXEMPTION FOR THE CIA

S. 1235 would realistically exempt the Central Intelligence Agency ("CIA") from the FOIA. The bill would eliminate judicial review and thereby prohibit courts from ordering the CIA to release anything it chooses to keep secret.[17] The bill is also cast so broadly that a document containing even a word of exempt material could be withheld entirely.[18]

The Society believes that S. 1235 addresses a problem that does not exist. The FOIA does simply not threaten national security—it enhances it by building a well-informed electorate. The FOIA does not endanger the CIA's intelligence gathering operations. Apparently, it is an annoyance for the CIA at times, but public servants often find public accountability annoying just as retailers sometimes find customers annoying, ranchers find their cattle annoying, or spouses find each other annoying. The CIA commands power and respect on Capitol Hill, but the Society and the public could respect the agency's professionalism a bit more if it would cease the bureaucratic overreaching that has characterized its attempts in recent years to obtain a virtual exemption from the FOIA.

Under the current classification order, Executive Order 12065, the CIA has ample discretion to protect our national security.[19] Even the agency concedes that not a single word of classified information has ever been released by a judge under the FOIA over its objection.

The FOIA, as currently drafted, is designed to complement Executive Order 12065, not override it. FOIA Exemption (b) (1) ensures that classified documents will be reviewed by the agency when the typical six-year initial classification period lapses.[20] This procedure permits proper classification for as long as 30 years. Indeed, the President retains the broad authority to extend even that time by further executive order. The FOIA in no way limits the ability of the CIA to withhold classified material from public view.

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[14] S. 587, 97th Cong., 1st Sess. § 2 (1981).
[15] See Open America v. Watergate Special Prosecution Force, 547 F. 2d 605, 616 (D.C. Cir. 1976).
[16] Staff of Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess., Agency Implementation of the 1974 Amendments to the Freedom of Information Act 68 (Comm. Print. 1980).
[17] S. 1235, 97th Cong., 1st Sess. § (b) (1981).
[18] Id. at § (b).
[19] Exec. Order 12065, 43 Fed. Reg. 23,949 (1978).
[20] 5 U.S.C. § 552(a)(1).

Experience demonstrates that the FOIA has been employed by responsible journalists to gain access to much useful information about this crucial agency. As a result of these disclosures, the American people have had an opportunity to develop a deeper appreciation of the effective bounds within which the agency must function. To deny the press and public access to virtually all information about the CIA simply because of agency complaints about administrative burdens is to remove the most effective means of public accountability available to the American people. Without the FOIA, the public will have no alternative but to trust the CIA, an agency that has, sadly, betrayed that trust before.

AN EXEMPTION FOR THE FBI

In a similar manner, S. 587 responds to the Federal Bureau of Investigation's ("FBI") claims that its operations are somehow damaged by the FOIA. Specifically, S. 587 would create a ten-year moratorium on the release of any information by the FBI.[21] The agency would be permitted to refuse to release information not simply for ten years after it is gathered, but for ten years after a case is closed or a convicted participant is released from prison.[22] Under S. 587, the FBI could withhold information that arguably invades personal privacy for as long as 25 years after the person to be protected has died.[23] Finally, S. 587 gives the agency broad authority to withhold information about "conspiratorial activity," which presumably includes any concerted action by two or more persons.[24]

The Society believes that the practical effect of S. 587 would be to provide the FBI with a blanket exemption from the FOIA. From the perspective of journalists, the various moratoria contained in S. 587 would extend far beyond the newsworthiness of the requested information. They would prevent any disclosure until long after such disclosure would serve any useful function in ensuring the public accountability of the agency. The public has an immediate and laudable interest in overseeing the operations of the FBI, so long as that oversight does not disrupt legitimate law enforcement activities.

To that end, the FOIA, through Exemption (b)(7), currently permits the FBI to withhold a great deal of information: anything that would harm an ongoing investigation, reveal a confidential source, invade individual privacy, expose investigative techniques, endanger law enforcement personnel, or deprive a criminal defendant of a fair trial.[25] Precisely because these safeguards are already built into the FOIA, the FBI is unable to cite a single instance in which an investigation has been hampered due to an FOIA disclosure.

On the contrary, most information revealed to the press under the FOIA has simply been embarrassing to the FBI, such as former director Hoover's efforts to investigate the private lives of disfavored authors, actresses and members of Congress.[26] It is understandable that the agency would prefer not to have its dirty laundry hung out in public. Nevertheless, the Society submits that the antidote for agency malfeasance is a more responsible agency, not a more secret one. Since 1966, we believe the FOIA has gone a long way toward ensuring that responsibility.[27]

BUSINESS INFORMATION

S. 1247, introduced by Senator Dole, responds to claims by the business community that it, too, has been "damaged" by the FOIA.

S. 1247 would create a "reverse" freedom of information procedure that would permit businesses to secure injunctive relief against the disclosure of information under the Act.[28] It would require agencies to notify any person who submits infor-

[21] S. 587, 97th Cong., 1st Sess. § 7 (1981).
[22] Id. § 7(b).
[23] Id. § 7(a).
[24] Id.
[25] 5 U.S.C. § 552(b)(7).
[26] New York Times, Nov. 24, 1976, at L 13, col. 4.
[27] Unfortunately, however, the FBI's intransigence in refusing to respond forthrightly to FOIA requests remains legendary. The agency habitually, and contrary to clear legislative history, refuses to answer any requests seeking information about a third person. It regularly ignores the Act's time limits and scrutinizes each request in such minute detail that five times as many agency officials are required to consent to release of information as are required in order to withhold information. In a recent case study, New York Times columnist James Reston provided a revealing illustration of how the FBI refused to provide him with requested information about the Jamestown tragedy. See Reston, The Jonestown Papers, The New Republic, Apr. 25, 1981, at 16–17.
[28] S. 1247, 97th Cong., 1st Sess. (1981).

mation as well as any person about whom information is submitted that an FOIA request has been made and of their rights under the reverse-FOI system.[29] The agency must wait ten days for the individual to respond before disclosing the requested information, and must provide the individual with a hearing, if one is requested.[30] Only the notified individual would be entitled to attend this hearing—apparently, the requester has no standing to appear and argue the propriety of release.[31] After the hearing, the agency must wait an additional 30 days before it issues a ruling.[32] If the agency opts for release, the losing party may seek an injunction and de novo review in federal district court.[33]

Once again, the Society believes that S. 1247 responds to an illusory problem, anticipated by the draftsmen of the FOIA and dealt with successfully in Exemption (b)(4).[34] Professor Russell Stevenson's report, which you have heard about today, establishes that trade secrets are, in fact, being protected.[35] His findings coincide with our experience that no agency that wishes to maintain a working relationship with its clientele is going to disclose classified information carelessly. It is not surprising, therefore, that the business community has been unable to document any concrete instances of damage it has suffered at the hands of the FOIA. Nor is it surprising, as the Securities and Exchange Commission can tell this Subcommittee, that American business does not relish public disclosure even when their activities touch upon public funding or public regulation.

Even if some fine-tuning in the (b)(4) exemption is warranted, however, the broad brush approach of S. 1247 would erect a serious and unnecessary obstacle in the patch of the timely disclosure of information of public interest. The additional delays inherent in the reverse-FOI system would give agencies and individuals alike a powerful tool to delay disclosure until its value to the public has dissipated. This unprecedented power could be wielded by an unlimited number of persons—every name in every record, every person who provides any information to the agency. Documents with no conceivable confidentiality or privacy interest would remain secret for many months while the elaborate and costly administrative process plays itself out.

If a reverse-FOI procedure is needed, it is surely not necessary for every record. Any procedure can be easily limited to claims of truly confidential business information, and any submitter can be required to inform the agency that certain records contain trade secret information. Notice to every person named is simply excessive.

In addition, if a submitter is permitted to assert claims of confidentiality, we agree with Professor Stevenson that agency review should take place upon release of the information rather than at the time of submission.[36] Otherwise, a company could effectively seal a record by stamping it confidential at the time of submission. Commercial information often loses its confidential character—or sometimes gains it—over time. Review at the time of release would provide the best method of protecting truly confidential information.

Finally, if judicial review is included in a reverse-FOI, the Society believes it should be upon the agency record, not a de novo review. The FOIA is designed to provide for the timely disclosure of information. A de novo review would constitute a time-consuming and costly process that is manifestly unnecessary once the agency has made a considered judgment to release the requested information.

CONCLUSION

We close, as we began, by cautioning this Subcommittee to review proposals to amend the FOIA carefully. Proposed legislation must remain faithful to the FOIA's original purpose of ensuring that the public's business is conducted in public. Indeed, efforts at legislative fine-tuning should seek to enhance the ability of the press and public to obtain information from government. In the near future, we urge this Subcommittee to consider legislation that would, inter alia, (1) minimize delay by providing for prompt access to information requested in

[29] Id. § 2.
[30] Id.
[31] Id.
[32] Id.
[33] Id.
[34] 5 U.S.C. § 552(b)(4).
[35] R. Stevenson, Jr., Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4 (Dec. 15, 1980).
[36] Id.

the public interest; (2) reduce the often preclusive costs of securing such information by cabining agency discretion to refuse to waive fees when the public interest is served by disclosure; and (3) enact into law a clear presumption in favor of disclosure absent demonstrable harm. In addition, we would ask Congress to check the proliferation of so-called (b)(3) exemptions by requiring that this Subcommittee be given a mandate to review proposed (b)(3) exemptions prior to enactment.[37]

Fifteen years of experience have demonstrated that the FOIA serves as a useful complement to constitutionally guaranteed rights of freedom of speech and of the press. In the landmark *Richmond Newspapers* case, Justice John Paul Stevens emphasized that "the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government."[38] As the Chief Justice wrote in *Richmond Newspapers*, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[39] Whether legislatively or constitutionally created, those rights should not be abrogated absent a showing of serious and demonstrable harm, especially where, as here, legitimate governmental interests can be more narrowly achieved.

Thank you, Mr. Chairman.

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[37] Indeed, the Society finds it somewhat remarkable that no authoritative, comprehensive list of enacted (b)(3) exemptions even exists. We would urge congressional action to provide for an official compilation at the earliest opportunity.

[38] 100 S.Ct at 2831 (Stevens, J., concurring).

[39] Id. at 2825 (Burger, C. J., announcing judgment).

STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee: I am pleased to submit this statement to explain the views of the Department of Justice concerning the need for amendment of the Freedom of Information Act (FOIA). In addition to discussing the issues arising under FOIA which relate directly to the responsibilities of this Committee, the Department of Justice has, in the interest of keeping this Committee fully informed of the Department's overall review of the operation of FOIA, included a discussion of other aspects of the Act's operations.

I

The Administration and the Department of Justice believe that there are significant problems with implementation of some of the provisions of the current FOIA which urgently require legislative solutions. We strongly support the basic purpose and philosophy of the Act: to inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. Unfortunately, the Act has, in practice, often proven ineffective as a means of providing the public with information in a timely fashion. Only a small fraction of FOIA requests are from the press or other researchers who actually communicate information to the public (only about 7% of the 30,000 annual requests received by the Department of Justice are from such requesters). The Act has, however, been widely used by various private interests in ways which tend to harm rather than promote the public's interests in good and open government.

There has been a consensus for some time now that the Act needs revision so as to limit its adverse effects and eliminate, where possible, its abuse. Possible ways of revising the Act have been under study by the Department of Justice for several years. Judge Charles B. Renfrew, who served as Deputy Attorney General in the prior administration and is here today, can comment more specifically on the review of the Act and the proposals developed by the Justice Department during the Carter Administration.

Pursuant to a request by Attorney General Smith, the Department of Justice recently solicited comments from all government agencies on the operation of FOIA and requested suggestions on how the Act could be improved. The Department is in the process of analyzing the comments as they are received and drafting possible amendments based on these comments, on past and current legislative initiatives, and on various proposals developed by the Department of Justice during the previous administration. The Department is seeking to develop approaches which will ameliorate the problems which have been identified, while, at the same time, preserving FOIA as an effective tool for keeping the electorate as informed as possible without unduly interfering with effective government.

The Department of Justice does not, at this time, have any specific amendments to propose, nor does it wish to comment specifically on any of the FOIA amendments which are currently before Congress and this committee. The Department intends to present to Congress a comprehensive package of Administration amendments to the Act within the next two months. We would at this time, however, like to share with the committee our perception of the most important problems presented by the current provisions of FOIA, which should be addressed by legislation.

I should say before I continue further that the Administration comes to this task of reviewing the operation of the Act fully conscious of the many hours devoted to this subject by this subcommittee, its predecessors, the other House of Congress and many prior administrations. We have come a long way from the period prior to those efforts when the public seemed to have the right to know nothing about the operations of its government. We are also fully aware

of the maxim that the best is often the enemy of the good in government. Thus, the Reagan Administration is not seeking perfection in the operations of the FOIA. However, it does believe that the success of the Act to date must be tested against two standards: (1) the standard of an open government; and (2) the standard of an effective government. In our view the imposition of these two standards of judgment does not always lead to the same conclusions.

II

The Department of Justice believes that there are several pressing problems arising from the current structure and implementation of the Act.

First, the current application of the Act to criminal law enforcement agencies has significantly impaired the investigatory abilities of those agencies. It has also imposed very substantial administrative burdens and does not appear, on balance, to be serving the public's interests in its current impact on those agencies.

Second, the current application of the Act to national security intelligence agencies, such as the Central Intelligence Agency (CIA) and the National Security Agency (NSA), appears to have substantially impaired the ability of those agencies to gather confidential information. Compliance with the Act appears, in addition, to have diverted valuable intelligence-gathering resources, while providing little countervailing benefit to the public.

Third, the use of the Act by commercial interests to obtain information submitted by other businesses to the government appears to have impaired the government's ability to collect needed information from businesses and may result in the unfair disclosure of confidential business information submitted to the government.

Fourth, the misuse of FOIA as a discovery device by private litigants results in the circumvention of judicial and administrative rules which should control such discovery. In addition, such misuse of FOIA creates substantial and unjustified administrative burdens on the government, and can result in the delay and disruption of an agency's primary functions.

Fifth, the government's present inability under the Act to collect the full costs of FOIA requests, even from requesters using FOIA for private commercial or financial purposes, results in excessive and sometimes frivolous use of FOIA for private purposes at substantial cost to the taxpayer.

While this is by no means a comprehensive list of the problems inherent in the administration of FOIA which deserve legislative consideration, these appear from our own study to be the areas of greatest government-wide concern.

A. The Effect of FOIA on Criminal Law Enforcement Agencies

The Department of Justice has extensive experience with the problems caused by the application of FOIA to criminal law enforcement agencies. In 1980, the Department received about 30,000 FOIA requests. The majority of these were directed specifically to the Department's criminal investigatory agencies, the Federal Bureau of Investigation (FBI) (which received over 15,000 requests) and the Drug Enforcement Administration (DEA) (which received about 2,000 requests). Significantly, a large number of these requests were from convicted felons or from individuals whom the FBI and DEA believe to be connected with criminal activities. Such requesters have made extensive use of FOIA to obtain investigatory records about themselves or to seek information concerning ongoing investigations, government informants, or government law enforcement techniques.

To comply with requests for investigatory information, investigatory files must be reviewed line-by-line to segregate exempt from non-exempt information. The principal exemption under FOIA which may be applied to law enforcement records is 5 U.S.C. § 552(b)(7), which authorizes the withholding of law enforcement investigatory records only to the extent the government can demonstrate that one or more of six specific categories of harm will be caused by the release. While this exemption is intended to protect the government's important law enforcement interests, it is, in practice, inadequate, because the exemption is too narrowly written and the government is obliged to segregate non-exempt information from information which falls within the terms of the specific categories of harm stated in exemption (b)(7).

The present requirements result in a very complicated and time-consuming review of law enforcement records. Moreover, it is often very difficult for an analyst

to determine whether the release of even segregable information may have an adverse effect on important law enforcement interests. The release of what appears on the surface to be innocuous information may prove damaging when viewed within a broader context of information known by criminal requesters. Such requesters may be able to piece together segregated bits of information in ways unknown to the FBI employee responding to the request and use the information to identify the existence of a government investigation or an informant.

It has been our experience that some criminals, especially those involved in organized crime, have both the incentive and the resources to use FOIA to obtain bits of information which can be pieced together. Some have shown great persistence in using the Act. The FBI, for instance, received 137 requests from one imprisoned felon who is reported to be an organized crime "hit man." This relentless user of the Act, and there are many others (some of whom have made more requests), is presently pressing a 35 count suit against the FBI under FOIA.

We have no way of knowing the exact extent to which criminals have been successful in using FOIA to uncover on-going investigations or government informants. But whether or not damaging information has been inadvertently released through FOIA, or informants have been uncovered through FOIA requests. it is very clear from the experiences of the FBI and DEA that gathering law enforcement information has become more difficult as a result of the Act. The perception is widespread that federal investigators cannot fully guarantee the confidentiality of information because of FOIA. This perception exists not only among individual "street" informants, who have become increasingly aware of the existence of FOIA, but also among institutional information sources, including local law enforcement agencies.

Even where confidential information or a confidential source can clearly be protected under existing law, this perception is difficult to dispel. It is no easy task for an FBI or DEA agent to explain to an informant exactly what information must be disclosed and what information may be withheld, or to adequately assure a confidential source that sensitive information will be properly segregated from the non-exempt information. As a result, it has quite clearly become much more difficult for our federal law enforcement agencies to gather needed information from sources who demand confidentiality. The FBI and the DEA have reported a large number of incidents in which potential informants have cited FOIA as their reason for declining to cooperate with the government.

It should be noted, finally, that the administration of FOIA entails a significant commitment of the limited resources of our criminal law investigatory agencies. The processing of investigatory files is extremely time-consuming, since they must be reviewed line-by-line to segregate exempt from non-exempt information. In 1980, the FBI alone received over 15,000 requests, which were processed by a unit of approximately 300 full-time employees. The direct cost of processing these requests was about $11.5 million. The DEA expended approximately $2 million in 1980 in processing FOIA requests.

In a time of tight budgetary constraints, the value of such expenditures can certainly be questioned, particularly when viewed in light of the substantial use of the Act which is made by prisoners or individuals connected with criminal activity. The DEA has estimated that 40 percent of its requests are from prisoners and another 20 percent are from individuals who are not in prison but are known to the DEA to be connected with criminal drug activities. Eleven percent of the FBI's total requests are from prisoners (over 1,600 last year). These requests consume far more than 11 percent of the FBI's processing expenses, because they are not generally requests which result in "no records" responses, but, rather, require substantial file review. By contrast, only about 5 percent of all the requests to the FBI and DEA are from the media, scholars, or public interest research groups.

B. The Impact of FOIA on National Security Agencies

FOIA also presents very serious problems to those government agencies concerned with national security intelligence-gathering functions. Confidentiality is obviously of paramount importance to intelligence information sources, whether they are individual sources or foreign governments. But the agency processing and judicial review requirements of FOIA, along with the mandate to release "reasonably segregable" material which is not properly classified, make it impossible for a national security intelligence agency to offer the clear and certain guarantees of confidentiality which national security intelligence often requires.

Our intelligence agencies can demonstrate that there is a belief among some important foreign sources that FOIA makes it impossible for our government to adequately protect sensitive information from disclosure. That belief significantly impedes our intelligence activities abroad.

Moreover, the FOIA imposes upon the intelligence agencies administrative burdens which interfere substantially with their ability to carry out their primary functions. Because of the nature of their missions and the indisputable need for secrecy and security, intelligence agencies, particularly CIA and NSA, are extremely decentralized organizations. Information is provided to personnel on a "need to know" basis only. As a result, the processing of an FOIA request by CIA or NSA intrudes more directly on the performance of their primary operations and functions than in other government agencies. Compliance with FOIA requests within national security agencies is not a routine administrative task which can be delegated to individuals designated expressly to handle FOIA requests. Within an agency such as the CIA, no single individual or even any single unit has access to a comprehensive cross section of files which would permit a complete and timely response to broad FOIA requests. Line personnel are forced to respond to FOIA requests while continuing to attempt to fulfill their regular duties. Our intelligence agencies have no excess of trained intelligence agents, and their time is of great value to the United States. The line-by-line review of documents requested under FOIA seems a very poor use of their time, particularly in light of the fact that, even though a great deal of material must be reviewed, very little can ultimately be released by intelligence agencies.

In addition, the problem of determining by review what information may be deemed harmless and reasonably segregable from properly classified material presents analytic difficulties similar to those experienced in processing criminal law enforcement files. Information which appears innocuous on its face, in fact may be damaging when viewed in context with information known by a foreign intelligence agency. It is often difficult for even the most experienced analyst to know with certainty what use might be made of a piece of information, and this problem is greater still for a reviewing court.

There is, of course, nothing in the Act to prevent its use by those whose interests are directly contrary to the national security. Mr. Phillip Agee, for example, has made extensive use of FOIA in his personal crusade to undermine the CIA abroad. The response to one request from Mr. Agee for all CIA records containing mention of him cost the American taxpayer over $300,000. That is a government expense which many citizens and members of Congress might justifiably question, particularly in a time of severe budgetary constraints. However, under existing law, CIA had no choice but to expend the money.

We recognize that, in the view of some, FOIA may appear to provide some protection against any improper use of intelligence agencies. We believe, however, that Congressional oversight of the intelligence agencies, established in its present form after the 1974 amendments to the Act, is more than adequate to protect against any possibility of future intelligence agency misconduct. Such oversight has proven a far more effective protection of the public's interests in this area than FOIA could conceivably be, and it has not resulted in comparable administrative burdens, questionable expenditures of resources, or the creation of a serious perception problem among sources of needed intelligence.

C. Use of FOIA as a Litigation Discovery Device

There are, of course, no limits under existing law on who may utilize FOIA or on the circumstances or purposes for which it may be used. As a result, it is common practice for parties in litigation with the United States to request information under the Act, even where they have compulsory process available under the rules of civil or criminal procedure or under agency regulations. It is likewise common for parties involved in private litigation to use FOIA rather than available discovery procedures to obtain government information concerning their case. Such requests are often nothing more than attempts to circumvent applicable discovery rules or, in some cases, to harass the government.

Discovery rules attempt to draw a careful and fair balance between the needs of the requester and the burdens imposed on the discovery target. They generally require a showing that the requested matter is relevant and material to the proceeding, that there is a need on the part of the requester, and that the burden

on the respondent is not excessive. A requester under FOIA is not required to make any such showing. Thus a requester/litigant can, through FOIA, freely pursue, at taxpayer expense, "fishing expeditions" and impose excessively burdensome document production requirements which are, for good reason, impermissible under the applicable discovery rules.

Discovery rules also contain response time schedules which are far more tolerant than those in FOIA and which can be adjusted by a court to respond to the needs of a particular situation. By contrast, FOIA's short, mandatory and inflexible time limits force agencies to give FOIA requests the highest priority. Responding to requests can often interfere substantially with an agency's ability to pursue an enforcement action. It is often necessary for the government attorneys responsible for a government litigation to themselves take time from their case preparation to review documents in response to a FOIA request from an opposing litigant. There is considerable evidence that many in the private bar are aware of the potential for disruption and delay of litigation afforded by FOIA and deliberately use the Act to harass a prosecuting agency.

The use of FOIA as a litigation discovery device has become an increasingly common problem for a number of departments and agencies, including the Department of Health and Human Services, the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Securities and Exchange Commission and the Antitrust Division of the Department of Justice. The Antitrust Division, for example, estimates that more than half of the FOIA requests it receives are made by actual or potential litigants in antitrust suits. These are often extremely burdensome requests, seeking Division information covering whole industries.

We do not believe that Congress intended FOIA to be so used as a means of disrupting law enforcement or avoiding the rules of discovery in judicial or administrative proceedings, and we believe Congressional action to prevent such misuse of the Act should be seriously considered.

D. Disclosure of Confidential Business Records Through FOIA

Effective government requires a constant flow of reliable business information from private enterprises. This flow will clearly be impeded if the government cannot maintain the confidentiality of valuable proprietary and competitively sensitive information submitted to it. It is clear that Congress intended to fully protect the legitimate interests of business submitters through the (b)(4) exemption, which permits agencies to withhold "trade secrets and commercial or financial information" which is obtained from an outside party and is "privileged and confidential." However, this exemption has been given a narrowing construction by the courts, which have required a showing that the release would either (1) result in a substantial risk of competitive injury to the submitter or (2) impair the agency's ability to collect similar information in the future. Unfortunately, this test has not proven as adequate as it might first appear. This is principally so because agencies frequently lack an adequate awareness of all factors in a particular business setting necessary to predict accurately the competitive harm caused by disclosure.

The extent to which FOIA has in fact resulted in financially damaging releases of information submitted by a third party is unclear. However, it is apparent that commercial interests have made great use of FOIA in many agencies to obtain information submitted by competitors. For instance, over 85% of the FOIA requests to the Food and Drug Administration, which received over 33,000 FOIA requests last year, are from the regulated industry, their attorneys, or FOIA request firms who are believed to be operating on behalf of the regulated industry. The requests most often are for information submitted to the FDA by competitors.

While it is unclear what damage may have been done to business submitters by FOIA releases, the persistent use of FOIA by businesses to obtain information submitted by competitors itself suggests strongly that FOIA releases have some competitive value and are not altogether harmless to the submitter. But, whether or not this is so, there is at least a perception in parts of the business community that commercially valuable information submitted to the government is vulnerable to FOIA requests. As a result, there is evidence that businessmen are more reluctant to make such information available to the government, and the quality of information received from the business community has deteriorated. This is clearly an unforeseen and undesirable, result of the Act's operation.

This increasing reluctance of the business community to trust the government with confidential information is very evident from the experience of the Antitrust

Division of the Justice Department. The Division relies heavily upon voluntary submissions of business information. It is therefore vital that nothing in FOIA jeopardize its ability to withhold genuinely confidential business information and to offer promises of confidentiality to submitters of sensitive business information. Because of the fears within the business community regarding the potential disclosure of submitted information, investigation targets and third parties have become increasingly more reluctant to comply with voluntary production requests. This has forced the Division to rely more heavily upon the use of compulsory process which is not only more time consuming and expensive, but also results in less forthright cooperation from the submitting party. In fiscal year 1976, the Division issued only 66 Civil Investigate Demands (CID's). In fiscal 1978 this figure rose to 359 and in fiscal 1980 to 910. Knowledgeable persons within the Division attribute this rise in the need to invoke CID's to the uncertain protection afforded submitters of confidential business information under FOIA and the complete exemption from FOIA allowed for information submitted pursuant to a CID.

Separate from the issue of whether the substantive scope of (b)(4) should be expanded or clarified, is the issue of whether a submitter of business information should be afforded some procedural protection by the Act's own terms. The current terms of the FOIA do not provide the business submitter with an adequate procedural means to assert and protect his interests either before the agency or in court. There is currently no statutory requirement that agencies give notice to submitters of information before releasing information they have provided. Nor does FOIA give submitters the right to prevent the discretionary release of business information which is exempted from mandatory disclosure under (b)(4). The Supreme Court's decision in *Chrysler* v. *Brown*, 441 U.S. 281 (1979), allows submitters only a right to challenge a discretionary release as an abuse of discretion if the release is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. However, the scope of the protection afforded by the Trade Secrets Act is quite unclear. Moreover, the rights afforded by the *Chrysler* decision are of little use unless a submitter is notified in advance of an agency's intention to release its documents.

It would seem to be in the clear interests of the government as well as of the business submitters that such submitters be afforded greater assurance than they have now that their confidential information will not be disclosed through FOIA.

E. Financial Cost of Compliance with FOIA and Fee Collections

Congress clearly did not contemplate that FOIA implementation would be as expensive as it has become. Little attention was paid to cost when the Act was passed in 1966. During the deliberations over 1974 amendments, Congress estimated annual government-wide costs of these amendments between $40,000 and $100,000. S. Rep. No. 93–854, 93d Cong. 2d Sess. (1974); H.R. Rep. No. 93–876, 93d Cong., 2d Sess. (1974).

A Justice Department survey estimated the direct cost of FOIA compliance in 1979 at $47.8 million. A more recent survey by the Department's Office of Information Law and Policy indicated that 1980 direct costs to the government were approximately $57 million. Both of these surveys were limited to direct costs, and did not attempt to quantify the indirect lost "opportunity costs" or the costs of the disruption of agency business caused by FOIA. We believe that the direct cost figures, though substantial, greatly understate the real costs of FOIA to the taxpayer.

Separate from the question of total cost is the question of who is paying for FOIA. At present, it appears that agencies collect, through fees charged to the requester, only about 4 percent of the direct cost of responding to FOIA requests. The Act presently allows agencies only to charge for time spent searching for records and for duplication expenses, and it requires waiver or reduction of fees for requests which can be considered in the public interest. By far the most significant agency cost, however, is the time which must be devoted by agency personnel to reviewing the requested material to determine whether an exemption should be asserted and to segregate exempt from non-exempt information. Under the present law, this expense is non-chargeable.

It should be noted, in addition, that the Act contains no provision to allow an agency to charge the market value for information which may have a substantial commercial value, such as technological information or reference materials, which may have been compiled by the government at substantial expense to the taxpayer.

It is important to re-examine the fee collection authority under FOIA in light of the considerable cost of FOIA compliance and the extensive use which has been

made of the Act by private, commercial interests. There is no reason why those who are using the Act to serve private commercial and financial interests should not be required to pay the full costs of FOIA processing and, when appropriate, the fair market price for commercially valuable information. The failure to do so not only results in the unnecessary expenditure of considerable taxpayer money to serve the narrow interests of private requesters, but also tends to encourage frivolous or unnecessarily broad requests. So long as FOIA requests are virtually free, we can expect sophisticated commercial users to make extensive and unnecessary use of the system.

The scope of the publication and indexing requirements imposed by subsection (a) (2) of the Act must also be reexamined in light of the substantial costs of compliance incurred by some agencies and, in some cases, the minimal resulting public benefits. Subsection (a) (2) of the Act requires agencies to index and make available to the public all final decisions and orders of an agency. Some agencies issue tens of thousands of such decisions yearly which are of virtually no interest to the public. They must, nevertheless be indexed and made available to the public under FOIA. The National Labor Relations Board, for instance, spent over $110,000 for the preparation of indexes of final decisions last year. The NLRB reports that there has been only one request in eight years for a document located through one of its indexes which contains entries for over 50,000 representation decisions by the Board's Regional Directors. Ninety percent of another NLRB file containing more than 125,000 documents, which is indexed and made available under FOIA, is comprised of Regional Director complaint dismissal letters. In eight years there has not been a single public request for a copy of any of these letters. We doubt Congress intended to impose such meaningless bureaucratic chores, but such results are required by the present terms of FOIA.

III

The problems outlined above constitute the primary areas of concern to the Administration. The Act presents, of course, a number of other problems which I have not discussed today and which can be usefully addressed by legislation. We expect that our legislative proposals will address some of these, including the difficulties of complying with the current time limits in the Act. Some Agencies—and some divisions within the Justice Department—have simply been overwhelmed by the volume and the difficulty of the requests they have received and, consequently, are experiencing processing backlogs of over a year. This, obviously, renders the Act virtually useless for requesters who need a timely response, such as the current events media on whom the public relies primarily for its information. We are interested in exploring ways in which this problem can be ameliorated and the Act made a more useful and timely public information device.

In this regard, I would note also that Congress may wish to reconsider its own complete exclusion from the Act. Nothing in our review of the Act to date has convinced us of the wisdom or necessity for this complete and total Congressional exclusion. Certainly no body of the federal government has more to do with how key decisions affecting our citizens are made. Why then, should the files of Congress be totally exempt? Since the judiciary operates on a public record, there is no comparable need to subject the judiciary to the Act. However, we would urge that the Congress reexamine the rationale which underlies its own exemption.

We wish to stress again that the Administration and the Justice Department are fully committed to the purpose and philosophy of this Act. An informed electorate is the best guarantee of a good and effective government. But the end which we seek through this Act is, it must be emphasized, good government in the public's interest and not the disruption of essential government functions or the waste of government resources to serve only private interests. It is clear from our experience that this is an Act which can and has been easily exploited by those whose goals are only to interfere with the government's efforts to protect public interests, such as law enforcement and national security, which are vital to this country. We do not believe that this was the intent of Congress in enacting FOIA. We believe that, with the benefit of the experience which we have now acquired in administering this statute, such abuses can be prevented while the Act is, at the same time, made a more effective and useful vehicle for public communication. We look forward to working with this Committee in this common effort.

VIEWS OF DR. ROY GODSON, ASSOCIATE PROFESSOR OF GOVERNMENT, GEORGETOWN UNIVERSITY

Mr. Chairman and Members of the Committee, I very much appreciate this opportunity to present my views on S. 1273, providing Freedom of Information Act (FOIA) relief to the intelligence community. I am a Professor of Government at Georgetown University where I teach courses on intelligence and national security. I am also Coordinator of the Consortium for the Study of Intelligence, a project of the National Strategy Information Center. The Consortium, a group of thirty academics at universities and research institutes in various parts of the country, is studying the organization and functions of intelligence, its role in a free society, and the interrelationship between intelligence and the study and teaching of international relations. We also have been studying the requirements for an effective full-service intelligence capability for the United States.

This statement will, I hope reflect the knowledge and experience I have gained from my study of intelligence, and particularly from the meetings of the Consortium, but the views I am expressing today are my own and do not necessarily represent those of Georgetown University or the Consortium for the Study of Intelligence.

As a scholar, with a research interest in our intelligence services, I of course want to obtain as much information as possible on this subject. However, as a U.S. citizen, I understand the overriding need to protect the sensitive sources and methods utilized in the U.S. intelligence process. To ensure we have an effective and first class intelligence capability, I therefore, reluctantly but firmly, find myself supporting the principles embodied in this legislation.

As you know, the FOIA and the manner in which it has been applied to our intelligence agencies is an exclusively latter day American phenomenon. There is nothing remotely like it in the Western Democratic World and certainly not in Communist Bloc Countries. Even liberal Sweden prosecutes journalists for merely discussing the existence of a Swedish intelligence agency. While Britain and the Commonwealth countries have their Official Secret Acts.

As the current legislation now stands, the FOIA allows "properly classified" information to be exempted from release. This is not enough. We need to pass legislation, as S. 1273 does, requiring the exemption of certain kinds of classified information, if we are to ensure a first class intelligence capability.

Although a document may be marked classified, its exemption is not insured under the current legislation. Every file (regardless of its classification) must be thoroughly searched in answer to each FOIA request, with a maximum effort made to declassify the requested material. The FBI and CIA, together, spend over 400 man-years, every year, responding to FOIA requests.

As I see it, the major problem with the current law is that the person who originally provided the information is not the one clearing it for release. Often only the provider of that information (and more than likely the requester of it under the Act) know what is and what is not sensitive information. What may appear to be inconsequential to you and I, may be very important to the original informant. Let me illustrate this point with several examples.

An informant may tell the FBI that a certain individual keeps a post office box in a neighboring city. The three hundred plus FBI officials working on the FOIA at FBI headquarters in Washington, who must make a decision on what material to release under a FOIA/Privacy Act request, will have no way of knowing that only the holder of the post office box and the informant know of its existence, and that its only function is to receive payment for espionage activities. The declassifiers would judge it the most reasonable thing in the world to inform an FOIA/Privacy Act requester that he, himself, has such and such a post office box. How could that reasonably be expected to affect the national security of the United States? But the release of that seemingly innocuous piece of information identifies the informant beyond question.

A second example will further depict the potential gravity of this situation. Publications like the "Covert Action Information Bulletin" and "Counterspy" can use the FOIA to gain information exposing the names of U.S. intelligence personnel. Philip Agee, a founder of both publications, has stated that he intends to:

> ... make this publication a permanent weapon in the fight against the CIA, the FBI, military intelligence... We know that the information and the research is there, crying to be published and disseminated... We will never stop exposing CIA personnel and operations whenever and wherever we find them... The CIA can be defeated.

Under the current law, the U.S. government would be required to respond to FOIA requests by Philip Agee and his associates for information on intelligence methods and sources.

Congress doubtless did not intend this sort of thing when it passed FOIA. It is surely unlikely also that the intelligence agencies that administer the Act mean to harm their sources. Intelligence personnel go over every page to be released and check to make sure that data on sources and methods are removed. But they are human beings. They make mistakes and they are perceived to make mistakes. It is easy to miss something important in millions of pages. For example, the FBI's typists are instructed to type individuals' names all in capital letters. In a recent case, an individual's name had been typed about 40 times in a series of reports. Thirty-nine times it was typed in all capitals and therefore blocked out upon release under FOIA. Once it was typed in a report as most people are used to typing names, with only the first letter of the name capitalized. The Bureau official's eyes skimmed over the name and it was left in the released document. Another source was identified, another FBI source who is unlikely again to cooperate with the Bureau.

I would conclude, based on my research to date, that the impact of these developments on the intelligence capacity of the United States has been significant. In the area of counter-intelligence (CI), for example, both case officer and informant have been gravely effected by FOIA. As it now stands, basically only one class of persons has an absolute ability to prevent information from being released under the Freedom of Information Act. That person is the informant himself. All he has to do to protect himself against the release of information is never to give it to the government in the first place. We are faced with a problem of how can we induce intelligence people to insinuate themselves among deadly enemies on behalf of a government which is unable to guarantee confidentiality under current law. There is little reason an informant should be more loyal to the government than the government is to him.

The effects of FOIA are also apparent to the CI case officer who must face the normally difficult task of developing informant sources. The knowledge that these valuable sources can be revealed by an FOIA request certainly has an impact on his attitude toward and performance of his job and this in turn seriously affects our national security. The same is true for those who have positive intelligence collection responsibilities to recruit sources abroad and those who need to gain the confidence of agents whom we need to engage in successful covert action abroad.

Intelligence is and will continue to be a vital element of the national security policy of the United States. If we are to have an effective intelligence capability, it must include protecting our sensitive sources and methods. By enacting legislation, such as S. 1273, we will increase both our ability to keep our sources and methods secret, as well as the perception that we can keep secrets. This in turn is likely to increase cooperation with friendly services, and potential assets and informants, resulting in improved intelligence, and, hopefully, enhanced national security.

Statement of the Association of American Publishers Concerning the Intelligence Reform Act of 1981

The Association of American Publishers ("AAP"), whose members constitute the major United States publishers of works concerning government, public policy, international affairs and history, submits this statement for inclusion in the record of the hearings on S. 1273, The Intelligence Reform Act of 1981.

AAP's members are acutely aware of the essential function which an effective national intelligence agency performs in the protection of our society. However, they are greatly concerned over S. 1273's virtual blanket exemption of the activities of the Central Intelligence Agency ("CIA") from the provisions of the Freedom of Information Act ("FOIA") and the consequent impact that such exemption would have upon the public accountability of that agency. Because S. 1273 presumptively favors secrecy over public disclosure concerning the range of CIA activities, without regard to the harm which disclosure might have in the specific instance, the AAP opposes this legislation.

The enactment of S. 1273, or any similar proposals, would inevitably have a negative impact upon journalists, historians and their publishers, whose contribution to informed public debate on subjects of moment to our nation often have been facilitated by access under the FOIA to information of the type which S. 1273 would routinely and permanently shield from public scrutiny. The creation and vitality of numerous types of works would be potentially affected by such legislation. Because of the pivotal role which the CIA has played in this country's foreign relations for the past four decades, its files have been an invaluable resource for historians, political scientists and other scholars whose research often finds expression in textbooks, historical and other diverse works of non-fiction. The closing of these files would deprive the American public of much-needed information.

The replacement of the present legislative scheme, which is sensitive to the public's right to know much about the workings of the CIA, by one that provides the Director of Central Intelligence with virtually absolute and unchecked discretion to decide what files may be exempt, that removes any obligation to examine agency files or to make a considered determination as to whether requested information legitimately warrants classified, non-public status, and that fails to provide any mechanism for administrative or judicial review of a decision to withhold information would be unwise, unwarranted and contrary to the principles upon which our nation was founded. Given our belief that the CIA already has ample means under the FOIA to protect against disclosures of particularly sensitive information, such a blanket removal of the CIA from the public eye would be especially unnecessary and unjustifiable.

These concerns prompt the AAP to urge the Committee to refrain from enacting this, or any other, legislation tantamount to exempting the CIA from proper standards of information disclosure and public accountability.

We thank the Committee for its consideration of AAP's views on this important piece of legislation.

STATEMENT OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

The American Society of Newspaper Editors is pleased to submit this statement on S. 1273 to the Senate Select Committee on Intelligence, which is now considering that bill.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Among the numerous current proposals to amend the FOIA, the ones of most serious concern to ASNE are those that would exempt the CIA, in whole or in part, from the disclosure obligations imposed by the Act. For example, S. 1273, which this Committee is now examining, would in effect provide a blanket exemption to the CIA. This bill would amend the Central Intelligence Act of 1949[1] so that "information in files maintained by an intelligence agency" would be exempt from the disclosure obligations imposed by the FOIA "if such files have been specifically designated by the Director of Central Intelligence to be concerned with . . . special activities and foreign intelligence, counterintelligence, or counter-terrorism operations."[2] No definition is provided for the term "special activities." Presumably, this term could refer to all activities of the CIA other than foreign intelligence activities. Thus, the Director of the CIA can shield all CIA files from disclosure simply by designating them as being concerned with "special activities."

Proponents of such amendments have conjured up images of CIA disclosures which allegedly endanger national security, make foreign governments hesitant to provide sensitive information to the U.S. Government, and endanger the lives of CIA operatives. These same proponents, however, have so far been unable to cite one single example where any FOIA disclosure by the CIA resulted in any of these harmful consequences.

This is not surprising since the FOIA, as currently written, provides a broad exemption to the CIA in order to accord substantial protection to the undeniably important interest of national security. Exemption 1 exempts information "specifically authorized under an Executive order to be kept secret in the interest of national security or foreign policy," that is, all classified information.[3] An Executive Order permits the classification of material as "Confidential," if its unauthorized disclosure could "reasonably be expected to cause damage to national security."[4] Exemption 3 also provides significant protection to the CIA.[5]

That exemption, which exempts information specifically exempted by another statute, has been consistently construed by the courts[6] to cover section 102(d)(3) of the National Security Act, which provides:

> That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.[7]

Accordingly, exemption 3 has been given an extremely wide scope in order to provide legitimate protection to the proper functioning of the CIA. Recently, for example, the D.C. Circuit Court of Appeals upheld the CIA's denial of a journal-

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[1] 50 U.S.C. § 403 et seq. (1976).
[2] S. 1273, 97th Cong., 1st Sess. § 2 (1981).
[3] 5 U.S.C. § 552(b)(1)(1976).
[4] Executive Order 11652, § 1(C)
[5] 5 U.S.C. § 552(b)(3)(1976).
[6] *See Halperin* v. *CIA*, 629 F.2d 144, 147 (D.C Cir. 1980); *Goland* v. *CIA*, 607 F.2d 339, 349–50 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980); *Ray* v. *Turner*, 587 F.2d 1187, 1196 (D.C Cir. 1978); *Baker* v. *CIA*, 580 F.2d 664, 668–69 (D.C. Cir. 1978); *Weissman* v. *CIA*, 565 F.2d 692 (D.C. Cir. 1977); *Phillippi* v. *CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976).
[7] 50 U.S.C. § 403(d)(3)(1976).

ist's request for documents detailing legal bills and fee agreements with private attorneys retained by the CIA.[8] The CIA was permitted to withhold all information about fees, including total amounts paid, notwithstanding that the identity of any of the retained attorneys would be disclosed. The fact that payment of a large fee might enable a trained analyst to use that information in conjunction with other information to draw some conclusion about the size, nature and extent of American intelligence operations was sufficient to convince the court that the information could be withheld. The Court stated:

> The Agency's general rationale for refusing to disclose rates and total fees paid to attorneys is that such information could give leads to information about covert activities that constitute intelligence methods. For example, if a large legal bill is incurred in a covert operation, a trained intelligence analyst could reason from the size of the legal bill to the size and the nature of the operation. This scenario raises a reasonable possibility of harm to the covert activity following from disclosure of the size of legal fees. We note that the CIA's showing of potential harm here is not so great as its showing concerning attorneys names. We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction.

Id. at 150. Similarly, this exemption protects not only the names of CIA sources, but also the nature and type of information supplied.[9]

Not only can the CIA avoid disclosure by relying on Exemptions 1 and 3, but also the CIA can avoid disclosure by the simple expedient of a unilateral decision not to cooperate with a requestor. The recent experience of James Reston during his efforts to research his book on the Jonestown tragedy is telling.[10] During the course of his research, Reston discovered the existence of voluminous documents and materials which related to the People's Temple in Jonestown and which were in the possession of federal agencies. For example, the FBI had approximately one thousand hours of tapes made by Jim Jones during his nightly sessions with members of the People's Temple. In addition, the FCC, the State Department, and the CIA all had relevant materials.

Reston waged a 14-month battle with these agencies in an attempt to gain access to some of these documents. Ultimately, after a personal appeal to Attorney General Civiletti, the FBI, for example, turned over the vast majority of the tapes and documents in its possession. The CIA, however, never even bothered to respond to Reston's FOIA request. Granted, the CIA may have been able to invoke legitimately either Exemptions 1 or 3 as a bar to disclosure. But in this instance, the CIA did not even make the minimal effort to invoke any applicable exemptions and hoped instead that delay would stifle the request. For any journalist who is making a legitimate request for newsworthy information, delay is tantamount to denial.

Given the breadth of the exemption accorded the CIA, as well as the ease with which the CIA can otherwise avoid any disclosure obligation, it is reasonable to suppose that the CIA is not being forced to disclose information that would be dangerous to national security. Moreover, the CIA is certainly not shovelling out mounds of information unwillingly as a result of FOIA requests by the Soviet Embassy or by foreign agents, as some of the proponents of a blanket exemption for the CIA have appeared to suggest.[11] Indeed, at the 1980 ASNE Convention, then director of the CIA Admiral Stansfield Turner stated: "Thus far, we have not lost a case in the courts when we have claimed that something was classified and therefore could not be released." Admittedly, information which should be kept secret is occasionally made public, but as was made clear by Hodding Carter, a former Assistant Secretary of State who was in charge of State Department FOIA responses, such information is made public "invariably in ways which have nothing to do with" the FOIA.[12]

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[8] *Halperin* v. *CIA*, 629 F.2d 144 (D.C. Cir. 1980).
[9] *Weissman* v. *CIA*, 565 F.2d 692, 694 (D.C. Cir. 1977).
[10] James Reston, Jr., The Jonestown Papers, 184 New Republic 16 (April 25, 1981).
[11] Remarks of Edward C. Schmults, Deputy Attorney General of the United States, before the Second Circuit Judicial Conference (Department of Justice Release, May 9, 1981).
[12] Hodding Carter III, "Less Freedom of Information Means Less Freedom," Wall Street Journal 25 (May 28, 1981).

Although the dangers to national security cited by advocates of a blanket exemption for the CIA turn out upon analysis to be illusory, the dangers to representative democracy posed by shielding any political institution completely from any and all public scrutiny are very real. The FOIA rests ultimately on the principle that the government of this country—unlike governments of totalitarian regimes—represents, and is accountable to, the people. Despite the considerable impediments which already exist, serious and responsible journalists have been able to force disclosure under the FOIA of misgovernment, maladministration, and abuse of legal authority. FOIA disclosures by the CIA have revealed that the agency engaged in domestic surveillance activities with respect to political dissidents[13] and that the CIA had engaged in drug experiments using unconsenting subjects.[14] Such disclosures have had no conceivable effect upon the legitimate national security functions of the CIA; rather, these disclosures have revealed improper, possibly unlawful, and certainly embarrassing conduct by the CIA. This is precisely the sort of information which, in a system of government such as ours, should be made public.

In sum, it is imperative that Congress carefully and critically consider any proposal to exempt the CIA from the requirements of the FOIA. The Act, as it currently stands, has been precisely drafted in order to protect fully all legitimate interests in national security. As a result, the CIA cannot seriously claim that the Act has resulted in a compromise of that interests as a result of forced disclosure of information which those agencies believe should have remained confidential. Instead, what appears to be involved is a frontal attack on the principle of an open government which underlies the FOIA. The words of James Madison bear consideration in this respect:

> A popular government, without popular information, or the means of acquiring it, is but the prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

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[13] New York Times, March 9, 1979.
[14] Washington Star, July 20, 1977.

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