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## Freedom of Information and the CIA Information Act

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# ARTICLES

## FREEDOM OF INFORMATION AND THE CIA INFORMATION ACT

*Karen A. Winchester\**

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## I. INTRODUCTION

The original Freedom of Information Act (FOIA) was signed into law by President Lyndon B. Johnson on July 4, 1966.<sup>1</sup> In form it was an amendment of section three of the Administrative Procedure Act of 1946.<sup>2</sup> In substance it represented a sweeping expansion of the law of public access to government records.<sup>3</sup> FOIA was the culmination of more than a decade of efforts by various congressional committees. It provides that "any person" may seek disclosure of federal agency records, with a statutory presumption favoring disclosure. An agency may withhold the information only if it falls within one of nine specific exemptions contained within FOIA.<sup>4</sup> Further, FOIA gives federal district courts jurisdiction to

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1. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

2. Pub. L. No. 404, 60 Stat. 237.

3. The original section three of the Administrative Procedure Act of 1946 contained the first general statutory provision for public disclosure of executive agency records. Because of its vague language and broad loopholes it proved ineffective and in practice was often used as a basis for withholding information. In its original form, section three provided that information could be withheld whenever an agency believed that secrecy was required in the "public interest," and "any matter relating solely to the internal management of an agency" could be withheld.

4. 5 U.S.C. § 552 (b) states that § 552 does not apply to matters that are:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells.

enjoin an agency's impermissible withholding of records. The immediate goal of FOIA was to make more government information available to the public, both as an end unto itself and as a means of promoting greater public oversight of the internal workings of government agencies.<sup>5</sup> The ultimate goal, as one writer observed, was the encouragement of administrative reform through increased public awareness of agency practices.<sup>6</sup>

A great deal of information has been routinely released since FOIA became effective on July 4, 1967. Also, more than 2,000 lawsuits to compel additional agency disclosure have been commenced during this time.<sup>7</sup> But from the beginning there was substantial disagreement between the executive and legislative branches concerning the degree of protection that should be afforded national security information under FOIA.<sup>8</sup>

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Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Subsection (c) provides that these exemptions do not apply to Congress.

5. "The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

As President Johnson observed in his bill-signing statement:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

STAFFS OF SENATE COMM. ON THE JUDICIARY AND HOUSE COMM. ON GOVT. OPERATIONS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Pub. L. No. 93-502); SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 1 [hereinafter SOURCE BOOK].

6. See Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970).

7. See, e.g., OFFICE OF INFORMATION AND PRIVACY, U. S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST (Sept. 1986). For an informative guide to litigation under FOIA, see LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT (A. Adler 11th ed. 1986) [hereinafter LITIGATION].

8. When the Senate issued the bill, S. 1160, 89th Cong., 2d Sess. (1966), which was to become the Freedom of Information Act, President Johnson threatened to veto it. The House Committee then entered into negotiations with the Department of Justice and eventually issued a report giving a broad interpretation to the proposed statutory exemption. The House, however, passed the Senate version, 112 CONG. REC. 13,640 (1966), which was signed into law. There is, therefore, a sharp distinction between the Senate and the House reports (S. REP. No. 813, 89th Cong., 1st Sess. (1965) and H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418-29). The courts have generally held that the Senate report more accurately reflects the legislative intent. See *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), and cases cited therein.

Congress recognized that not all agency records should be available to the public as a matter of statutory right. Of the nine exemptions contained in FOIA,<sup>9</sup> (b)(1) and (b)(3) are the exemptions most directly involved in the protection of national security information. As Congress recently demonstrated in enacting the Central Intelligence Agency Information Act of 1984 (the "Act"),<sup>10</sup> the application of FOIA to an intelligence service such as the Central Intelligence Agency (CIA) raises policy questions as well as problems in application.

This article examines the circumstances that led to the enactment of the Act, which exempts, with certain exceptions, CIA operational files from the application of FOIA. Those portions of the legislative history that most likely will affect judicial interpretation will also be examined.

The central difficulty with FOIA in its application to national security information, especially information held by the CIA, lies in a failure on the part of Congress to fully recognize those organizational and functional characteristics of a secret intelligence service that distinguish it from other executive agencies. This failure appears to derive in part from a fundamental misperception that there exists under our Constitution a public "right" to obtain sensitive information pertaining to intelligence activities and the conduct of foreign affairs. The public's so-called "right to know," on which FOIA in part is premised, is founded more in the popular press and the writings of some commentators than in the Constitution. This is not to suggest that in a representative democracy there are not strong, even compelling reasons to discover or create a right of access on the part of the public to most government information. But there is no general "right to know" found in the Constitution. The most that can be said is that a limited right, in some circumstances, may be inferred from other rights. FOIA (and the functionally related Privacy Act) were enacted precisely because it was necessary to create enforceable rights not otherwise in existence to obtain government information.

Congress has provided in exemptions (b)(1) and (b)(3), respectively, that information properly classified in the interest of national security, or information otherwise specifically exempted from disclosure by statute, will not be subject to the disclosure re-

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9. 5 U.S.C. § 552 (b).

10. Pub. L. No. 98-477, 98 Stat. 2209.

quirements of FOIA.<sup>11</sup> In the latter instance, there must be "particular criteria" established to define (and contain) agency discretion or, in the alternative, a reference to the particular types of matters that are to be withheld. Otherwise, statutory authority must provide that matters are to be withheld so as to leave an agency no discretion.<sup>12</sup> Congress clearly intended that executive branch decisions concerning the need for secrecy should be given great weight and that information properly withheld should not be subject to disclosure. But Congress failed to fully recognize the way in which the CIA is structured to carry out its principle tasks of gathering information ("collection"), assembling and analyzing it ("analysis"), and protecting sources and methods from penetration by foreign intelligence services ("counterintelligence"). There was also a failure to anticipate the effect that FOIA would have on the CIA in terms of the extraordinarily high cost of compliance and, perhaps more importantly, the effect on the perception of those foreign individuals and organizations with whom the CIA does business who might be inhibited by the fear, albeit unjustified, that the CIA might be ordered by a court to disclose its sources. These concerns ultimately led to the enactment of the Central Intelligence Agency Information Act of 1984.

In 1966, when the original FOIA was enacted, Congress failed to anticipate the judicial deference that would be afforded executive branch decisions to classify or otherwise limit access to national security information under the (b)(1) and (b)(3) exemptions.<sup>13</sup> This was promptly addressed, however, in the 1974 and 1976 amendments, which are discussed below. These amendments, of course, were intended only to impose limits on the executive branch's ability to withhold information under these FOIA exemptions. They obviously did nothing to address the other problems created for the CIA by FOIA. (In fact, the number of FOIA requests received by the CIA increased sharply after the 1974 amendments.) For example, in order to enhance security within

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11. 5 U.S.C. § 552 (b)(1), (b)(3). It should also be noted that the Privacy Act provides a broad exemption from its coverage for the Central Intelligence Agency. See 5 U.S.C. § 552a(j)(1) (1982).

12. The National Security Act of 1947, as amended, 50 U.S.C. § 403 (d)(3), provides "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." It has been uniformly recognized that the provision qualifies as an exemption under (b)(3). *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981); *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir.), *vacated in part*, 607 F.2d 367 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

13. See *FAA v. Robertson*, 422 U.S. 255 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

the CIA, there is a compartmentalization of files and access to information is on a strict "need-to-know" basis. When an FOIA request is made, the CIA in effect is required to break down this system of compartmentation when assembling the requested information for review. This is a substantial security concern. Furthermore, the nature of the information contained in CIA files, particularly operational files, requires that reviewers be experienced enough to recognize the implications likely to follow from the release of a particular item that might, to the untrained eye, appear innocuous. This creates a substantial demand on limited resources, detracting from the CIA's principal responsibility to a much greater extent than an agency that is not burdened with the extensive security requirements of an intelligence service. Finally, most of the information contained in operational files is protected by the (b)(1) and (b)(3) exemptions. This has resulted in very little information being released while imposing a substantial burden on the CIA. There is an additional concern. The information that can be released, a word or phrase here and there in an otherwise blanked-out document, may lead the unwary to erroneous conclusions as a result of using the information out of context.

## II. EXEMPTION (b)(1)

In the original FOIA, Congress provided that information "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy" was not subject to disclosure.<sup>14</sup> In 1973, in *EPA v. Mink*,<sup>15</sup> the Supreme Court interpreted this exemption to afford the executive branch broad discretion to withhold information in the interest of national security. This case involved an action filed in 1971 by Congresswoman Patsy Mink and thirty-two of her colleagues in the House of Representatives to compel the release of recommendations contained in a report by a high-level interdepartmental committee that had investigated the advisability of underground nuclear testing. The government contended that the materials sought were within the (b)(1) and (b)(5) exemptions. At least eight of the ten requested documents were described as classified at the secret or top secret levels. They were also described as "restricted data" pursuant to the Atomic Energy Act of 1954.<sup>16</sup> The government did not choose to rely on (b)(3),

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14. 5 U.S.C. § 552 (b)(1) (1967).

15. 410 U.S. 73 (1973).

16. 42 U.S.C. §§ 2014(y), 2161-2162 (1982).

although the Court made reference to that exemption in footnote four of its opinion. The Court held that the (b)(1) exemption did not permit the compelled disclosure of classified documents, nor did it permit in camera inspection of classified documents either to determine the legitimacy of the classification or to segregate for release any "non-secret components."<sup>17</sup> The Court noted that FOIA might have provided more stringent requirements for asserting the (b)(1) exemption, but concluded that the legislative intent was to defer to the executive branch regarding what should be withheld in the interest of national security.<sup>18</sup>

The majority opinion in *Mink* addressed issues of statutory interpretation. Because of the broad interpretation given to the statutory exemption, it was not necessary for the Court to examine the constitutional questions posed by the doctrine of separation of powers, the state secrets doctrine, or executive privilege.<sup>19</sup> These constitutional doctrines are not coextensive with the statutory exemptions.<sup>20</sup> In *Mink*, the Court suggested that Congress could have gone further than it did in opening government files to the public. However, the Court also made a pointed reference to the limita-

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17. *Mink*, 410 U.S. at 78.

18. "Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored." *Id.* at 81.

19. Justice Stewart in his concurring opinion noted: "This case presents no constitutional claims, and no issues regarding the nature or scope of 'Executive privilege.'" *Id.* at 97 (Stewart, J., concurring). In reviewing claims of privilege under the state secrets doctrine, courts may in appropriate circumstances require in camera examination of the documents in question.

20. *United States v. Reynolds*, 345 U.S. 1 (1952) (general discussion of state secrets doctrine). See generally *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 144 (1981); *United States v. Nixon*, 418 U.S. 683, 703-16 (1974) (executive privilege); *United States v. United States Dist. Ct.*, 407 U.S. 297, 321 (1972) (no inherent presidential authority to conduct warrantless electronic surveillance in domestic security cases); *Totten v. United States*, 92 U.S. 105 (1876); *Salisbury v. United States*, 690 F.2d 966, 975 (D.C. Cir. 1982); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir.), *reh'g*, 30 Fed. R. Serv. 2d (Callaghan) 1274 (4th Cir. 1980); *ACLU v. Brown*, 609 F.2d 277, 280 (7th Cir. 1979), *reh'g*, 619 F.2d 1170 (7th Cir. 1980); *In re Halken*, 598 F.2d 176 (D.C. Cir. 1979); *Halken v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Fitzgerald v. Penthouse Int'l*, 525 F. Supp. 585 (D. Md. 1981) (libel action where government intervened as a party and moved to dismiss on the ground that any trial of the libel action would reveal classified military secrets); *rev'd in part*, 691 F.2d 666 (4th Cir. 1982), *cert denied*, 460 U.S. 1024 (1983); *United States v. Felt*, 491 F. Supp. 179 (D.D.C. 1979); *Simrick v. United States*, 224 Ct. Cl. 724 (1980).

The Classified Information Procedure (Graymail) Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980), establishes procedures governing the discovery of classified information in criminal prosecutions. No similar statute exists for discovery in civil actions.



tions required by executive privilege.<sup>21</sup>

Congress moved quickly in the 1974 amendments to overrule these parts of *Mink* by providing specifically for *in camera* review and the release of segregable portions of otherwise non-disclosable documents, even where the document as a whole was properly classified.<sup>22</sup> Congress also provided that in (b)(1) cases the courts should determine *de novo* whether a document was properly classified according to the criteria and procedures established by the applicable Executive Order.<sup>23</sup> The legislative history indicates that Congress, in providing for *de novo* judicial review, intended that "substantial weight" be given to an agency's affidavit supporting the decision to classify.<sup>24</sup> This qualifying language in the conference report was apparently designed to address strong objections by the executive branch to the proposed amendments, particularly those relating to *de novo* review.<sup>25</sup> During the course of the joint conference committee deliberations, President Nixon resigned and was succeeded by President Ford, who expressed his reservations and proposed a less intrusive standard of review:

I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis.<sup>26</sup>

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21. *Mink*, 410 U.S. at 83. The Court noted: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." *Id.*

22. See 5 U.S.C. § 552 (a)(4)(B) (1982).

23. *Id.*

24. The conference committee report notes that: the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

S. REP. NO. 93-1200, 93d Cong., 2d Sess. 12 (1974).

25. See *Ray v. Turner*, 587 F.2d 1187, 1206-15 n.28 (D.C. Cir. 1978) (Wright, C.J., concurring); see also *Allen v. CIA*, 636 F.2d 1287, 1294-97 (D.C. Cir. 1980).

26. Letter from President Gerald R. Ford to the Honorable William S. Moorhead (Aug. 20, 1974), cited in *Ray*, 587 F.2d at 1207, reprinted in SOURCE BOOK, *supra* note 5, at 380.

The conference committee rejected this compromise language, and the conference committee's version, ultimately passed by Congress, was vetoed by the President. In vetoing the bill, the President again offered a compromise proposal that would permit courts to review the classification of documents while requiring them to uphold the classification where there was a reasonable basis to support it. Under the President's proposal, *in camera* review would have been available only after consideration of all other evidence.<sup>27</sup> Instead, Congress overrode the veto.

As amended, the first exemption protects from disclosure matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive Order."<sup>28</sup> Executive Order No. 12,356<sup>29</sup> is the current authority for classifying, declassifying, and safeguarding national security information. It provides procedural and substantive criteria for classification and declassification and expressly prohibits the classifying of information to hide violations of law, bureaucratic inefficiency, administrative error, and embarrassment to a person or agency, or to prevent or delay the release of information that does not require classification to protect national security.<sup>30</sup>

The principal area of disagreement between the executive branch and Congress over the 1974 amendments dealt with *de novo* judicial review. The legislative history indicates that Congress was concerned with executive branch accountability to Congress and to the public. Congress insisted on an objective, independent judicial determination, believing that judges would be sensitive to the executive branch's responsibility to protect national security. In the debates on the amendment, Senator Sam Ervin perhaps put it most succinctly: "The court ought not to be required to find any-

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27. I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an *in camera* examination of the document.

*Ray*, 587 F.2d at 1208-09 (Wright, C.J., concurring) (message from the President vetoing H.R. 12471, an act to amend the Freedom of Information Act, H.R. Doc. No. 983, 93d Cong., 2d Sess., reprinted in SOURCE BOOK, *supra* note 5, at 483-85).

28. 5 U.S.C. § 552 (b)(1).

29. 47 Fed. Reg. 14,874 (1982).

30. See Statement of President Reagan upon signing Exec. Order No. 12,356, concerning national security information, 1982 PUB. PAPERS 420 (Apr. 2, 1982).

thing except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge . . . ."<sup>31</sup> As the District of Columbia Court of Appeals made clear in *Ray v. Turner*, Congress "emphasized that in reaching a de novo determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had 'unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record'."<sup>32</sup> Senator Chiles observed:

If, as the Senator from Mississippi said, there is a reason, why are judges going to be so unreasonable? We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.<sup>33</sup>

The courts are in general agreement concerning the standard of judicial review incorporated in FOIA.<sup>34</sup> The characteristics of de novo review are essentially the same in all national security cases, although the government's burdens under de novo review are somewhat different depending upon whether (b)(1) or (b)(3) is being invoked.<sup>35</sup> For (b)(1), the government must show a reasonable

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31. *Ray*, 587 F.2d at 1194 n.18 (quoting 120 CONG. REC. 17,030 (1974)). The court also quoted Senator Muskie:

As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

*Id.* (quoting 120 CONG. REC. 36,870 (1974)).

32. *Id.* at 1194 (citing S. REP. NO. 1200, 93d Cong., 2d Sess. 12, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6290).

33. 120 CONG. REC. 17028 (1974), cited in *Ray*, 587 F.2d at 1194 n.18.

34. *But see* LITIGATION, *supra* note 7, at 29 (suggesting that two somewhat different standards for judicial review have been employed, with the court in *Ray* and *Allen* suggesting that a determination that information is properly classified is required while later decisions require only that there be a "reasonable basis" for finding potential harm).

35. [I]n reaching a de novo determination [a] judge [should] accord substantial weight to detailed agency affidavits and take into account that the executive had 'unique insights into what adverse affects [sic] might occur as a result of public disclosure of a

basis for its belief that disclosure may result in damage to national security and that the information is classifiable under the current Executive Order. By contrast, (b)(3) requires only that the information be protected by a statute that qualifies under that exemption. There is no requirement under (b)(3) that the government demonstrate danger to national security. The government, however, always bears the burden of establishing that information sought to be withheld falls within one of the statutory exemptions.<sup>36</sup>

An exemption is usually asserted by filing an unclassified affidavit with the court, indicating the specific reasons for invoking the exemption. Since the burden is on the government to show why

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particular classified record.'

The salient characteristics of de novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.' (4) Whether and how to conduct an *in camera* examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. To these observations should be added an excerpt from our opinion in *Weissman* (as revised): 'If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.'

In part, the foregoing considerations were developed for Exemption 1. They also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests.

*Ray*, 587 F.2d at 1194-95 (citations omitted).

Under (b)(3) an agency must only "show specifically and clearly that the requested materials fall into the category of the exemption." *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *see also* *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 (D.C. Cir. 1979).

It should be noted that in a (b)(3) case, the third part of the above process will involve a determination of whether the information in question falls within the scope of a qualifying statute rather than a review of the details of classification. Although classification is not a requirement under (b)(3), it is often the case that a determination of what is an intelligence source or method will involve information that is classified.

36. *Ray*, 587 F.2d at 1194. Congress in the FOIA did not limit an agency's discretion to disclose. The decision whether to invoke an exemption is within the discretion of the agency. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). By comparison, in a "reverse FOIA" suit, a plaintiff seeks to enjoin an agency's release of information. In these cases, the judicial review is limited to a finding that the agency has not acted arbitrarily. *See generally* *Worthington Compressors, Inc. v. Gorsuch*, 668 F.2d 1371 (D.C. Cir. 1981).

In the normal reverse-FOIA case the ultimate issue is whether an agency violates the APA [Administrative Procedure Act] when it seeks to disclose submitted information which is exempt under FOIA. In that case the agency has some discretion to act, and the issue properly is limited to whether the record indicates that it has done so reasonably.

*Id.* at 1373.

information is sensitive and would, if released, be injurious to national security under (b)(1) or is protected by statute under (b)(3), it is often necessary for the government to bring this information to the attention of the court by filing *ex parte in camera* a classified affidavit. This would be in addition to the filing of an open affidavit notifying the court and the parties that the government is invoking one or more of the national security exemptions. To prevail in an FOIA action, an agency must prove that each document requested has either been produced, is unidentifiable, or is wholly exempt.<sup>37</sup>

An agency's affidavits must be sufficiently detailed to demonstrate to the court that the documents sought fall within one of the statutory exemptions. The standard that the district court must apply in making this *de novo* review is whether the government's affidavits or showings are reasonably specific and demonstrate that the documents are properly exempt.<sup>38</sup> A conclusory affidavit that merely states that compliance with an FOIA request would reveal information protected by one of the exemptions, without producing information sufficient to demonstrate that the information sought is protected, is not sufficient to support dismissal or summary judgment.<sup>39</sup> It is within the discretion of the district court, after reviewing the government's affidavits, to require an *in camera* inspection of the documents to determine whether they are properly exempt.<sup>40</sup>

If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without any *in camera* review of the documents.<sup>41</sup>

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37. *Founding Church of Scientology*, 610 F.2d at 836.

38. *Id.*

39. *Founding Church of Scientology*, 610 F.2d 824.

40. *Ray*, 587 F.2d at 1195.

41. *Hayden v. National Sec. Agency/Central Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980), *cited with approval* in *Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir. 1980). The *Allen* opinion provides a good discussion of when *in camera* inspection is appropriate. The opinion also describes what the court found to be inadequate affidavits filed in support of Exemptions 1 and 3.

The affidavits' reliance on such expansive phrases as 'intelligence sources and methods,' 'sequence of events,' and 'process' falls far short of providing the 'reasonable specificity' that this court has held is required for summary judgment without *in camera* inspection. Indeed, the statement does not adequately demonstrate that the substantive standard for classification . . . has been met. . . . The affidavits also offer

Conversely, in camera inspection of the requested documents does not imply bad faith on the part of the government. It is merely a determination by the court that, under the circumstances, in camera review is appropriate in order for the court to make a *de novo* determination.<sup>42</sup>

In deciding whether to require in camera inspection, a court is required to give "substantial weight" to an agency's affidavits.<sup>43</sup> Although it is within the court's discretion to require in camera inspection, such inspection should not be ordered unless the court finds that the agency's affidavits are not sufficiently specific, or are otherwise unpersuasive in demonstrating the applicability of the statutory exemptions. This issue was addressed in the conference committee's report on the 1974 amendments: "Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the government under this law."<sup>44</sup> As Judge Wright notes in his concurring opinion in *Ray*:

[T]hen, without shifting the burden of proof or weakening the requirement of *de novo* review or curtailing the propriety of *in camera* examination, the Conference Report added the following qualification with respect to judicial review in cases involving national de-

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no basis for a conclusion that all 'reasonably segregable' non exempt portions of the document have been released. They do not even contain an assertion to that effect.

*Allen*, 636 F.2d at 1292-93 (citations omitted).

With respect to those portions of the document withheld under Exemption 3, the affidavits fail to demonstrate that the portions are clearly exempt. . . . The CIA's affidavits do little more than parrot the language of Section 403(d)(3) by stating that 'intelligence sources and methods' will be compromised if the document is disclosed. But as this court's opinion in *Sims v. CIA* . . . demonstrates, the phrase . . . is susceptible to varying interpretations, some of which are unacceptably broad.

*Id.* at 1294 (citations omitted).

42. The ultimate criterion is simply this: Whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claimed exemption. . . . *In camera* inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a *de novo* determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account.

*Ray*, 587 F.2d at 1195.

43. *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 481 n.48 (D.C. Cir. 1980).

44. *Ray*, 587 F.2d at 1208 (Wright, C.J., concurring) (quoting S. REP. No. 1200, 93d Cong., 2d Sess. 9 (1974)).

fense and foreign policy matters:

However, the conferees recognized that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information Law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.<sup>45</sup>

By comparison, the Supreme Court, in considering the question of *in camera* examination in the context of the state secrets doctrine, held in *United States v. Reynolds*<sup>46</sup> that a district court may not automatically insist upon such an examination of classified documents that the government claims are protected from discovery under Federal Rules of Civil Procedure because of their relation to national security. When the government's affidavits adequately demonstrate that the information should be protected, a district court is to respect the security considerations and not order *in camera* review.<sup>47</sup> When a district court is in doubt, it may

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45. *Ray*, 587 F.2d at 1208 (Wright, C.J., concurring). A good summary of the weight to be given agency affidavits in *de novo* judicial review is found in *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982):

Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith. Conversely, summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith. The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.

*Id.* at 1104-05 (citations omitted).

46. 345 U.S. 1 (1953).

47. As Chief Justice Vinson observes in the opinion of the Court:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

*Id.* at 10.

require that the documents be made available to the court for *ex parte* in camera review.<sup>48</sup>

#### A. *Which Executive Order?*

When documents have been classified under a previous Executive Order, the courts have held that the Executive Order in effect at the time the most recent classification decision was made will control.<sup>49</sup> The question may arise when a new Executive Order is promulgated after documents are classified, but before an FOIA request is made for their release. Since an agency is required to justify the continuing need for classification in asserting a (b)(1) exemption in accordance with substantive and procedural criteria established by the then-current Executive Order, it seems clear that the Executive Order in effect at that time should control, and the courts that have considered the question have so held.<sup>50</sup> A less likely occurrence would be the promulgation of a new and less restrictive Executive Order during the pendency of an appeal after agency consideration and *de novo* review under the criteria established by the previous Executive Order. In such a case, the appellate court should probably remand to the district court for a determination of whether or not the material fits within the less restrictive criteria established by the new Executive Order.<sup>51</sup> If a new and more restrictive Executive Order is promulgated while the

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In *Reynolds*, the Court also defines the procedures which the executive must follow in invoking the state secrets privilege. The head of the executive department which has control over the matter, usually a cabinet officer, or in the case of the Department of Defense, the service secretary, must make a formal claim of privilege by affidavit in which the officer demonstrates with sufficient specificity the circumstances which make the claim of privilege appropriate. The officer claiming the privilege must have personally considered the matter and the affidavit must so state. *See id.* at 7-8.

48. *Cf.* *United States v. Nixon*, 418 U.S. 683 (1974) (concerning the power of the President to protect the confidentiality of communications among senior executive officials).

49. *See Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir. 1980); *see also Lesar v. United States Dep't of Justice*, 636 F.2d 472, 480-84 (D.C. Cir. 1980).

50. "Exemption 1 requires that the most recent classification of a requested document be in conformity with both the procedural and substantive criteria of the then applicable Executive Order." *Allen*, 636 F.2d at 1291 (citing *Lesar*, 636 F.2d at 483).

As the court in *Lesar* noted: "*The general principle espoused here, then, is that a reviewing court should assess classification under the Executive Order in force at the time the responsible official finally acts.*" 636 F.2d at 480 (emphasis in original).

The point, however, is not without some confusion. The court in *Lesar* noted earlier that a reviewing court should apply the executive order in effect at the time classification took place. *See id.* But the actual holdings make clear that the executive order in effect at the time the agency last reviews the matter controls.

51. *See generally Lesar*, 636 F.2d at 484-85.



case is on appeal, the new Executive Order will be applied on remand where the original classification was found to be defective.<sup>52</sup>

In reviewing classified documents pursuant to an FOIA request to determine if classification is still warranted, an agency may reclassify at a higher level due to a change in circumstances between the time of original classification and the request for release, or where information was not originally classified, due either to inadvertence<sup>53</sup> or a change in circumstances that would require classification.<sup>54</sup>

### B. *The "Vaughn Index"*

In *Vaughn v. Rosen*,<sup>55</sup> the court of appeals addressed the courts' problem created by the necessity of de novo judicial review where the government seeks to withhold large quantities of information. The court in *Vaughn* defined a two-part problem. First, the in camera review of agency affidavits is ex parte, thereby depriving a district judge of the benefit of the views of the opposing party that would be present in a true adversarial proceeding. Since many FOIA requests involve a review of hundreds and sometimes

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52. *Afshar v. Department of State*, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983).

53. *See Halperin v. Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977).

54. *See Baez v. Department of Justice*, 647 F.2d 1328, 1334 (D.C. Cir. 1980). Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982), is the current authority for classification. Section 1.6 provides that:

(d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act or the Privacy Act of 1974, or the mandatory review provisions of this Order, if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the agency head, the deputy agency head, the senior agency official designated under Section 5.3(a)(1), or an official with original Top Secret classification authority.

Section 1.3 of the Executive Order defines the categories of information which may be classified:

(a) Information shall be considered for classification if it concerns: (1) military plans, weapons, or operations; (2) the vulnerabilities and capabilities of systems, installations, projects, or plans relating to the national security; (3) foreign government information; (4) intelligence activities (including special activities), or intelligence sources or methods; (5) foreign relations or foreign activities of the United States; (6) scientific, technological, or economic matters relating to the national security; (7) United States Government programs for safeguarding nuclear materials or facilities; (8) cryptology; (9) a confidential source; or (10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President.

55. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

thousands of pages of documentation, the court of appeals found that it is "unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case."<sup>56</sup> Second, the problem is made more difficult by the fact that an entire document may not be withheld where the sensitive information is segregable and may be excised, permitting release of the non-sensitive portions. Thus a judge, in making a de novo determination, is required to examine every executive justification in some detail.

The "Vaughn Index" was the court's answer to these problems. Agencies are required to submit a "relatively detailed analysis [of the material being withheld] in manageable segments."<sup>57</sup> Conclusory and generalized allegations of exemptions will not suffice. Further, an agency is required to provide "an indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification."<sup>58</sup> Finally, the court requires that a Vaughn Index be made available to opposing counsel to enhance the adversarial testing of the government's claimed exemptions.<sup>59</sup>

It should be noted that the administrative burden to which the court referred in *Vaughn* is also of concern to agencies that are required to search and respond to what are sometimes extensive requests for materials involving sensitive national security information. It is true that an agency has at its disposal more resources than a federal district judge, but the demands on an agency are also much greater because every request must be responded to and every identifiable file must be reviewed. This would seem to raise a substantial question whether this is a wise allocation of relatively scarce resources. One should recall that a principle goal of FOIA is oversight of agency activities.<sup>60</sup> In the case of the intelligence agencies, Congress has provided for designated committees of the House and Senate to fully oversee their operation.<sup>61</sup>

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56. *Id.* at 825.

57. *Id.* at 826; see also *Ray v. Turner*, 587 F.2d 1187, 1191 (D.C. Cir 1978).

58. *Vaughn*, 484 F.2d at 827; see also *Ray*, 587 F.2d at 1191.

59. *Vaughn*, 484 F.2d at 828; see also *Ray*, 587 F.2d at 1192. In the 1974 amendments to FOIA, the Senate Committee reviewed and specifically approved the approach adopted in *Vaughn*. See S. REP. NO. 854, 93d Cong., 2d Sess. 15 (1974), cited in *Ray*, 587 F.2d at 1192.

60. See *supra* note 5 and accompanying text.

61. National Security Act of 1947, 50 U.S.C. § 413 (1982) (accountability for intelligence activities); see S. RES. 400, 94th Cong., 2d Sess. (1976) (establishing Senate Select Committee on Intelligence); see also XLVIII RULES OF HOUSE OF REP. (establishing Permanent Se-

## III. THE GLOMAR RESPONSE

A relatively small number of FOIA requests to the CIA seek information concerning alleged intelligence activities. When the CIA receives such a request, a determination must first be made whether the fact of the existence or nonexistence of the alleged special activity is properly classifiable pursuant to the applicable Executive Order. If it is, the CIA will reply that it can neither confirm nor deny the fact of the existence or nonexistence of records responsive to the request, for to do so would indicate the existence or nonexistence of particular intelligence activities. This is the so-called "Glomar response." The Glomar response was first utilized in a FOIA action concerning the CIA's Glomar Explorer Project, which was undertaken, according to press reports, to raise a sunken Russian submarine believed to have been carrying nuclear weapons from the floor of the Pacific Ocean at an undisclosed location northwest of Hawaii.<sup>62</sup> In May of 1977, following disclosures in the press, the government acknowledged that the CIA, operating through a contractual arrangement with Howard Hughes's SUMMA Corporation, was responsible for the project, and acknowledged the existence of 154 documents pertaining to a FOIA request initiated by a correspondent for *Rolling Stone* magazine. At that time, sixteen documents were released without deletions, 134 were released with deletions, and four were withheld in their entirety. In withholding the information, the CIA invoked the (b)(1) and (b)(3) exemptions. In the ensuing litigation, the CIA's action was upheld, based on the (b)(3) exemption and the agency's statutory requirement to protect intelligence sources and methods.<sup>63</sup>

A 1982 decision upholding the Glomar response is illustrative of the problem the CIA faces in responding to FOIA requests seeking information concerning operational activities. In *Gardels v. CIA*,<sup>64</sup> the CIA refused "to confirm or deny the existence of records pertaining to covert contacts for foreign intelligence purposes between the Agency and individuals at a specific university in the United States."<sup>65</sup> Gardels, a student at the University of California at Los

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lect Committee on Intelligence).

62. *Military Audit Project v. Casey*, 656 F.2d 724, 727-30 (D.C. Cir. 1981).

63. See *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981); see also *Military Audit Project*, 656 F.2d 724.

64. 689 F.2d 1100 (D.C. Cir. 1982).

65. *Id.* at 1102.

Angeles, had sought disclosure of past and present relationships between the CIA and individuals at the eleven campuses of that university. As the court's opinion points out, for the CIA to acknowledge that such records existed would be to assist foreign intelligence services in identifying individuals cooperating with the United States government.<sup>66</sup> To deny covert contacts with the University of California would also compromise intelligence sources and methods in the same way. The CIA had received more than 125 similar FOIA requests seeking information on contacts with American colleges covering approximately one hundred schools. To indicate which schools had not been involved in covert contact would be to make the work of intelligence services much easier. They could concentrate their efforts on the remaining college campuses where their foreign nationals were located.<sup>67</sup> The court in *Gardels* notes, in reviewing the CIA's assessment of the risk to intelligence sources and methods resulting from disclosure, that

[t]he test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.<sup>68</sup>

The court goes on to quote an earlier opinion in another case: "[T]he purpose of national security exemptions to the FOIA is to protect intelligence sources before they are compromised and harmed, not after."<sup>69</sup>

The Glomar response must be used in a consistent manner to be effective. In other words, the CIA must use this response when the

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66. *Id.* at 1104.

The foreign intelligence entity could and probably would examine and take measures against those of its citizens who had studied at the university, could and would prevent its nationals from attending the university, and could and would curtail access and availability to academics from California (and other American schools) traveling abroad or seeking contact with foreign sources.

*Id.*

67. *Id.*

68. *Id.* at 1105 (citations omitted).

69. *Id.* at 1106 (quoting *Halpern v. CIA*, 629 F.2d 144, 149 (D.C. Cir. 1980)). "Nor should we reject the Agency's refusal to answer because it cannot prove conclusively that, if it responded, some intelligence source or method would in fact be compromised or jeopardized. This is necessarily a region for forecasts in which informed judgment as to potential future harm should be respected." *Id.*

alleged intelligence activity does not exist, as well as when it does, or the response would be equivalent to admitting that responsive records do in fact exist. The Glomar-type response is recognized in section 3.4 (f)(1) of Executive Order No. 12,356, which requires an agency to "refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order."<sup>70</sup> When the CIA uses this response it does not initiate a search of its records systems, since the CIA is refusing either to confirm or deny the existence of responsive records. Therefore, in cases invoking the Glomar response, a Vaughn Index is not required.<sup>71</sup>

#### IV. EXEMPTION (b)(3)

Under the (b)(3) exemption, an agency's discretion to release information may be limited by other statutes.<sup>72</sup> The (b)(3) exemption now excludes from coverage information that is:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.<sup>73</sup>

Two statutes that have been held to be qualifying statutes under the (b)(3) exemption are section 102 of the National Security Act of 1947, which requires the Director of Central Intelligence to pro-

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70. 47 Fed. Reg. 14,880 (1982).

71. *Phillippi*, 546 F.2d at 1013. For a good discussion of those cases where *Vaughn* does not require a detailed affidavit but only "as complete a public record as possible" under the circumstances, see *Hayden v. National Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In *Hayden*, the court also addressed the question of whether opposing counsel have a right to be present at an in camera proceeding and holds that they have no such right. See *Agee v. CIA*, 517 F. Supp. 1335 (D.D.C.), *reh'g denied*, 524 F. Supp. 1290 (D.D.C. 1981) (CIA not required to supply additional information when to do so would force them to breach the exemption).

72. As originally enacted, (b)(3) applied only to matters statutorily exempted from disclosure. The Supreme Court, however, upheld a broad grant of discretion to the executive branch to withhold information in *Federal Aviation Admin. v. Robertson*, 442 U.S. 255 (1975). Congress believed that the Supreme Court's interpretation of the original language gave agency officials too much discretion to withhold information, and in response to the *Robertson* decision, amended FOIA to narrow the scope of this exemption. A good summary of the legislative history of the amendments is found in *Allen v. CIA*, 636 F.2d 1287, 1294-97 (D.C. Cir. 1980).

73. 5 U.S.C. § 552(b)(3) (1982).

tect "intelligence sources and methods from unauthorized disclosure,"<sup>74</sup> and section 6 of the CIA Act of 1949, which protects the nature of the CIA's functions.<sup>75</sup> The same procedural requirements associated with de novo judicial review that pertain to exemption (b)(1), such as the usual requirement of a Vaughn Index, specific and detailed affidavits, and the basic requirement that the government bear the burden of justifying an exemption, also pertain to exemption (b)(3).<sup>76</sup>

Finally, we would make a general observation concerning de novo judicial review. It seems clear from the legislative history of FOIA, the cases interpreting that legislation, and the debates in Congress leading up to the new CIA Information Act, that what is meant by this phrase is not very different, as it turns out, from that which President Ford wanted in lieu of the 1974 amendments that he vetoed. Congress has specifically provided in the legislative history that executive branch determinations of the need for secrecy are to be accorded substantial weight when considered by courts in the review process. As the Seventh Circuit observed in the *Stein* case:

The court is limited to determining that the documents are the kinds of documents described in the government affidavit, that they have been classified in fact, and that there is a logical nexus between the information at issue and the claimed exemption. The court is in no position to second guess either the agency's determination of the need for classification or the agency's prediction of harm should release be permitted.<sup>77</sup>

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74. 50 U.S.C. § 403(d)(3) (1982).

75. In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of . . . any . . . law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

50 U.S.C. 403g (1982). For cases holding that § 403(d)(3) and § 403(a) are statutes qualifying as (b)(3) exemptions, see *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

76. See *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978); see also *Allen*, 636 F.2d at 1294; *Baker v. CIA*, 580 F.2d 664, 668-69 (D.C. Cir. 1978); *Phillippi*, 546 F.2d at 1015-16 n.14.

77. *Stein v. Department of Justice*, 662 F.2d 1245, 1254 (7th Cir. 1981); see also *Gardels*, 689 F.2d at 1105. The *Gardels* court noted:

The Supreme Court has never specifically addressed the extent to which the Constitution requires that deference, in a FOIA case, be afforded to an executive branch decision to withhold information in the interest of national security, but it seems clear that the Constitution would require such deference notwithstanding the statutory requirement.<sup>78</sup> Only on four occasions has the CIA been ordered by a court to release documents that the agency maintained were protected from disclosure under the FOIA.<sup>79</sup> In *Holy Spirit Association for the Unification of World Christianity v. CIA*,<sup>80</sup> the plaintiff withdrew the document request after the Supreme Court granted certiorari, thereby mooting the constitutional question. In *CIA v. Sims*,<sup>81</sup> the Supreme Court, in a sweeping opinion, upheld the statutory authority of the Director of Central Intelligence to determine what is an intelligence source and method under the (b)(3) exemption.

In its opinion in *Sims*, the District of Columbia Court of Appeals had underestimated the importance of providing intelligence sources with an assurance of confidentiality that is as absolute as possible. Under the court's approach, the CIA would have been forced to disclose a source whenever a court determined, after the fact, that the CIA could have obtained the kind of information supplied without promising confidentiality. Such a forced disclosure of the identities of its intelligence sources could have had a serious impact on the CIA's ability to carry out its mission.

With the Supreme Court's decision in *Sims*, a potential intelligence source will not be faced with the prospect that judges, who have little or no background in the delicate business of intelligence gathering, might order his identity revealed only after examining

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The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather the issue is whether on the whole record the agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.

*Id.* (citation omitted).

78. See generally *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Reynolds*, 345 U.S. 1 (1952) and its progeny, *supra* note 18.

79. See *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983), *aff'd in part, rev'd in part*, 105 S. Ct. 1881 (1985); *Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982); *Peterzell v. Department of State*, Civil No. 82-2853 (D.D.C. April 3, 1984) (unreported decision); *Fitzgibbon v. CIA*, 578 F. Supp. 704 (D.D.C. 1983).

80. 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982).

81. 105 S. Ct. at 1881.

the facts of the case to determine whether the CIA, in hindsight, needed to promise confidentiality in order to obtain the information.<sup>82</sup>

Finally, after reviewing the requirements of de novo judicial review under FOIA, it seems apparent that Congress provided a standard of review that is de novo only in the sense that agencies are required to come forward with a reasonable basis for their belief that the information is properly classified and should not be divulged. As one court put it, citing the legislative history of the 1974 amendments:

It appears that Congress did not intend the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of the classification status of each classified document. Rather, Congress intended that the courts would review the sufficiency of the agency's affidavits and would require the agency to come forward with more information or with the documents themselves if the affidavits proved insufficient.<sup>83</sup>

One may reasonably ask whether President Ford did not achieve essentially the same standard of review that he advocated in vetoing the 1974 amendments. In our view, Congress constitutionally could not have prescribed a standard of review that would fail to accord a measure of deference to executive decisions concerning foreign affairs and national security. To do otherwise would be to raise serious separation of powers problems.<sup>84</sup>

## V. THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT OF 1984

On 15 October 1984, President Reagan signed into law H.R. 5164, the Central Intelligence Agency Information Act ("Act").<sup>85</sup> The Act is the culmination of years of effort by the CIA to achieve relief from the requirements of the Freedom of Information Act.<sup>86</sup> The Act does not amend FOIA, but rather adds a new title to the

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82. *Sims*, 105 S. Ct. at 1891; see also *McGehee v. CIA*, 697 F.2d 1095, 1112 n.78, *vacated in part*, 711 F.2d 1076 (D.C. Cir. 1983); *Holy Spirit*, 636 F.2d at 844.

83. *Stein*, 662 F.2d at 1253.

84. See *Nixon*, 418 U.S. 683; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the steel seizure case); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

85. Pub. L. No. 98-477, 98 Stat. 2209 (1984).

86. 5 U.S.C. § 552 (1982).



National Security Act of 1947<sup>87</sup> to exempt certain operational files of the CIA from the search, review, publication, and disclosure requirements of FOIA.

We turn now to a review of the purpose and legislative history of the Act and an examination of the major provisions in the Act. In order to confine the length of this article to manageable limits, we will rely, to the extent possible, on frequent citations to printed Congressional committee hearings and reports that form the legislative history of the Act.<sup>88</sup>

### A. *Purposes of The Act*

The statutory exemption for operational files is intended to benefit both the CIA and the public.<sup>89</sup> The benefit to the CIA is relief from the requirement to search and review its operational files, as defined in the Act, in response to a FOIA request. For security reasons, CIA records systems are decentralized and strictly compartmentalized. A search for records responsive to a FOIA request can require the search of numerous records systems and the pulling together of responsive documents. This process defeats the purpose of compartmentalization. In addition, the review of responsive documents must be done by skilled intelligence officers, thus diverting them from their intelligence duties. Years of experience had shown that the inevitable result of these efforts was the release of very little, if any, significant information from these files

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87. 50 U.S.C. §§ 401-26 (1982).

88. See *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 98th Cong., 2d Sess. (1984) [hereinafter *House Intelligence Comm. Hearing*]; *CIA Information Act: Hearing on H.R. 5164 before the Government Information, Justice, and Agriculture Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [hereinafter *Government Operations Hearing*]; *An Amendment to the National Security Act of 1947: Hearings on S. 1324 before the Senate Select Comm. on Intelligence*, 98th Cong., 1st Sess. (1983) [hereinafter *Senate Intelligence Comm. Hearing*]; H.R. REP. No. 726, pt. 1, 98th Cong., 2d Sess. (1984) (report to accompany H.R. 5164) [hereinafter *House Intelligence Comm. Report*]; H.R. REP. No. 726, pt. 2, 98th Cong., 2d Sess. (1984) (report to accompany H.R. 5164) [hereinafter *Government Operations Report*]; S. REP. No. 305, 98th Cong., 1st Sess. (1983) [hereinafter *Senate Intelligence Comm. Report*].

89. The original and earliest version of the bill in the 98th Cong., S. 1324, contained a "Findings and Purposes" section which was deleted in the later House versions. See *Senate Intelligence Comm. Report supra* note 88, at 1-2; 129 CONG. REC. S16742 (daily ed. Nov. 17, 1983). For committee statements as to the purpose and benefits of the legislation, see *Senate Intelligence Comm. Report, supra* note 88, at 10-17; *House Intelligence Comm. Report, supra* note 88, at 4-6; *Government Operations Report, supra* note 88, at 4, 5-8.

since the material was usually exempt under (b)(1) or (b)(3), and occasionally under other exemptions. The definition of operational files makes it clear that the purpose is not to provide a total exclusion for the CIA; furthermore, there are important exceptions to the exemption for operational files.<sup>90</sup> The Act is also intended to provide a basis for the CIA to extend further assurances to its sources that the United States government is committed to and capable of protecting their identities and the confidentiality of their relationships.<sup>91</sup>

The public is meant to benefit from the Act through improved processing of FOIA requests by the CIA. By eliminating unproductive search and review of operational files, the Act seeks to reduce the current two to three year FOIA backlog at the CIA to bring about the speedier processing and release of responsive information that does not fall within one of the nine withholding exemptions of the FOIA.<sup>92</sup>

### B. *Legislative History*<sup>93</sup>

Efforts by the CIA to achieve relief from FOIA began in the 96th Congress. During 1979 and 1980, several bills were introduced that contained provisions for partial relief for the intelligence agencies or for the CIA. The House and Senate Intelligence Committees and a subcommittee of the House Government Operations Committee held hearings on the bills.<sup>94</sup> At these hearings, the CIA testified in support of an amendment to section 6 of the Central Intelligence Agency Act of 1949<sup>95</sup> giving the Director of Central

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90. See *infra* notes 139-72 and accompanying text.

91. The authors view this protection of source identities as a separate and distinct issue from the question of the definition of a source, considered by the United States Supreme Court in *Sims II*. See *supra* notes 81-82 and accompanying text.

92. See 5 U.S.C. § 552(b) (1982).

93. For a more detailed account of the legislative history, see *Senate Intelligence Comm. Report*, *supra* note 88, at 5-10, and *House Intelligence Comm. Report*, *supra* note 88, at 6-8.

94. See *Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearing before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. (1979) [hereinafter *FOIA Impact Hearing*]; *The Freedom of Information Act: Central Intelligence Agency Exemptions, Hearings before the Subcomm. on Government Information and Individual Rights of the House Government Operations Comm.*, 96th Cong., 2d Sess. (1980); *National Intelligence Act of 1980: Hearing before the Senate Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980); *The National Intelligence Act of 1980: Hearings on H.R. 6588 before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. (1980).

95. 50 U.S.C. § 403g (1982).

Intelligence (DCI) the authority to exempt from search, review, and disclosure all information contained in certain designated files of United States intelligence agencies. The concept of partial FOIA relief through the DCI's designation of specific files was one that appeared in various legislative forms in the 96th and 97th Congresses and ultimately formed the basis of the legislation enacted in the 98th Congress.

The CIA-proposed amendment to section 6 was included in S. 2216, the "Intelligence Reform Act of 1980," but was dropped from the bill as reported by the Senate Intelligence Committee.<sup>96</sup> A similar proposal, limited to CIA files, was included in S. 2284, the National Intelligence Act of 1980. In the House, H.R. 6588, the National Intelligence Act of 1980, contained a proposal similar to the CIA's, and H.R. 5129 used the same approach but limited the designation to CIA and National Security Agency (NSA) files. Following hearings by these three committees, no further action was taken during the 96th Congress.

In the 97th Congress, the only congressional consideration of FOIA relief for the CIA took place in the Senate. Early in the first session S. 1273, the "Intelligence Reform Act of 1981," was introduced. It embodied the same provisions as section three of S. 2216 in the 96th Congress. The original CIA proposal, which included other intelligence agencies or components, was again the subject of a hearing by the Senate Intelligence Committee.<sup>97</sup> In testifying for the CIA, Deputy Director Bobby Inman stated that while S. 1273 was "a more promising approach" than attempting to strengthen the withholding exemptions in FOIA, the best legislative remedy for the problems posed by FOIA would be to exclude totally the CIA and the NSA from the requirements of FOIA.<sup>98</sup>

The desire for a total exclusion from FOIA was voiced again several weeks later by Director of Central Intelligence William J. Casey in his testimony before a subcommittee of the Senate Judiciary Committee.<sup>99</sup> The subcommittee had before it several bills seeking to amend FOIA,<sup>100</sup> including S. 1235,<sup>101</sup> which sought to

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96. S. REP. No. 896, 96th Cong., 2d Sess. (1980) (report to accompany S. 2216).

97. See *Intelligence Reform Act of 1981: Hearing before the Senate Select Comm. on Intelligence*, 97th Cong., 1st Sess. (1981).

98. *Id.* at 12, 16-17.

99. See *Freedom of Information Act: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. (1981) [hereinafter *FOIA Hearing*].

100. See *id.* at 4-13, 19-29, 30-52, 53-70 (reprinting text of S. 587, S. 1247, S. 1730, and S.

provide partial relief to the CIA through amendments to FOIA.<sup>102</sup> While the Director testified that the partial relief bills which had been introduced "would all be most helpful" in reducing the burdens posed by FOIA, he advocated total exclusion for CIA, NSA, and the Defense Intelligence Agency as the only way to eliminate the perception of sources of information that the United States could not assure the confidentiality of their identities.<sup>103</sup> Neither S. 1273 nor S. 1235 were reported out of committee.

The first bill introduced in the 98th Congress was S. 1324, the "Intelligence Information Act of 1983," introduced in May 1983. S. 1324 clearly flowed from the concepts of S. 1273 and its predecessors. However, DCI designation of files was limited to certain operational files of three CIA components. Given the adverse public reaction and congressional inaction in response to the total exclusion proposal in the 97th Congress, CIA Deputy Director John N. McMahon testified in total support of S. 1324 before the Senate Intelligence Committee in July.<sup>104</sup> In his testimony, Deputy Director McMahon made it clear that the CIA still preferred total exclusion but was prepared to accept this proposed legislation as an acceptable compromise given the difficulties the Agency was experiencing with FOIA.<sup>105</sup> It was also made clear in the subsequent question and answer session that the CIA would not seek an expansion of the relief given in this bill in the near future.<sup>106</sup>

The questions and issues raised during the two days of hearings resulted in lengthy negotiations between Senate Intelligence Committee members and staff, representatives of the CIA, and various public interest group members. This process produced an amendment in the nature of a substitute that was unanimously approved by the Committee in October.<sup>107</sup> S. 1324, as reported out of Committee, then passed the Senate by unanimous consent late in November 1983.<sup>108</sup>

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1751).

101. *Id.* at 14-18.

102. The Senate Judiciary Committee had jurisdiction over S. 1235 because it proposed amendments to FOIA itself, rather than to the CIA Act of 1949 over which the Senate Intelligence Committee had jurisdiction.

103. *FOIA Hearing, supra* note 102, at 578.

104. *See Senate Intelligence Comm. Hearing, supra* note 91, at 5-31.

105. *Id.* at 20, 24.

106. *Id.* at 25.

107. *Id.* at 111-29.

108. *See* 129 CONG. REC. S16742-46 (daily ed. Nov. 17, 1983).

In June, legislation had been introduced in the House. H.R. 3460, the "Intelligence Information Act of 1983," exempted certain operational files of the CIA but differed from S. 1324 in several respects.<sup>109</sup> It did not use a DCI designation process as the previous bills had, it contained a definition of "operational files", and it added another exception to the exemption for operational files. In November 1983, H.R. 4431 was introduced, which was a companion bill to S. 1324 as reported by the Senate Intelligence Committee.

Early in the second session, the Subcommittee on Legislation of the House Intelligence Committee held a hearing on these two bills and S. 1324 as passed by the Senate. Deputy Director McMahon again testified on behalf of the CIA. During the course of his testimony, some of the differences between the bills were explored, as well as a judicial review provision that had been added by the Senate Intelligence Committee.<sup>110</sup> The testimony did not indicate a clear preference for one bill over the others. The Deputy Director did state that S. 1324, as reported by the Senate Intelligence Committee, contained amendments "achieved through good faith negotiations and compromise on the part of all parties involved."<sup>111</sup> The hearing made it clear that there were still unresolved issues and differences of opinion concerning all three bills.<sup>112</sup>

Following the hearing, further negotiations took place between House Intelligence Committee members and staff, the CIA, and interested non-governmental organizations. In March, the bipartisan introduction of H.R. 5164 represented a blending of S. 1324 and H.R. 3460, with numerous additional changes that reflected the status of the negotiations at that point.<sup>113</sup> The DCI designation process was included,<sup>114</sup> and the judicial review provisions had been expanded. For the first time there was a requirement that the DCI review the file exemptions made under the legislation (now entitled the "Central Intelligence Agency Information Act") at least once every ten years to determine whether any exemptions could be removed. Furthermore, the retroactivity provision in the

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109. *House Intelligence Comm. Hearing, supra* note 88, at 91-94.

110. *See id.* at 4-29.

111. *Id.* at 15.

112. *See, e.g., id.* at 46-65 (testimony of Mark H. Lynch, Counsel, American Civil Liberties Union).

113. H.R. 5164, 98th Cong., 2d Sess. (1984), *reprinted in Government Operations Hearing, supra* note 88, at 2-9.

114. This authority of the DCI was no longer phrased in terms of authority to "designate" files, but was now an authority to "exempt" operational files.

bill<sup>115</sup> was now limited, in the area of FOIA litigation against the CIA, to cases filed on or after February 7, 1984.<sup>116</sup> The negotiations continued and on April 11, 1984, the full House Intelligence Committee unanimously adopted an amendment in the nature of a substitute bill and favorably reported H.R. 5164 as amended.<sup>117</sup> The further changes incorporated into the substitute bill pertained to the judicial review provisions.

H.R. 5164, as reported, was now the product of a lengthy legislative process involving both intelligence oversight committees. However, unlike the Senate, there was a second committee with primary jurisdiction over the bill in the House. In May 1984, the Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations held a hearing on H.R. 5164.<sup>118</sup> CIA Executive Director Charles A. Briggs testified in support of the bill<sup>119</sup> and for the first time the American Civil Liberties Union (ACLU) testified in total support of the legislation, urging enactment of H.R. 5164 as reported by the House Intelligence Committee without further amendment. The Subcommittee did, however, amend the reported bill to include an additional reporting requirement for the CIA and, more importantly, an amendment to the Privacy Act to prevent use of the Privacy Act as a (b)(3) withholding statute under FOIA.<sup>120</sup> The bill as amended by the Subcommittee was adopted by the full Government Operations Committee and, with one dissenting vote, was ordered reported on July 31, 1984.<sup>121</sup>

On September 17, 1984, the House debated H.R. 5164, as reported by the Government Operations Committee, under suspen-

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115. H.R. 5164, 98th Cong., 2d Sess. § 4 (1984), reprinted in *Government Operations Hearing*, *supra* note 88, at 2-9.

116. Prior to this, the House and Senate bills in the 98th Congress had provided for the legislation to be effective upon enactment and to apply to all pending FOIA requests and civil actions.

117. For the bill as reported, see *House Intelligence Comm. Report*, *supra* note 88, at 2-4.

118. See *Government Operations Hearing*, *supra* note 88.

119. *Id.* at 11-37.

120. The amendment to the Privacy Act had been previously introduced in the House as H.R. 4696. The CIA did not use the Privacy Act as a (b)(3) withholding statute under FOIA so the amendment would have no impact on CIA processing of FOIA requests. For this reason, there will be no further discussion of this provision in the legislation. For an explanation as to the reason for the amendment, see *Government Operations Report*, *supra* note 88, at 12-17.

121. For H.R. 5164 as reported, see *Government Operations Report*, *supra* note 88, at 1-4.

sion of the rules.<sup>122</sup> Two days later the House overwhelmingly passed H.R. 5164 as reported by a vote of 369 to 36.<sup>123</sup> Since the House-passed version of the legislation contained in H.R. 5164 differed from the Senate-passed version in S. 1324, H.R. 5164 had to be referred to the Senate. On September 28, the Senate voted unanimously to pass H.R. 5164,<sup>124</sup> and on October 15, President Reagan signed it into law.

### C. *Major Provisions*

#### 1. Exemption of Certain Operational Files and Subsection 701(c) Exceptions

The new subsections 701(a) and (b) of the National Security Act of 1947 give the Director of Central Intelligence authority to exempt certain categories of files from the requirements of FOIA. As mentioned earlier, this concept is not a new one. The main variable over the years has been whether the legislation would exempt files located in all the intelligence agencies or only in certain ones. Once the conclusion was reached that a total exclusion from FOIA for any intelligence agency was not politically feasible, the focus was once again on the partial relief approach contained in the earlier bills. The question then became whether these approaches were still adequate and, if so, for which agencies.

There was little doubt that FOIA was posing problems for all the intelligence agencies. However, in time, two other factors became clear. First, the CIA had the largest volume of requests and a tremendous backlog. Whenever a FOIA request involved search and review by the Directorate of Operations within the CIA, a final response was two to three years in coming. Second, the CIA's strictly compartmentalized records system made it possible to identify most readily those files that would fall within the proposed categories for exemption. Therefore, the decision was made within the Reagan Administration to support legislation that would grant partial relief only to the CIA.<sup>125</sup>

The decision to limit the legislation to the CIA was discussed during the Senate Intelligence Committee hearing on S. 1324. In

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122. See 130 CONG. REC. H9621-31 (daily ed. Sept. 17, 1984).

123. See 130 CONG. REC. H9817-18 (daily ed. Sept. 19, 1984).

124. See 130 CONG. REC. S12395-97 (daily ed. Sept. 28, 1984).

125. See *Senate Intelligence Comm. Hearing, supra* note 88, at 26 (statement of Chairman Goldwater).

one exchange, Deputy Director McMahon was asked whether S. 1324 was "a camel's nose under the tent" and whether the White House would be seeking further amendments to achieve relief for other agencies in the intelligence community.<sup>126</sup> Deputy Director McMahon replied that the White House would not seek them, and if such efforts were made, they "would not be sanctioned."<sup>127</sup> As a result of confining the relief to the CIA, the previous DCI exemption authority was refined so as to be limited to certain operational files located in three separate components of the CIA. Subsection 701(a) of the new Title VII gives the DCI the authority to exempt operational files of the CIA from the search, review, publication, and disclosure requirements of FOIA. Subsection 701(b) then defines "operational files" for the purposes of Title VII. The three-part definition spells out which categories of files may be exempted within each component. The exemptions are to be based on the function of the files rather than on the files' specific contents. Paragraph 701(b)(1) allows only those files belonging to the Directorate of Operations "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services" to be exempted. Paragraph 701(b)(2) defines operational files within the Directorate for Science and Technology to mean those files "which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems." Paragraph 701(b)(3) defines operational files within the Office of Security to be those "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources."

What do these definitions allow to be exempted and what do they leave fully subject to FOIA? The intent of these definitions is to allow files that document intelligence sources and methods to be exempt. Information detailing foreign intelligence activities or counterintelligence activities has proven to be the most difficult and time-consuming information to review, and after two to three years of processing most, if not all, of the information can be withheld under the exemptions afforded in FOIA. Which foreign governments or foreign intelligence or security services cooperate with

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126. *Senate Intelligence Comm. Hearing, supra note 88, at 25; see also House Intelligence Comm. Report, supra note 88, at 8.*

127. *Senate Intelligence Comm. Hearing, supra note 88, at 25.*



the United States is information that must be, and has been, protected under FOIA. Information detailing scientific and technical systems available for the collection of foreign intelligence or counterintelligence, and how and where they are used, is as sensitive as any information the CIA has, and is clearly withholdable under the exemptions in FOIA. In all of these areas, security investigations must be performed to support these activities. Information documenting an investigation undertaken to determine whether potential sources are suitable for either foreign intelligence or counterintelligence purposes is information relevant to the activities themselves and, as such, is withholdable under FOIA. Therefore, exempting operational files that "concern the intelligence process"<sup>128</sup> will not result in the loss of information to the public.<sup>129</sup> It will, however, relieve the CIA of the burden of requiring trained intelligence officers to take time away from their assigned intelligence duties to review documents word for word that ultimately cannot be released.

If information regarding the conduct and management of intelligence activities, as set forth in the definition of operational files, is to be exempted, what type of information remains accessible? An important distinction was made between files documenting the intelligence process and files documenting the intelligence product, with the function of the latter being "to store the intelligence gathered from human and technical sources."<sup>130</sup> This distinction came about as a result of the debate questioning what type of information belonging to the CIA does the public have a legitimate interest in having access to for purposes of search and review and possible release. Agreement was reached on the need to withhold information detailing the intelligence process. On the other hand, information gathered through the intelligence process, i.e., the intelligence product, is information of greater value to the public. It is the intelligence product that is shared with the President, the National Security Council, other Executive Branch agencies and Congress for their use in making decisions affecting the national security and foreign policy of the United States. After close congressional scrutiny, it was accepted that the filing systems and filing practices of the CIA made it possible to exempt operational files docu-

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128. *House Intelligence Comm. Report*, *supra* note 88, at 20.

129. *Id.* at 17-18; see also *House Intelligence Comm. Hearing*, *supra* note 88, at 13 (testimony of Deputy Director McMahon).

130. *House Intelligence Comm. Report*, *supra* note 88, at 21.

menting the intelligence process while leaving the intelligence product accessible to the public through FOIA.

To understand why this is so, it is necessary to explain the two types of intelligence information and how they are handled by the CIA. Information coming to the CIA from the field is known as "raw intelligence." It is information gathered from a CIA source. Usually it can be written so as to protect the source's identity. This raw intelligence is included in the appropriate operational file, a file that will be exempted under the Act. The fact that copies of raw intelligence reports are also disseminated to and retained by the analysts in the Directorate of Intelligence for their use in preparing "finished intelligence" is critical here. Finished intelligence is comprised of a variety of reports, studies, and publications and it is routinely the finished intelligence product that is utilized by our policymakers. The files of the Directorate of Intelligence cannot be exempted under the new Act. Therefore, both raw and finished intelligence remain accessible to the public through the files of the Directorate of Intelligence. As pointed out in the House Intelligence Committee Report:

[I]n this case the crucial feature of the CIA filing system is the practice of disseminating copies of raw intelligence reports for storage in the files of the Directorate of Intelligence; the Committee expects the CIA to continue this practice. This practice is, of course, essential to the very mission of the CIA; it would be useless to collect information and then fail to share it with analysts and policymakers. CIA dissemination practices thus ensure continued availability of raw intelligence.<sup>131</sup>

Another area identified for continued accessibility by the public was information concerning policy issues, including operational policy matters, considered at the executive levels of the CIA. Again, a close inspection of the CIA's filing practices showed that it was possible for this type of information to remain accessible. First of all, decisions at the executive level would involve one or more of the following: the Director or Deputy Director, Executive Director, General Counsel, Comptroller, Deputy Director for Administration, Deputy Director for Intelligence, Deputy Director for Operations, Deputy Director for Science and Technology, as well as other senior CIA officials. Any documents given to the Director,

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131. *Id.* at 18-19.

Deputy Director, or Executive Director by other Agency officers on any matter are filed in the CIA's Executive Registry, which remains subject to search and review under the Act. Thus, all documents on policy issues considered at the executive level will be accessible through the Executive Registry. Of course, all the CIA files not falling within the definition of operational files remain subject to search and review and any policy documents in these files remain accessible to the extent permitted by FOIA. In the event that a document is so sensitive that it is returned to an exempted operational file after it has been seen by the Director or Deputy Director, that document will still be accessible through the Executive Registry. Internal regulations require the Executive Registry to maintain a reference for any such document with sufficient information to indicate where the document is being stored, thus ensuring its future retrievability for any purpose, including FOIA. As stated in the House Intelligence Committee Report:

The fact that raw intelligence reports and policy documents are accessible through index and retrieval systems located in the Directorate of Intelligence and the Office of the Director and Deputy Director has made it possible to refine the standards for exemption of CIA operational files in the bill to ensure that enactment of the bill will preserve the availability to the public of CIA information currently releasable to the public.<sup>132</sup>

The definition of operational files contains an exception after paragraph 701(b)(3) which states that "files which are the sole repository of disseminated intelligence are not operational files." Again, this provision is designed to correspond to unique CIA filing practices. The intent of the definitional exception is to preclude the exemption of files containing extremely sensitive intelligence disseminations which are stored solely in the Directorate of Operations after having been read by the appropriate senior officials. These intelligence disseminations are the exception rather than the rule. However, since the intent of the legislation is to continue public accessibility to the intelligence product, this limited group of files is specifically excluded from the definition of operational files to ensure that they remain subject to FOIA search and review.<sup>133</sup>

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132. *Id.* at 19.

133. *See id.* at 22-23.

There exist three exceptions to the overall exemption of operational files from search and review for information in response to a FOIA request. These exceptions, found in subsection 701(c), define three types of requests that can trigger the search and review of all CIA files, regardless of exemption by the DCI under subsection 701(a).

The first exception, provided in paragraph 701(c)(1), was contained in all the Senate and House versions of the legislation. It states that, notwithstanding the exemption for operational files contained in subsection 701(a), the CIA must continue to search and review exempted operational files for information that concerns:

- (1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act), or section 552a of title 5, United States Code (Privacy Act of 1974).

For several years, the stated policy of the CIA has been to search all of its files upon request by United States citizens or permanent resident aliens for information about themselves. For example, in 1979 CIA Deputy Director Carlucci testified before the House Intelligence Committee:

At the same time we are also conscious of the competing needs of our U.S. citizens whose support and confidence we must maintain. It is for this reason that we believe that our files should continue to be accessible to American citizens and permanent resident aliens, subject to existing FOIA exemptions, to the extent that information concerning such persons may be contained in our files.<sup>134</sup>

When Director Casey testified in 1981 in support of a total exclusion for CIA, NSA, and DIA from FOIA, he ended his testimony by stating:

Mr. Chairman, I would simply like to add this morning that nothing which I have said would 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

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134. *FOIA Impact Hearing, supra* note 94, at 7.

and to obtain this information when security considerations permit. I wish to state categorically that the intelligence community would continue full compliance with the Privacy Act, even if totally exempted from the Freedom of Information Act.<sup>136</sup>

This exception is the easiest of the three exceptions to understand. Whenever the CIA receives a request from a United States citizen or a permanent resident alien, a search will be made of all CIA files and a review will be made of all, if any, responsive information without exception.<sup>136</sup> Such an exception reflected not only the CIA's position, but also the political reality that Congress would never seriously consider cutting off an individual's ability to request information about himself or herself from the CIA or any other intelligence agency.

The second exception, paragraph 701(c)(2), requires that all files continue to be searched and reviewed for information concerning "any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act)." This exception was contained in S. 1324 as introduced and reported and the CIA testified in support of the provision at all three hearings.<sup>137</sup> The Act does not contain a definition of "special activity." However, the House Intelligence Committee Report defines the term for purposes of paragraph 701(c)(2) to mean "any activity of the United States Government, other than an activity intended solely for obtaining necessary intelligence, which is planned and executed so that the role of the United States is not apparent or acknowledged publicly, and functions in support of any such activity, but not including diplomatic activities."<sup>138</sup>

The second exception recognizes that there are occasions when the CIA cannot properly use the Glomar response. When the fact of the existence or non-existence of a special activity is no longer properly classifiable, the CIA must undertake a search for any re-

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135. *FOIA Hearing*, *supra* note 99, at 581.

136. *House Intelligence Comm. Hearing*, *supra* note 88, at 13; *Senate Intelligence Comm. Hearing*, *supra* note 88, at 14; *see also House Intelligence Comm. Report*, *supra* note 88, at 23.

137. *Government Operations Hearing*, *supra* note 88, at 22-23; *Senate Intelligence Comm. Hearing*, *supra* note 88, at 14; *House Intelligence Comm. Report*, *supra* note 88, at 13; *see also Senate Intelligence Comm. Hearing*, *supra* note 88, at 24-25.

138. *House Intelligence Comm. Report*, *supra* note 88, at 28. This definition followed the Senate Intelligence Committee Report definition found on page 25.

sponsive records and then report either that it has no responsive records or that it is reviewing responsive records for possible release. When the CIA undertakes such a search, this exception ensures that all CIA files, even exempted operational files, will be subject to the search.<sup>139</sup>

It is important to understand that this exception is not meant to have any impact on what constitutes an acknowledgement of the fact of the existence or non-existence of a special activity. As stated in the House Intelligence Committee Report, “[t]he Committee emphasizes that nothing in paragraph 701(c)(2) in any way changes the statutory and case law concerning whether the existence of a special activity is exempt from disclosure under the FOIA.”<sup>140</sup>

The third exception differs from the previous two exceptions in that it was not contained in the original version of the legislation considered in the 98th Congress, i.e., S. 1324 as introduced. Paragraph 701(c)(3) requires continued search and review of exempted operational files for information concerning:

the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence, or the office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.<sup>141</sup>

The issue of continued public access to information concerning alleged intelligence abuses and improprieties was raised several times during the two days of hearings before the Senate Intelligence Committee. In his testimony before the committee, Deputy Director McMahan stated that should there be an investigation of an alleged illegality or impropriety relating to the conduct of an intelligence activity, the

information relevant to the subject matter of the investigation

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139. For the Intelligence Committee discussions of the exception, see *Senate Intelligence Comm. Report*, *supra* note 88, at 24-25, and *House Intelligence Comm. Report*, *supra* note 88, at 27-28.

140. *House Intelligence Comm. Report*, *supra* note 88, at 28.

141. 50 U.S.C. § 431(c)(3)(Supp. III 1985).

would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's Office, for example, and these files cannot be designated under the terms of this bill. The same would be true for similar reasons, Mr. Chairman, if under the Congressional Oversight Act a senior intelligence community official reports an illegal intelligence activity to this Committee or to the House Intelligence Committee.<sup>142</sup>

Later in the hearing, Chairman Barry Goldwater asked whether the CIA would

support an amendment which would make it clear that designated files will be subject to search and review if they concern any intelligence activity which the DCI, the Inspector General, or General Counsel of the Agency has reason to believe may be unlawful or contrary to Executive order or Presidential directive.<sup>143</sup>

Deputy General Counsel Ernest Mayerfeld replied that in his view

such a specific item to be legislated would be unnecessary by the very definition. If the Inspector General or the General Counsel or the Director's office has reason to believe that something may be unlawful, there is documentation on this particular matter located in those files, and they are not in designated files.<sup>144</sup>

On the second day of hearings, Senator Daniel K. Inouye raised the issue again. In his prepared statement, he reiterated CIA assurances that information concerning intelligence abuses would be available in non-designated files. However, he went on to state:

Yet there is some ambiguity about this explanation, since the files maintained by these offices might not contain all the details of the activities in question, but simply the procedural records of the investigating office. We may wish to specify, in the bill, therefore, that no records on intelligence abuses could be exempted.<sup>145</sup>

In his testimony on behalf of the ACLU, Mark Lynch indicated that this was one of two areas where they were urging amendment.

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142. *Senate Intelligence Comm. Hearing, supra* note 88, at 15.

143. *Id.* at 29-30.

144. *Id.* at 30.

145. *Id.* at 55.

The concern was that in doing the investigation, the Inspector General or the Office of General Counsel might send a representative to the component involved to conduct the review. Therefore, relevant documents in exempted operational files might not be copied and available through the Inspector General or Office of General Counsel files. To avoid this, the ACLU proposed a third proviso, i.e., an exception, to "trigger a search of the underlying relevant documents, wherever they may be located in the Agency."<sup>146</sup> When later asked by Senator Patrick Leahy whether the ACLU felt the concerns regarding access to information concerning alleged intelligence abuses or improprieties could be met "with clear language in the legislative history," Mr. Lynch responded:

I think it would be preferable to spell it out in the legislation. I think there should be another proviso as there is for information responsive to first party requests, information about covert operations the existence of which is no longer classified. There ought to be a further provision in there, information concerning the subject of an investigation for impropriety or illegality. Something along those lines I think is essential.<sup>147</sup>

The Committee agreed and amended the bill. S. 1324 was structured so that the exception for special activities was contained in a proviso to the designation authority in subsection 701(a). The committee amended the proviso to also require continued search and review of designated files

for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive in the conduct of an intelligence activity.<sup>148</sup>

In the Senate Intelligence Committee Report it was made clear that this provision was intended to ensure "that all materials relevant to the subject matter of the investigation which were reviewed and relied upon by those who conducted the investigation will be

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146. *Id.* at 69.

147. *Id.* at 77.

148. S. 1324, 98th Cong., 1st Sess., 129 CONG. REC. S16742 (daily ed. Nov. 17, 1983).



subject to search and review, even if stored solely in designated files."<sup>149</sup> The report went into detail concerning how allegations of abuse or impropriety made by an employee or by a person outside the Agency are handled within the CIA.<sup>150</sup> It is evident from the language of the proviso itself, as well as the report language, that the committee was trying to address the concerns that had been raised in a way that would not seriously detract from the relief given in the bill. The sectional analysis of the proviso ended by stating the following:

However, the proviso is not intended to open up all designated files or even an entire file because portions contain information relevant to an activity that was the subject of an investigation. The Committee's intent is rather that only those directly relevant files or portions of files shall be reviewed.<sup>151</sup>

It became apparent during the hearing before the House Intelligence Committee the following February that the Senate-passed language in the proviso was a matter of concern. Deputy Director McMahan again stressed in his testimony the availability of information concerning an alleged impropriety or illegality through the files of the Director's office, the Inspector General's office or the Office of General Counsel. In an apparent reference to the language in S. 1324 and the identical language in H.R. 4431, Deputy Director McMahan testified that "any information found relevant by the investigating office but still contained in exempted operational files would be subject to search and review in response to an FOIA request."<sup>152</sup>

The day after the Senate Intelligence Committee hearings concluded, Representative Romano Mazzoli, Chairman of the Subcommittee on Legislation of the House Intelligence Committee, introduced H.R. 3460.<sup>153</sup> Instead of requiring continued search and review of exempted operational files for information "reviewed and relied upon" in an investigation, the Mazzoli bill exception required search and review for information concerning "the subject of an investigation." All three bills, however, listed the same group

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149. *Senate Intelligence Comm. Report, supra* note 88, at 26.

150. *See id.* at 26-27.

151. *Id.* at 28.

152. *House Intelligence Comm. Report, supra* note 88, at 14.

153. *See supra* note 114 and accompanying text.

of investigating bodies. During the testimony of Mary C. Lawton, Counsel for Intelligence Policy for the Department of Justice, Rep. Mazzoli noted that the list did not specifically include the Department of Justice, and he asked whether she believed the list should be extended to include them.<sup>154</sup> Ms. Lawton replied that she did not think that the practical effect would be very different since "normally CIA could investigate internally before referring it to us for further investigation," although she did state that it appeared "rather odd that the law enforcement branch is excluded."<sup>155</sup> As a result of this exchange, the Department of Justice was included in H.R. 5164 when it was introduced in March. It remained in the bill as reported by the House Intelligence Committee and subsequently enacted. The House Intelligence Committee Report discusses the investigative responsibilities of the Department of Justice as they relate to the Intelligence Community agencies and states that all files of the CIA "will remain subject to FOIA search and review for information concerning the specific subject matter of such investigations for impropriety or illegality in the conduct of intelligence activities."<sup>156</sup>

While the CIA officials did not indicate in their testimony a strong preference for one bill over another in connection with the language concerning the investigations exception, the ACLU did. Mark Lynch testified that the Mazzoli language was "quite superior" to that contained in the Senate bill.<sup>157</sup> He explained the reasoning for their strong preference as follows:

Now, the difference is that if an investigator happens to overlook a document, he has not reviewed or relied upon it, and it would not be covered by the Senate bill, whereas the Mazzoli bill will cover all documents which concern the subject of the investigation, irrespective of whether it has been actually looked at or overlooked through inadvertence or whatever other reason.<sup>158</sup>

Subsequently Rep. Mazzoli returned to this exchange and asked Mr. Lynch whether the difference in language between the bills was really "worth fighting over."<sup>159</sup> Rep. Mazzoli opined that "re-

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154. *House Intelligence Comm. Hearing, supra* note 88, at 31.

155. *Id.*

156. *House Intelligence Comm. Report, supra* note 88, at 30.

157. *House Intelligence Comm. Hearing, supra* note 88, at 49.

158. *Id.*

159. *Id.* at 58.

lied upon' may be too narrow [but] 'concerning the subject' is as broad as the universe."<sup>160</sup> After Mr. Lynch reiterated his concern that the investigators might overlook relevant information, Rep. Mazzoli stated that he felt that the language in his bill (H.R. 3460) "seems to be just a little bit murky and amorphous, and it may lead to more problems."<sup>161</sup>

Rep. Mazzoli's concerns led to further negotiations following the hearing. The goal was to craft the exception to include any information that might have been overlooked and yet preclude an expansive interpretation as to which exempted operational files would have to be searched and reviewed under the exception. The language finally agreed upon was incorporated into H.R. 5164 and, as cited above, required continued search and review of exempted operational files for information concerning "the specific subject matter of an investigation." The House Intelligence Committee Report again outlined the procedures within the CIA for investigating an alleged impropriety or illegality in connection with an intelligence activity.<sup>162</sup> In discussing the intent behind the revised language, the House Intelligence Committee Report stresses that "[t]he key requirement is that information concern the specific subject matter of the investigation, not that the information surfaced in the course of the investigation."<sup>163</sup> The report then goes on to state:

The specificity requirement in the phrase 'specific subject matter of the investigation' tailors the scope of information remaining subject to the FOIA process to the scope of the specific subject matter of the investigation. This tailoring was intended to avoid the possibility of an unreasonably expansive interpretation of paragraph 701(c)(3) to include as subject to search and review information wholly unrelated to any question of illegality or impropriety.<sup>164</sup>

There is a second and equally important phrase contained in the exception that should be noted. For the exception to apply, the investigation must concern a possible impropriety or illegality "in the conduct of an intelligence activity." The intent was to exclude investigations of possible criminal conduct by CIA employees, such

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160. *Id.*

161. *Id.*

162. *House Intelligence Comm. Report, supra note 88, at 28-29.*

163. *Id.* at 30-31.

164. *Id.* at 31.

as stealing office equipment, which has no relationship to an intelligence activity. The phrase is intended to make it "clear that the continued obligation to search and review exempted operational files for information concerning an investigation for impropriety or illegality extends only with respect to an impropriety or illegality that has a nexus to an intelligence activity."<sup>165</sup>

Occasionally, in the context of a FOIA lawsuit, the issue arises as to whether certain documents are agency records or congressional documents.<sup>166</sup> This is an important distinction since congressional documents are not subject to FOIA. The House Report specifically addresses this issue in connection with the investigations exception since it covers investigations by the intelligence committees of the Congress. The committee's views are set forth in the following statement:

The Committee emphasizes that nothing in paragraph 701(c)(3) is intended to affect the definition of agency records subject to request under the FOIA, as distinguished from congressional documents not subject to request under the FOIA, or to waive in any way the prerogatives of the House of Representatives and the Senate to maintain control over, and confidentiality of, documents generated in the course of congressional activities.<sup>167</sup>

## 2. Internal Dissemination of Information Within the CIA

Subsection 701(d) contains three paragraphs designed to address the internal dissemination of information that has been transferred from exempted to nonexempted operational files. The provisions in paragraphs 701(d)(1) and (2) were contained in some manner in all of the House and Senate bills. Paragraph 701(d)(1) states that nonexempt files "which contain information derived or disseminated from exempted operational files" will continue to be subject to search and review. The intent of the paragraph is to ensure that "the status of a file which is not exempted does not change by the addition to it of information from an exempted operational file; the receiving nonexempted file remains subject to search and re-

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165. *Id.*

166. See, e.g., *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983), *modified*, 724 F.2d 201 (D.C. Cir. 1984); *Holy Spirit Ass'n for Unification of World Christianity v. CIA*, 636 F.2d 838 (D.C. Cir. 1980), *vacated in part*, 455 U.S. 997 (1982); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

167. *House Intelligence Comm. Report*, *supra* note 88, at 29-30.

view."<sup>168</sup> On the other hand, it was equally important to protect the exempted status of the operational file from which the information was derived or disseminated. In order to do so, paragraph 701(d)(2) was written to provide that the dissemination of information from an exempted operational file to a nonexempted file does not change in any way the exempted status of the originating operational file. "Therefore, under paragraphs 701(d)(1) and (2), the flow of records and information from a file which is exempted to a file which is not exempted has no effect on the exempted/nonexempted status of the two files."<sup>169</sup>

Paragraph 701(d)(3) was not included as a separate provision in the legislation until the introduction of H.R. 5164. It addresses a particular internal record-keeping practice of the CIA that was discussed during the Senate and House Intelligence Committee hearings and touched upon earlier. On rare occasions, information is shown to the Executive Director, Deputy Director and/or Director that is of such a sensitive nature that the documents themselves are not maintained in the Executive Registry but taken back to operational files for retention. In such cases, the CIA requires that a "dummy copy" of the document be filed in the Executive Registry in lieu of the document itself.<sup>170</sup> The "dummy copy" is a reference page that contains sufficient information concerning the subject matter, author, and location of the document so as to make it retrievable. The Executive Registry remains subject to FOIA search and review under the Act and the Senate Intelligence Committee Report, in discussing the referencing requirement, states that "under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to FOIA search and review requirements. All documents referenced in the Executive Registry will be subject to search and review."<sup>171</sup>

Language in the legislative history, however, was felt to be inadequate. In testifying before the House Intelligence Committee for the ACLU, Mark Lynch noted the clear legislative intent in the Senate Intelligence Committee Report, but went on to state: "We think this issue is sufficiently important that it should be elevated from the level of being dealt with in report language and should be

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168. *Id.* at 31.

169. *Id.* at 32.

170. *See Senate Intelligence Comm. Hearing, supra* note 88, at 30-31.

171. *Senate Intelligence Comm. Report, supra* note 88, at 14.

dealt with in statutory language, which should not be too difficult to draft."<sup>172</sup> And so it was. The paragraph reads:

(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.<sup>173</sup>

Language in the House Intelligence Committee Report clearly sets forth the intent of the paragraph:

As a result of this provision, when the CIA is searching a non-exempted file for records responsive to a FOIA request and locates a marker reference which substitutes for a record in an exempted operational file which may be responsive, the CIA must retrieve the record from the exempted operational file and process it in response to the FOIA request.

The marker [sic] reference practice is of particular importance given its use in some circumstances in the Executive Registry of the CIA, which serves the Director of Central Intelligence, the Deputy Director of Central Intelligence and the CIA Executive Director. Under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to the FOIA search and review requirements.<sup>174</sup>

### 3. Judicial Review

Judicial review was by far the most difficult and complex issue that had to be dealt with by the legislation. Interestingly enough, the subject of judicial review was not really addressed by those concerned with the legislation until after the hearing before the Senate Intelligence Committee. During this hearing, it became clear that there were widely divergent opinions as to whether there would be any judicial review at all of the actions taken by the CIA pursuant to the legislation. The Senate Intelligence Committee decided that there should be, and added judicial review provisions. Further concerns were expressed in the hearings before the House

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172. *House Intelligence Comm. Hearing, supra* note 88, at 50.

173. 50 U.S.C. § 431(d)(3) (Supp. II 1985).

174. *House Intelligence Comm. Hearing, supra* note 88, at 32.

Intelligence Committee and the provisions were revised. Some of the remarks and exchanges made during these hearings are important in understanding how Congress finally decided upon the judicial review provisions in the Act.

As judicial review was not mentioned in Deputy Director McMahon's prepared testimony for the Senate Intelligence Committee hearing, the issue first arose during an exchange between Senator Walter Huddleston and Deputy Director McMahon and Deputy General Counsel Mayerfeld.<sup>175</sup> Senator Huddleston asked them whether they agreed with his assumption "that the courts would be able to review the determination that a particular file or set of files is exempt from search and review."<sup>176</sup> They did not agree, and Mr. Mayerfeld responded that he understood "the designation by the DCI would not be judicially reviewable and that this bill would delegate that authority to the DCI."<sup>177</sup> He then added that "any other interpretation I think would turn this legislation on its head, because if every time the designation by the DCI were challenged in court, we would be right where we started."<sup>178</sup> It was clear from further questioning that the CIA felt any kind of judicial review would defeat the relief sought by the legislation.<sup>179</sup>

The concern over judicial review began to crystallize during the second day of hearings before the Senate Intelligence Committee.<sup>180</sup> The prepared statement and oral remarks of Mark Lynch best illustrate the lack of exchange and opposing assumptions that had existed concerning judicial review during the previous months

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175. *Senate Intelligence Comm. Hearing, supra* note 88, at 23.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. In his opening statement, Senator David Durenberger listed the lack of judicial review as one of the problems he had with the bill. *Id.* at 45. Senator Daniel Inouye made it clear in his prepared statement that he felt judicial review would apply, just as it does under the current FOIA. *Id.* at 54. Chairman Barry Goldwater asked Mary Lawton from the Department of Justice whether she thought the DCI designations should be subject to judicial review. Ms. Lawton replied that she believed "it would be very difficult . . . for a court which has no knowledge of or experience with the CIA filing system to second-guess the Director on a description of whether the files fit the statutory definition." *Id.* at 47. In a subsequent exchange with Senator Patrick Leahy, Ms. Lawton indicated her belief that S. 1324 did not provide for judicial review, and that if the legislation remained silent on the issue of judicial review, case law would allow the Department of Justice the option of arguing that judicial review of the designations was precluded. *Id.* at 51. If some form of judicial review were included, Ms. Lawton made it clear that the Department of Justice would press the courts to give great deference to the designation decision of the DCI. *Id.*

of discussion. In summarizing his statement for the Committee, Mr. Lynch expressed "surprise" at the CIA's testimony on judicial review and expressed the ACLU's position that judicial review was "absolutely essential."<sup>181</sup> His prepared statement indicated the ACLU's belief that the bill's silence on judicial review meant that the courts would have the authority to conduct de novo judicial review of the operational file designations and went on to press the committee to have the bill and the legislative history clearly provide for such a review. In his view, de novo judicial review would not result in the document-by-document review feared by the CIA. To resolve any question about the availability of judicial review, Mr. Lynch proposed that the designation authority of the DCI be struck and the bill structured so that Congress determined which operational files could be designated.<sup>182</sup> He felt that such a congressional determination, along with the necessary legislative history, "would make it clear that this action, like all other actions under the act, are subject to judicial review" and would preclude the Justice Department from arguing that the standard of review was other than de novo.<sup>183</sup>

Subsequent witnesses differed in their views on judicial review of the file designations. There was testimony from representatives of the American Newspaper Publishers Association,<sup>184</sup> the Society of Professional Journalists,<sup>185</sup> the ABA Standing Committee on Law and National Security,<sup>186</sup> and the Center for Law and National Security.<sup>187</sup> The two-day hearing impressed everyone with the impor-

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181. *Id.* at 68.

182. *Id.* at 71, 73-74.

183. *Id.* at 76.

184. Charles S. Rowe, testifying on behalf of the American Newspaper Publishers Association, stated that the absence of judicial review was "of primary concern" to his association. *Id.* at 79. He went on to state that the de novo review provision of the FOIA "put teeth into the law and helped make it an effective tool for the public." *Id.* at 80.

185. Steven Dornfeld, National President of the Society of Professional Journalists, questioned whether "the lack of review [would] increase the likelihood of abuses by the Agency." *Id.* at 85.

186. John Shenefield, a member of the ABA Standing Committee on Law and National Security, appearing in his personal capacity, testified that the bill's silence on judicial review would reasonably allow for the conclusion that it was not available, which he believed was "appropriate." *Id.* at 98. As for the proper standard of judicial review should the Congress provide for it, he stated his belief "that de novo review in this area is absolutely inappropriate." *Id.* at 99.

187. The last remarks made on the issue of judicial review came from John Norton Moore. Mr. Moore, Director of the Center for Law and National Security, University of Virginia Law School, and Chairman of the ABA Standing Committee on Law and National Security, had also testified in his personal capacity. In responding to a question concerning



tance of the judicial review issue and the necessity for the Senate Intelligence Committee to clearly express its intentions through statutory language, legislative history, or both. It soon became evident that if the legislation was to survive politically, some kind of statutory judicial review provision had to be crafted. Over the next three months, intensive and tedious negotiations took place in an effort to reach agreement on provisions to govern judicial review. With the CIA having testified against any judicial review and the ACLU and press groups insisting on de novo judicial review, it was difficult, to say the least, and required give and take on all sides.

Agreement was finally achieved, however, and on October 4, 1983 the Senate Intelligence Committee met to mark up S. 1324. All Committee members who addressed the judicial review amendment, contained in a new subsection 701(e) and incorporated into the substitute bill, expressed their support for it. The CIA was commended for moving from its position of no judicial review.<sup>188</sup> Senator Leahy discussed one of the major areas of concern that had been identified in the negotiations on a judicial review provision:

In our discussions, it became clear that the Agency's central concern was not judicial review per se, but a fear that plaintiffs might be able to use the discovery process to circumvent the Bill's intent and uncover sensitive aspects of CIA operational file systems. As a member of this Committee, I understand and share the CIA's concern in this respect. For this reason, I agree with draft Report language which states that '[t]he Committee does not intend that this amendment will require CIA to expose through litigation, via discovery or other means, the make up and contents of sensitive file systems of the Agency to plaintiffs.'<sup>189</sup>

The new subsection 701(e), consisting of two paragraphs, was intended "to provide for judicial review in certain circumstances."<sup>190</sup>

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judicial review, Mr. Moore testified emphatically that there should be no judicial review of the designations; furthermore, he had no doubt that under the language of S. 1324 the designations by the DCI would not in fact be reviewable. *Id.* at 103-04.

188. *See id.* at 122-24 (remarks of Senator Patrick Leahy); *see also id.* at 113 (remarks of Senator Daniel Inouye); *id.* at 116 (remarks of Senator Walter Huddleston). For text of new subsection 701(e), see S. 1324 as reported, *reprinted in* 129 CONG. REC. S16742-43 (daily ed. Nov. 17, 1983).

189. *Senate Intelligence Comm. Hearing, supra* note 88, at 124. Draft report language cited included in final Senate Intelligence Committee Report at 19.

190. *Senate Intelligence Comm. Report, supra* note 88, at 19.

Paragraph 701(e)(1) provided that whenever a complaint alleged improper designation of files or improper placement of records solely in designated files, courts could review the CIA's regulations (required under the new paragraph 701(d)(1)) implementing the designation authority contained in subsection 701(a). The court's jurisdiction was initially limited to a review of the regulations. The Senate Intelligence Committee Report stated the expectation that "the court will uphold the validity of those regulations if there is a rational basis to conclude that the implementing regulations conform with the statutory criteria for designating files."<sup>191</sup> The court's review of the complainant's allegations could not go any further unless the complaint was supported with an affidavit, based on personal knowledge or otherwise admissible evidence, which made a prima facie showing of the allegations in the complaint. If a court found the affidavit sufficient to make a prima facie showing, the court was required to order the CIA to file a sworn response justifying the file designation or the filing of the record in dispute solely in designated files. It was only at this point that a court had jurisdiction to review the underlying designation explanations or filing procedures required in subparagraphs 701(d)(1)(B) and (C), respectively. The CIA's response could be filed in camera and ex parte if classified information was involved. While the Committee thought a court could normally make a decision based on these submissions, the report made it clear that a court had the authority to require additional affidavits or even the submission of requested CIA's records "in extraordinary circumstances."<sup>192</sup> The Report also stated, however, that the committee did not "anticipate the court's review to include examining the file in question or conducting any other form of discovery."<sup>193</sup> If a court found there was no rational basis upon which to hold that the regulations conformed to the statutory criteria in subsection 701(a), or that the CIA had improperly designated a file or improperly filed records solely in designated files, the court was required to order the CIA to search designated files for the requested records and review them under the provisions of the FOIA. The report stated that it was "the intent of this Committee that this be the sole remedy for either nonconformance of the regulations with the statute, improper placement of records solely in designated

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191. *Id.* at 30.

192. *Id.* at 31.

193. *Id.*

files, or improper designation of a file."<sup>194</sup> The paragraph ended with a provision requiring a court to dismiss the complaint if at any point during the litigation the CIA agreed to search for the requested records in designated files.

Paragraph 701(e)(2) provided that where a complaint alleged improper withholding of records because of failure to comply with the regulations required by 701(d)(2) (which would govern the review of designated files not less than once every year for possible redesignation), the court's review would be limited to determining whether the CIA considered the criteria set forth in such regulations.<sup>195</sup> Thus, if a court found that the CIA had considered the public interest or the historical value of a category of files and had considered whether a significant portion of the information could be declassified, the court could not substitute its own judgment for that of the CIA concerning the dedesignation of a file.

While the CIA was not elated over the inclusion of statutory provisions ensuring judicial review, officials there believed that, given the political realities, a reasonable compromise had been achieved. Furthermore, they believed the unanimous consent passage of S. 1324 by the Senate meant that the judicial review issue was settled. It was their turn to be surprised, as indeed they were, by the testimony given before the House Intelligence Committee the following February.

In his testimony before the House Intelligence Committee, Deputy Director McMahon did not specifically discuss judicial review but only referred to it indirectly when he remarked that the amendments to S. 1324 "were achieved through good faith negotiations and compromise on the part of all parties involved."<sup>196</sup> Later, in response to questioning by Representative William Whitehurst, the CIA made it clear that they still preferred no judicial review of the file designations by the DCI but, having realized there was no chance of passage without provisions for judicial review, accepted the language added to S. 1324 (and included in H.R. 4431) as language the CIA could "live with."<sup>197</sup> Questioning by Representative Mazzoli elicited the CIA's view that his bill, H.R. 3460, in which operational files were defined and exempted without a DCI desig-

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194. *Id.*

195. S. 1324, 98th Cong., 1st Sess., 129 CONG. REC. S16742 (daily ed. Nov. 17, 1983).

196. *House Intelligence Comm. Hearing, supra* note 88, at 15.

197. *Id.* at 17-18.

nation process, could be seen to preclude judicial review, since it was Congress legislating which files were to be exempted from FOIA search and review. Representative Mazzoli responded that his intent was to retain the current FOIA de novo judicial review in his bill so that it could be compared with the Senate version.<sup>198</sup> The testimony indicated, however, that it is difficult to compare the two because the current judicial review provisions of FOIA address whether the *information* in a particular document has been improperly withheld under any of the existing nine exemptions, not the question of the exemption of particular *files* from FOIA processing. The latter is the issue presented by this legislation, and the CIA stated there is "no case law that instructs us on this."<sup>199</sup> Representative William Goodling concluded the Committee's questioning of the CIA on this issue by asking whether the CIA would continue to support the legislation if it was amended for "full blown" de novo judicial review. Deputy General Counsel Mayerfeld responded in the following manner:

What is de novo review? That is a term of art. Let me say that if the review meant that a plaintiff by means of discovery could examine our entire file systems and make us prove, the way we have to today, that a piece of information is classified, make us prove that we filed properly or that every piece of paper in that file ought to be in there, if the judicial review is that unfettered, then we could no longer live with it.<sup>200</sup>

Concern over the extent of judicial review was echoed by Mary Lawton. She expressed the Justice Department's preference for H.R. 3460 since, in their view, the judicial review provisions in H.R. 4431 (and S. 1324) offered a range of new issues to be litigated. The litigation burden on the Department and the CIA could increase, resulting in a cure worse than the disease.<sup>201</sup> In the question and answer period following her prepared statement, Ms. Lawton repeatedly gave the position of the Department of Justice of no judicial review under H.R. 3460. This view was based on the fact that in H.R. 3460 it was "the Congress of the United States designating the files, and acts of Congress are reviewable customa-

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198. *Id.* at 23-24.

199. *Id.* at 24.

200. *Id.* at 26.

201. *Id.* at 30; *see also id.* at 32 (Ms. Lawton outlined the various legal challenges she believed possible).

rily when you are challenging them on constitutional grounds.”<sup>202</sup> Given that access under FOIA is a statutory right, she stated that in her view “there will be a one-shot test of whether that is reviewable. My best guess is it would be found not reviewable, and that would be the end of it.”<sup>203</sup>

Representative Mazzoli again stated in his exchanges with Ms. Lawton that it was his intention that H.R. 3460 incorporate the current judicial review available under FOIA.<sup>204</sup> He also made it clear that one of his concerns was to ensure access by judges to the information in dispute. Representative Whitehurst and Deputy General Counsel Mayerfeld, who were asked to join Ms. Lawton, stated their belief that the Senate/Whitehurst bill, H.R. 4431, provided judges with the necessary access. When questioned whether he believed that language should be added to the bill to keep the current practice of judicial access to documents, Mr. Mayerfeld replied that the CIA was “not worried about judges looking at our files and judges satisfying themselves, but if it gives rise to a litigating right and permits the plaintiff an unfettered kind of discovery, to walk through our files, that is what we would find intolerable.”<sup>205</sup>

The next witness was Mark Lynch of the ACLU. While he disagreed with Ms. Lawton’s testimony that silence on judicial review in H.R. 3460 could preclude it, he noted that the possibility of such an argument by the Department of Justice required Congress to clearly address the issue of judicial review. He suggested that one way to address Ms. Lawton’s view that a congressional designation of files would preclude judicial review would be to amend H.R. 3460 to give the DCI the authority to exempt operational files as defined in the bill.<sup>206</sup>

He also disagreed with Ms. Lawton’s view that “there is no precedent to guide the courts in the way disputes under this statute might be handled.”<sup>207</sup> Mr. Lynch believed that the body of law that developed concerning the adequacy of a search for requested documents by an agency would be useful in litigation under this legislation. While Mr. Lynch left no doubt that *de novo* judicial

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202. *House Intelligence Comm. Hearing, supra* note 88, at 31.

203. *Id.* at 32.

204. *Id.* at 34.

205. *Id.* at 36.

206. *Id.* at 51.

207. *Id.* at 52.

review was a requirement for ACLU support of the legislation, he indicated his belief that de novo judicial review under this legislation would not "require the same kind of litigation demands that the Agency has experienced when the issue has been whether a particular document is exempt under the act."<sup>208</sup> Nor did he think that de novo review would give "plaintiffs an unfettered right of discovery into the Agency's file system," a possibility that worried the CIA.<sup>209</sup> Later, in response to a question concerning depositions, Mr. Lynch testified that while he did not "anticipate" an occasion under the legislation where a plaintiff could depose a CIA official, he would not rule out the possibility of a judge deciding "in some extraordinary circumstances" that live testimony was required from a CIA official with a plaintiff proposing some questions for the judge to ask.<sup>210</sup> However, he did not foresee this happening very often because "ordinarily the CIA's first affidavit demonstrating compliance with the statute—assuming that it is a sufficient affidavit—is going to resolve the issue because unless the plaintiff can come up with an affidavit controverting the CIA's affidavit, there is no need for the judge to go further."<sup>211</sup>

In his prepared statement, Mr. Lynch characterized the judicial review paragraph of S. 1324 and H.R. 4431, paragraph 701(e)(1), as "hastily drafted on the eve of the Senate Committee's mark-up."<sup>212</sup> He suggested that the House Intelligence Committee consider five different "principles" which the ACLU believed could clarify the intent of the paragraph.<sup>213</sup> First, the legislation should provide for judicial review of all disputes. In his oral testimony, Mr. Lynch listed three areas of dispute: (1) whether the designated files meet the definition of operational files in the bill; (2) whether documents which should have been found outside of designated operational files have been improperly placed solely in designated operational files; and (3) whether the request triggers search and review of designated operational files under one of the exceptions for first person requests, a special activity the existence of which is no longer exempt from disclosure, or information concerning an investigation for illegality or impropriety in the conduct of an intelligence activity.

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208. *Id.*

209. *Id.* at 53.

210. *Id.* at 60-61.

211. *Id.* at 53.

212. *Id.* at 38-46.

213. *Id.* at 44-45.

Secondly, the focus of any judicial review of a complaint under paragraph 701(e)(1) should be on whether the CIA's action complied with the statute, and not on the question of whether the regulations required by paragraph 701(d)(1) complied with the statute. Mr. Lynch remarked that he found the CIA's compliance with its regulations to be "irrelevant."<sup>214</sup>

Third, various procedures consistent with current litigation practice needed to be set forth in a clear manner. These were explained as follows:

Whenever a complaint alleges that the CIA has not complied with the statute, the Agency should be permitted to rebut the allegation with an affidavit from an appropriate Agency official averring that the Agency has complied with the statute. At that point, the burden of proof should shift to the plaintiff to show a genuine dispute that the Agency's affidavit is incorrect. We have no objection to requiring the plaintiff to do this by an affidavit based on personal knowledge or otherwise admissible evidence, for the Federal Rules of Civil Procedure require no less. If the court finds that the plaintiff has raised a genuine issue that the Agency has not complied with the legislation, it can require further submissions from the CIA, which can be filed *in camera* ex parte if they are classified. This procedure of *in camera* ex parte filings, when necessary, is consistent with current practice. Although we agree that the plaintiff would not be able to direct discovery to the CIA on his own initiative, it is important that the court have the authority to require the CIA to make whatever submission which the court determines is necessary to resolve the controversy before it. Any implication in the Senate Report that this authority is circumscribed should be rejected. However, we stress that (1) ordinarily a CIA affidavit demonstrating compliance with the statute will be sufficient, and (2) these affidavits would not be the same as the detailed affidavits which the Agency is required to file in support of its decisions to withhold documents under the exemption to the FOIA.<sup>215</sup>

Fourth, the standard of judicial review should be *de novo*, rejecting the "rational basis" standard contained in the Senate Report to S. 1324.<sup>216</sup>

Fifth, and finally, the ACLU suggested that the legislation

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214. *Id.* at 60.

215. *Id.* at 45.

216. *Id.*

clearly state that any litigation under section 701 would be reviewable under subparagraph 552(a)(4)(B) of FOIA, which is the de novo judicial review provision for disputes under FOIA. They proposed that their suggested litigation procedures be spelled out in the legislative history, although they indicated a willingness to have them incorporated into the legislation.<sup>217</sup> It is evident from a review of the legislation as amended and reported out by the House Intelligence Committee that these suggestions by the ACLU had a direct impact upon the development of the legislation subsequent to the hearing.

John Shenefield also testified before the House Intelligence Committee. This time he testified on behalf of the American Bar Association (ABA). In that capacity, he testified concerning the support of the ABA for both H.R. 3460 and H.R. 4431, with a "slight personal preference for H.R. 4431 simply because it deals precisely with the mechanics of judicial review."<sup>218</sup> Later, in response to a question by Chairman Edward Boland, Mr. Shenefield stated that "the position of the ABA, however it is worded, is one in favor of substantial deference to the DCI in his designation of these files."<sup>219</sup> When Representative Mazzoli asked Mr. Shenefield the meaning of de novo review, he began his response by saying "it is pretty much what the Congress wants it to be in a particular statute" and went on to testify that the position of the ABA was that de novo review, as it is generally understood in the practice of administrative law, is an improper standard of judicial review for disputes arising under this legislation.<sup>220</sup>

At the conclusion of the hearing there was little doubt in anyone's mind that changes would be made in the judicial review section. No one believed it would be easy and it, in fact, turned out to be a tedious process of negotiations. In the middle of March, Representatives Mazzoli, Boland, Robinson and Whitehurst introduced H.R. 5164 (see Appendix 1) which incorporated the agreed upon amended judicial review provisions. These provisions, except for minor technical changes, were included in the amendment in the nature of a substitute which was favorably reported out on April 11, 1984. The amended provisions largely included the suggested changes made by the ACLU and, at the CIA's insistence, the pro-

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217. *Id.*

218. *Id.* at 65.

219. *Id.* at 80-81.

220. *Id.* at 88.



cedural provisions were included in the bill rather than set out in legislative history. The requirement in subsection 701(d) of S. 1324 and H.R. 4431 for the promulgation of regulations implementing the new operational file exemption authority was dropped from H.R. 5164, since it was agreed that the CIA would have to craft implementing regulations in any event. The judicial review provisions in H.R. 5164 deleted the requirement in S. 1324 and H.R. 4431 that the court first review CIA compliance with its regulations in the event of a complaint against the CIA of improper designation of operational files or improper placement of records solely in designated files.

Given the changes that were made in the judicial review provisions by the House Intelligence Committee, and the subsequent enactment of these changes as part of H.R. 5164, the House Intelligence Committee Report is a critical part of the legislative history of the judicial review provisions and the congressional intent behind the provisions. Therefore, the following discussion of the enacted judicial review provisions will focus on the explanation of section 701(f) as set forth in the House Report.

The basic premise underlying subsection 701(f) is *de novo* judicial review within a "precisely defined procedural framework."<sup>221</sup> It provides that whenever a person alleges that the CIA has improperly withheld records requested pursuant to FOIA because of failure to comply with the provisions of section 701, the review by the courts shall be "under the terms set forth in section 552(a)(4)(B) of Title 5, United States Code"<sup>222</sup> and it then goes on to list seven procedural provisions for *de novo* judicial review of actions taken under section 701. Two witnesses before the Committee had testified to the effect that *de novo* judicial review was whatever the Congress defined it to be. Thus, the Committee sought to maintain the current standard of *de novo* review under FOIA while providing procedures to meet the CIA's fears of plaintiff access to entire file systems and litigation burdens in excess of what they were currently facing in FOIA litigation.

The Committee determined that "*de novo* judicial review is essential to ensure effective CIA implementation of the Freedom of Information Act and to maintain public confidence in the imple-

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221. *House Intelligence Comm. Report, supra* note 88, at 32.

222. *Id.*

mentation of the Act.”<sup>223</sup> The report goes on to explain the intent of the subsection by stating:

Thus, by virtue of subsection 701(f), CIA action to implement section 701 will be subject to judicial review in the same manner as CIA action [is subject] to judicial review currently, except to the extent that paragraphs 701(f)(1) through (7) provide specific procedural rules. Matters not addressed by paragraphs 701(f)(1) through (7) will continue to be decided in accordance with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience. Nothing in H.R. 5164 in any way affects the law of evidence.<sup>224</sup>

The first procedural provision in paragraph 701(f)(1) requires *ex parte* in camera review by the court of any properly classified information which the CIA files with, or produces for, the court. This limitation of access to classified information pertaining to a case

is generally consistent with current practice under FOIA. However, because issues arising under H.R. 5164 will be considered in the context of CIA's most sensitive operational files, the Committee believed it appropriate to provide expressly in statute that classified information involved in judicial review of CIA action under H.R. 5164 is for the judge's eyes only.<sup>225</sup>

The second procedural provision in paragraph 701(f)(2) also largely reflects current practice under FOIA. It requires a court, “to the fullest extent practicable, [to] determine issues of fact based on the sworn written submissions of the parties.”<sup>226</sup> Once again, the Committee thought that it was necessary to put this procedure into the statute because of the sensitivity of the operational files which would be involved in litigation under section 701. The discussion of paragraph 701(f)(2) in the report goes on to explain that although the Committee expects in most cases for the court to be able to determine factual issues on the basis of sworn written submissions, it explicitly noted that a court may need to go further in certain cases. “Thus, when necessary to decision, the

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223. *Id.* at 32-33.

224. *Id.* at 33.

225. *Id.*

226. *Id.*

court may go beyond sworn written submission to require the Agency to produce additional information, such as live testimony, or the court may examine the contents of operational files."<sup>227</sup> The ability of a court to obtain whatever information it needs for decision had been strongly urged by the ACLU.<sup>228</sup>

Paragraph 701(f)(3) requires a complainant who alleges improper withholding of requested records because of improper placement solely in exempted operational files to support his complaint with a sworn written submission based on the complainant's personal knowledge or otherwise admissible evidence. As the report notes, the requirement of personal knowledge or otherwise admissible evidence is consistent with Rule 56(e) of the Federal Rules of Civil Procedure. In order to defend against such an allegation, the Committee recognized that the CIA may have to search exempted operational files for any responsive records and, should records be located, determine whether they were properly filed. The report then states the reasoning and intent behind the paragraph:

Since one of the basic purposes of H.R. 5164 is to remove from the CIA precisely this burden of searching exempted operational files, the Committee believed that the CIA should not be forced by a mere allegation of improper filing into a position of having to search exempted operational files to defend a lawsuit. Accordingly, a complainant alleging that requested records were improperly [sic] withheld because of improper placement of records solely in exempted operational files must support such an allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence. When such an allegation of improper placement of records is supported by such a submission based upon personal knowledge or otherwise admissible evidence, the CIA must answer and defend against the allegation. In responding to the complainant's submission, the CIA may, of course, challenge its factual basis.<sup>229</sup>

Paragraph 701(f)(4) deals with the procedural aspect of a complaint that the CIA improperly withheld requested records because of improper exemption of operational files. Subparagraph 701(f)(4)(A) provides that when a complaint of this nature is filed,

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<sup>227</sup> *Id.*

<sup>228</sup> See *supra* text accompanying note 215.

<sup>229</sup> *House Intelligence Comm. Report, supra* note 88, at 34.

the CIA has the burden of sustaining its action pursuant to the requirement of section 552(a)(4) of FOIA. The new subparagraph (A) states that the CIA shall do this by sworn written submission in which the CIA will demonstrate that the function of the exempted operational files likely to contain responsive records meets the functions set forth in the definition of operational files in subsection 701(b).

Subparagraph 701(f)(4)(B) recognizes the similarity of purpose but difference in procedure between an allegation of improper exemption of operational files and an allegation of improper placement of records solely in exempted files. The subparagraph states that unless a complainant disputes the CIA's sworn written submission regarding the function of the exempted operational files involved with a sworn written submission based on personal knowledge or otherwise admissible evidence, the CIA may not be ordered by the court to review the records contained in any of the exempted operational files in order to carry the burden of proof required in subparagraph 701(f)(4)(A). Here again, one of the basic purposes of the legislation, to relieve the CIA of the burden of search and review of sensitive operational files, is achieved. The Committee crafted the provision so that the CIA would not have to undergo an extensive search and review of exempted operational files unless the complainant had personal knowledge or otherwise admissible evidence as to the allegation being made.<sup>230</sup> The difference in procedure between an allegation of improper placement of records under paragraph 701(f)(3) and an allegation of improper exemption of files under paragraph 701(f)(4) is that, when alleging improper placement of records solely in exempted operational files, the complainant must support such an allegation with his sworn written statement at the initial stage of the litigation for the CIA to be required to answer the allegation. However, when the allegation is improper exemption of operational files, the submission of a sworn written statement by the plaintiff is not required before the CIA has to respond and carry its burden of sustaining the propriety of the exemptions under subparagraph 701(f)(4)(A). If, after the filing of CIA's response by sworn written submission,

the complainant *thereafter* files a sworn written submission genuinely disputing the CIA's submission concerning the functions of the files, the court may in its discretion order the CIA to review the

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230. *See id.* at 35.

contents of operational files in connection with determination of the issue of improper exemption of the operational files. Of course, if the CIA fails to sustain its burden to demonstrate the propriety of the exemptions of the files in issue due to the insufficiency of its sworn written submissions and any other submitted information, the court will, under paragraph 701(f)(6), order the CIA to search such files for responsive records, and the reference in subparagraph 701(f)(4)(B) to a complainant's submission would be inapplicable.<sup>231</sup>

The House Report concludes its discussion by again affirming a court's authority to review whatever CIA material it needs in order to reach its decision, including the contents of exempted operational files likely to contain responsive documents, if the court finds the written submissions to be inadequate.<sup>232</sup>

Paragraph 701(f)(5) limits discovery by both parties under rules 26 through 36 of the Federal Rules of Civil Procedure to requests for admission under rules 26 and 36. In doing so, the Committee responded to major litigation concerns of the CIA. Requests for admission will be allowed because it was believed that they would not pose a significant risk of compromise of classified information. It is important to note that the limitation on discovery goes only to litigation alleging improper placement of records solely in exempted operational files, or improper exemption of operational files under paragraphs 701(f)(3) and (f)(4), respectively. The report gives the intent of the Committee concerning discovery on other issues by stating it is not to be "either especially encouraged or discouraged in any manner" but should "continue to be governed by the practices developed by the courts under the judicial review provision of the Freedom of Information Act."<sup>233</sup> The report also noted that this paragraph did not address access to information by the court, and specifically stated that the paragraph did not preclude complainants from suggesting to the court matters the court should address and seek answers on from the CIA in deciding the issues in the case.<sup>234</sup>

Paragraph 701(b)(6) is an important paragraph because it sets forth the only available remedy if a court finds that the CIA has failed to comply with section 701. Should it make such a finding,

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231. *Id.* at 34-35 (emphasis added).

232. *Id.* at 35.

233. *Id.*

234. *See id.*

the court must order the CIA "to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act)."<sup>235</sup> This certainly is an appropriate remedy, since the heart of the issue in any of these cases is a complainant who has been denied records requested pursuant to the FOIA, and by this order the CIA will have to conduct the usual search and review for requested records in otherwise exempted operational files and make the appropriate releases. It is important to understand that the remedy requires the requested records to be released in accordance with FOIA, which includes the nine exemptions in subsection 552(b) of FOIA. Therefore, an order to search and review for responsive documents could result in the release of varying amounts of information ranging from significant to slight, if any, once the exemptions have been applied. The Committee accepted this as a reasonable remedy which served the interests of the complainant and calmed the concerns of the CIA as to what would occur if each court could fashion its own remedy in each case. The report also noted that this exclusive remedy provision did not affect the power of the court in other matters in the case, such as punishing contempt or awarding attorney fees.<sup>236</sup>

The final procedural exception, 701(b)(7), was insisted upon by the CIA. It provides that if at any time after the complaint is filed the CIA agrees to search for the requested records in the appropriate exempted operational files and process them under FOIA, the court must dismiss the claims alleging failure to comply with section 701. This is to ensure that once the CIA agrees to search for and review records responsive to the complainant's request from exempted operational files, the claims based upon failure to comply with section 701 are dismissed rather than allowing the litigation to drag on or become enmeshed with ancillary claims.

#### 4. Decennial Review

The new law also adds a new section 702 to the National Security Act. Subsection 702(a) requires a review of the operational file exemptions not less than once every ten years for the purpose of determining whether any of the exemptions can be removed from

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235. *Id.*

236. *Id.* at 35-36.

any category of exempted files or any portion of a category.

The push for some kind of limitation on the duration of the operational file exemptions came mainly from the historical community. However, during the Senate Intelligence Committee consideration of S. 1324, Senator Daniel Inouye also took up the issue of the unlimited duration of the DCI file designations. In his prepared statement for the hearing, Senator Inouye noted the lack of any time limit and argued that "at some point the details of intelligence operations—which ordinarily would not be within the scope of legitimate public debate on national security—could become a subject of public interest."<sup>237</sup> He then suggested that the Committee consider some kind of time limitation on the designations.

In her testimony before the Senate Intelligence Committee, Dr. Anna Nelson, representing the National Coordinating Committee for the Promotion of History, discussed the problems with the lack of any time limit from a historical viewpoint:

Experience has shown that information requiring absolute secrecy at the time of its origin can be open to the public after passage of time with absolutely no harm to the national security . . . . Since CIA files have never been sent to the National Archives and since they are quite unlikely to be sent in the foreseeable future, information on foreign policy guidelines or planning in which the CIA participated will continue to be available only under the Freedom of Information Act. Thus, a plan for eventual access to these documents is absolutely essential.<sup>238</sup>

Dr. Nelson proposed a twenty-five or thirty year limitation on the operational file exemptions from FOIA search and review. Another time duration proposed was fifty years.<sup>239</sup>

In response to these concerns, one of the amendments to S. 1324 by the Senate Intelligence Committee was the addition of paragraph 701(d)(2), which required the DCI to promulgate regulations providing procedures and criteria for a review of the operational file designations not less than once every ten years. It required "consideration of the historical value or other public interest in the subject matter . . . and the potential for declassifying a significant

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237. *Senate Intelligence Comm. Hearing, supra* note 88, at 55.

238. *Id.* at 107.

239. *See id.* at 109-10 (letter to Chairman Goldwater from Samuel R. Gammon, Executive Director of the American Historical Association).

part of the information."<sup>240</sup> Paragraph 701(e)(2) was added to limit any judicial review of CIA compliance with these regulations to a determination as to "whether the Agency considered the criteria set forth in such regulations."<sup>241</sup>

At the Senate Intelligence Committee markup of S. 1324, Senator Durenberger accurately described the decennial review provision as "a compromise."<sup>242</sup> The historical community pushed hard for a fixed time limit on the duration of any operational file designation. The CIA, however, argued just as forcefully that it is impossible to know exactly how long information in various operational files will remain sensitive. So it was indeed a compromise when all concerned parties agreed that a review of all the file designations for possible dedesignation of an entire category of operational files or a portion thereof would be undertaken no less than every ten years.

In discussing this amendment before the House Intelligence Committee, CIA Deputy General Counsel Mayerfeld pointed out that the DCI is not required to wait the full ten years, but could dedesignate a category or portion of a category of files after a much lesser period of time if circumstances allowed.<sup>243</sup> H.R. 3460 did not contain a decennial review provision, but H.R. 4431 contained the Senate amendments relating to decennial review. H.R. 5164 as introduced, reported, and later enacted, contains in section 702 the requirements for the decennial review of all the operational file exceptions. The requirements are the same as those contained in paragraph 70(d)(2) of S. 1324 and H.R. 4431, except the requirements are not in the context of regulations and they are broken down into subsections 702(a) and 702(b).<sup>244</sup> Subsection 702(c), which contains the judicial review provisions for this section, differs from that in S. 1324 and H.R. 4431 since the requirement to promulgate regulations on decennial review procedures was deleted. It also differs from the judicial review of allegations concerning compliance with section 701 because the review is not *de novo* in this particular area. Instead, the court's review is limited to two issues: (1) whether the Agency conducted the required decennial review; and (2) whether the Agency, in fact, considered the criteria set forth in

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240. *Senate Intelligence Comm. Report*, *supra* note 88, at 3.

241. *Id.* at 4.

242. *Senate Intelligence Comm. Hearing*, *supra* note 88, at 119.

243. *Id.* at 19.

244. *House Intelligence Comm. Report*, *supra* note 88, at 2-3.



subsection 702(b) (historical or other public interest, etc.) in conducting the review of the operational files.<sup>245</sup> While the House Intelligence Committee Report spells out how it expects the DCI to apply the statutory criteria,<sup>246</sup> the court cannot substitute its own judgment as to whether a category of files or portion thereof continues to merit exemption. As Mark Lynch testified in the hearing before the House Intelligence Committee, "This review . . . is solely in the Agency's discretion. It is up to the Agency to decide whether there is historical interest, and it is up to the Agency to decide whether a significant portion of the file can be declassified."<sup>247</sup>

The statute does not go on to spell out the appropriate remedy for noncompliance with the decennial review provisions, but the House Intelligence Committee Report does. Should the court find the CIA in noncompliance with subsection 702(a) or 702(b), the report lists the three exclusive remedies available to the court: (1) order the CIA to undertake a search and review of the appropriate exempted operational file or files and process any responsive records for release under FOIA; (2) order the CIA to conduct the review required by subsection 702(a); or (3) order the CIA to consider the criteria specified in subsection 702(b) when reviewing appropriate exempted operational files for the requested records.<sup>248</sup> Thus, a court is limited in its remedial orders for noncompliance with any provision of section 701 or subsection 702(a) or (b) of the Act.

## 5. Retroactivity

Section 4 of the Act provides for retroactivity of the provisions in sections 701 and 702. Upon enactment, these provisions became applicable to all pending FOIA requests to the CIA, even if they had been made prior to the date of enactment. The new provisions also apply to all civil actions filed against the CIA pursuant to FOIA *if* they were not filed before February 7, 1984. Cases filed prior to this date are not affected by the new Act.

A retroactivity provision was included in all the various House and Senate bills. S. 1324 as introduced, amended, and reported out

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245. *Id.*

246. *Id.* at 36.

247. *House Intelligence Comm. Hearing, supra* note 88, at 50.

248. *Id.* at 37.

contained a retroactivity provision, but it applied to all pending civil actions regardless of the date of filing. The impact of retroactive application of the provisions was not discussed in any great length during the Senate hearing. CIA Deputy General Counsel Mayerfeld's response to Chairman Goldwater's inquiry as to the effect of the provision on pending lawsuits indicates how difficult it was for the CIA to attempt to estimate how many cases could be affected and the extent of the impact on each case.<sup>249</sup>

During the House Intelligence Committee hearing Representative Mazzoli questioned both Mr. Mayerfeld and Mr. Lynch concerning the impact of the retroactivity provision on pending FOIA litigation.<sup>250</sup> Several plaintiffs had expressed concern as to the impact of the provision on their individual lawsuits. It was during the exchange with Mr. Mayerfeld that Representative Mazzoli suggested a cutoff of the preceeding day for any retroactive impact on litigation. This was the compromise ultimately adopted, incorporated into H.R. 5164, and later reported out and enacted. The House Intelligence Committee Report explains that, as of the date of enactment, the provisions of sections 701 and 702 apply to all pending FOIA requests, whether in initial processing or administrative appeal. As to the February 7 date for pending FOIA litigation, the report states that this date was chosen "to avoid creating an incentive for a race to the courthouse by FOIA complainants in anticipation of the enactment of legislation modifying the application of the FOIA to the CIA."<sup>251</sup>

## VI. CONCLUSION

In enacting the Freedom of Information Act in 1966, Congress provided for broad disclosure of agency records. It was recognized, however, that certain categories of information should not be disclosed through a FOIA response, and nine specific exemptions were included in the statute. In exemption (b)(1), as amended, Congress provided that FOIA would not apply to matters properly classified in the interest of national security under criteria established by Executive Order. Section (b)(3), as amended, exempts matters protected from disclosure by another statute where an agency has limited, if any, discretion in the matter.

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249. *Senate Intelligence Comm. Hearing, supra* note 88, at 27-28.

250. *Id.* at 22-23, 53-54.

251. *House Intelligence Comm. Report, supra* note 88, at 38.

In the case of the Central Intelligence Agency, provisions of two statutes, section 102 of the National Security Act of 1947,<sup>252</sup> protecting intelligence sources and methods and section 6 of the Central Intelligence Agency Act of 1949,<sup>253</sup> protecting information concerning CIA organization and functions, have been held to qualify as (b)(3) exemptions.

Experience has shown that applying FOIA to the CIA has been difficult, as Congress might have expected. The principal difficulties have arisen because FOIA does not adequately address legitimate concerns for security, which are reflected in the CIA's organizational structure and functions. The CIA restricts access to information internally as well as externally. Agency files are compartmentalized, with access limited to those with a need to know. Under FOIA the CIA is required to search and assemble information which would otherwise remain compartmentalized, even though it is often clear that most or all of the information falls within one or more of the statutory exemptions. This process, particularly where CIA operational files are concerned, is both costly and time consuming, creates problems of security, and is usually futile, with no appreciable release of information.

The Central Intelligence Agency Information Act, enacted in December 1984, addresses many of the concerns of both the CIA and those public interest organizations concerned with increasing public access to intelligence information utilized by policymakers. Such organizations include the American Civil Liberties Union, which supported passage of the Act. By eliminating the need to search exempted operational files, the new Act will facilitate more timely CIA responses to other FOIA requests, a clear quid pro quo documented in the legislative history. The CIA Information Act provides for de novo judicial review of decisions to exempt operational files pursuant to the Act when there are substantial allegations of non-compliance. And the new Act will at least partially address the problem created for the CIA by the inaccurate perception, widely shared by some foreign intelligence services and individuals with whom the CIA must deal, that the United States is no longer able to adequately protect sources and confidential information from disclosure through litigation.

The question remains, however, whether it is necessary for the

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252. 50 U.S.C. § 403(d)(3).

253. 50 U.S.C. § 403(g).

United States to continue to include its intelligence service within the operation of a general disclosure statute. We know of no other country which does so. And it is clear from the legislative history that Congress intended FOIA to serve primarily as an oversight function. In the mid-1970's, however, both the House of Representatives and the Senate established separate committees to oversee the activities of the Intelligence Community, including the CIA. These committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, are to be kept fully informed on all significant intelligence activities and have unlimited access to all CIA information. There can be no serious question that these committees exercise full and continuous oversight, unlike the sporadic ad hoc process contemplated by FOIA. It is one thing for United States citizens and permanent resident aliens to inquire of the CIA whether it has information concerning themselves. There is much to be said in a democracy for an individual's right to know to the extent possible what personal information his government may hold. The CIA has indicated its willingness to continue to respond as fully as possible to such requests consistent with its statutory obligation to protect national security.

A different issue is presented, however, where the CIA remains subject to FOIA requests from any person for information relating generally to intelligence activities after Congress has created a separate and specialized oversight mechanism far more comprehensive than anything contemplated in FOIA. In this sensitive area requiring secrecy, it is Congress, rather than private organizations or individuals operating from their own motives, who can best oversee the activities of an intelligence service in a systematic fashion.

There are sound reasons, apart from oversight and access to general information, for providing a mechanism for releasing information involved in the decision-making process once it has ceased to be sensitive. Historians, writers, and academicians generally, to name a few, may have legitimate interests in obtaining information when access would not compromise national security. Whether FOIA is the best mechanism to resolve these competing claims is a question which should be more seriously addressed.

## APPENDIX

"TITLE VII—PROTECTION OF OPERATIONAL FILES OF  
THE CENTRAL INTELLIGENCE AGENCY"EXEMPTION OF CERTAIN OPERATIONAL FILES FROM SEARCH,  
REVIEW, PUBLICATION, OR DISCLOSURE

"SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

"(b) For the purposes of this title, the term 'operational files' means—

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

"(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

"(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;  
except that files which are the sole repository of disseminated intelligence are not operational files.

"(c) Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning—

"(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act) or section 552a of title 5, United States Code (Privacy Act of 1974);

"(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

“(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

“(d) (1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

“(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

“(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

“(e) The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of subsection (a), and which specifically cites and repeals or modifies its provisions.

“(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a) (4) (B) of title 5, United States Code, except that—

“(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined *ex parte*, in camera by the court;

“(2) the court shall, to the fullest extent practicable, deter-

mine issues of fact based on sworn written submissions of the parties;

“(3) when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

“(4) (A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational file likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

“(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency’s showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

“(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be pursuant to rules 26 and 36;

“(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

“(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for

the requested records, the court shall dismiss the claim based upon such complaint.

“DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

“SEC. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions maybe removed from any category of exempted operational files or any portion thereof.

“(b) The review required by subsection (a) of this section shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for de-classifying a significant part of the information contained therein.

“(c) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this section may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court’s review shall be limited to determining (1) whether the Central Intelligence Agency has conducted the review required by subsection (a) of this section within ten years of enactment of this title or within ten years after the last review, and (2) whether the Central Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review.”

(b) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

“TITLE VII—PROTECTION OF OPERATIONAL FILES OF  
THE CENTRAL INTELLIGENCE AGENCY

“Sec. 701. Exemption of certain operational files from search, review, publication, or disclosure.

“Sec. 702. Decennial review of exempted operational files.”

SEC. 3. The Director of Central Intelligence, in consultation with the Archivist of the United States, the Librarian of Congress, and appropriate representatives of the historical discipline selected by the Archivist, shall prepare and submit by June 1, 1985, to the Permanent Select Committee on Intelligence of the House of Rep-



representatives and the Select Committee on Intelligence of the Senate a report on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

SEC. 4. The amendments made by section 2 shall be effective upon enactment of this Act and shall apply with respect to any requests for records, whether or not such request was made prior to such enactment, and shall apply to all civil actions not commenced prior to February 7, 1984.