THE WHITE HOUSE

WASHINGTON

January 24, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of Alfred S. Regnery Before Juvenile Justice Subcommittee and Senate Judiciary Committee, January 25, 1984 Regarding School Discipline and School Crime

Al Regnery proposes to deliver the attached testimony on school discipline tomorrow, before Senator Specter's Subcommittee on Juvenile Justice of the Senate Judiciary Committee. The testimony argues that violence in schools is a serious problem, that it directly affects educational quality, and that it contributes to the decay of inner city schools. The testimony contends that greater discipline rather than more money or programs will solve the problem. It concludes by reviewing plans for the Justice Department National School Safety Center, announced by the President in his January 7 radio address.

Much of the testimony is based on the memorandum to the President and the Cabinet Council on Human Resources prepared by the Cabinet Council on Human Resources Working Group on School Violence and Discipline. Regnery advised me that the report had been distributed to the press by Secretary Bell. Accordingly, I have no objection to Regnery referring to it in his testimony.

On page 1, Regnery begins his testimony be snidely chiding Congress for "seeing fit" to address the issue of school discipline at this time. On the same page, however, he notes that the Subcommittee held hearings on the subject beginning in 1975. In the attached proposed memorandum, I recommend changing the "are pleased that Congress has now seen fit to address this issue" language to something like "look forward to working with Congress in addressing this serious issue."

On page 5, the testimony states that "school discipline is a civil rights issue," and supports this statement by citing statistics that minority students are more likely than others to be the victims of violence. The basis of our whole effort in the civil rights area, however, has been to move away from contentions that disparate impacts are evidence of discrimination. School violence, regardless of

its statistical impact on minorities, is a civil rights issue only if minority students are attacked more than non-minority students because of their race. There is no evidence that this is so. The point of the greater proportional impact of school violence on minorities can be made, but it should not be labelled a "civil rights issue."

On page 11, Regnery cites the President's direction in the radio address to the Justice Department to file amicus briefs in school discipline cases. In our comments on the radio address (copy attached), we suggested adding the phrase "when appropriate" to this sentence. Our advice was not heeded. Nonetheless, I think we should recommend the addition to Regnery's testimony.

I have alerted McConnell's office that we have concerns about this testimony. I should be advised as soon as you have reviewed this memorandum, so that I can telephone the changes to McConnell's office in a timely fashion.

Attachments

[After this memorandum was prepared, I received a call from an attorney in McConnell's shop, who advised me that the testimony had already been re-written in a manner that responded to most of the concerns raised above. The opening paragraph now "welcomes Congress' interest," and the "civil rights issue" language is out. Our suggestion concerning the amicus brief language was accepted. The paragraph on busing on page 6 is also to be deleted, over Mike Horowitz's objections but at the insistence of Justice's Civil Rights Division. There is now no need for any action on our part.]

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Subject: Statement of Alfred S. Regnery before Juvenile Justice Subcommittee and Senate Judiciary Committee, January 25, 1984 re: School discipline and School Crime

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Statement of Alfred S. Regnery
Administrator
Office of Juvenile Justice and Delinquency Prevention

Juvenile Justice Subcommittee
Senate Judiciary Committee

January 25, 1984

Thank you very much, Senator Specter, for asking me to testify at this hearing on school discipline and school crime. The issue is a timely and an important one, and falls squarely within the jurisdiction of the Juvenile Justice Subcommittee. As you know, the executive branch has been addressing the question over the last several months, and we in the executive branch generally, and particularly in the Justice Department, are pleased that Congress has now seen fit to address the issue also.

The Cabinet Council on Human Resources Working Group on School Violence and Discipline, of which I am a member, presented a memorandum to the Cabinet Council on Human Resources and to the President early in January, which outlined the nature of the problem as we saw it, and which made several suggestions on what we thought should be done. I would ask that a copy of that memorandum be made part of the record of this hearing. Additionally, the President addressed the issue of discipline in the schools at the Excellence in Education Forum in Indianapolis on December 8, 1983, and again addressed the issue in his weekly radio address on January 7, at which time he outlined some of the things that the executive branch would do to try to alleviate the problem.

The issue of crime in the schools is by no means a new one, nor is it a new one to this Subcommittee. Starting in 1975, this Subcommittee held a series of hearings which examined the problem of school crime and violence. Those hearings received nationwide coverage on television, radio,

and in the newspapers. One of the lead witnesses described his experience as follows:

> "As a prime witness, I presented evidence of the serious nature and extent of crime in our schools throughout the country. Representatives of school districts and educational associations also testified as to daily grim experiences in schools dealing with murder, assault, extortion, vandalism, theft and arson -- problems which create an atmosphere of fear and frustration and drain sorely needed monies from the basic educational process." [1]

As a consequence of those hearings, Congress amended the Juvenile Justice and Delinquency Prevention Act in 1977 with the Juvenile Delinquency in the Schools Act, which recognized the problem of school crime and violence and which set forth various things that my office should do to help with the problem.

As a result of earlier initiatives in the Congress, the Department of Health, Education and Welfare, in 1978, released an extensive study on crime in the schools entitled, "Violent Schools -- Safe Schools: The Safe School Study Report to the Congress." The objectives of that study were to determine the frequency and seriousness of crime in elementary and secondary schools in the United States; the number and location of schools affected by crime; the cost of replacement or repair of objects damaged by school crime; and how school crime can be prevented.

The Violent Schools--Safe Schools study included the following findings:

- 6,700 of the nation's schools had a serious problem with crime;
- one-fourth of all schools in the country were vandalized in a given month and 10% were burglarized;
- in a typical month about 2.4 million secondary school students had something stolen and about 282,000 students reported being attacked;
- in a month's time 120,000 secondary school teachers had something stolen at school, 6,000 had something taken by force, weapons, or threats, 5,200 were physically attacked, about 1,000 of whom were injured seriously enough to require

medical attention;

- the risk of violence to teenagers was greater in school than elsewhere. They spent 25% of their waking hours in school, yet 40% of the robberies and 36% of the assaults on urban students occurred in schools;

- data from students interviewed reflected that monthly 525,000 attacks, shakedowns, and robberies occur in public secondary schools -- almost 22 times as many as are recorded by the schools;

- an average of 21% of all secondary students stated they avoided restrooms and were afraid of being hurt or bothered at school; 800,000 students reported staying home from school because they were afraid;

- 12% of the teachers hesitated to confront misbehaving students because of fear, and almost half of them had been insulted or subjected to obscene gestures; and

- secondary students reported beer, wine, and marijuana were widely available in their schools. Almost half of them stated that marijuana was easy to get and 37% made the same comment concerning alcohol. Serious drugs were reported much harder to get than marijuana or alcohol.

Although the National Institute of Education (NIE) study has never been duplicated in its scope, additional research indicates that the problem is still a very real one. A major 1983 study of school violence by Jackson Toby, Director of Rutgers University's Institute for Criminological Research, for example, concluded that the NIE data had probably understated the actual instances of school violence at the time the survey was conducted. ("Violence in School", Crime and Justice: An Annual Review of Research, vol. 4).

Similarly, a November 29, 1983, report prepared by the Boston Commission on Safe Public Schools, chaired by retired Massachusetts Supreme Court Justice Paul C. Reardon entitled "Making Our Schools Safer for Learning", concluded that the problems described in the NIE report have probably worsened since 1978. According to the study, four out of every ten high school students surveyed by the panel reported that they had

been the victims of robbery, assault, or larceny during the course of the 1982-83 school year. Moreover, 37% of male students and 17% of female students surveyed in Boston high schools reported that they had carried a weapon in school at some time during the school year -- a problem about which the panel had "no doubt" was "on the rise." In news reports discussing the Commission's report, the Boston Superintendent of Schools characterized his city schools as safer than those in other cities.

The issue is not, of course, whether the problem is "better" or "worse" than in 1978. Any violence in school is unacceptable. Since violence still is a real problem in many schools, we need to do what we can to help.

Teachers, as well as students, are victims of school crime. As the report to the President noted, "For many teachers, schools have become hazardous places to teach and definitely places to fear. Self-preservation rather than instruction has become their prime concern."

And as Ernest Boyer, Commissioner of Education during the last Administration, noted:

> "Beaten down by some of the students and unsupported by the parents, many teachers have entered into an unwritten, unspoken corrupting contract. The promise is a light workload in exchange for cooperation in the classroom. Both the teacher and the students get what they want. Order in the classroom is preserved, and students neither have to work too hard nor are too distracted from their preoccupations. All of this at the expense of a challenging and demanding education."

In a poll taken by the National Education Association (NEA) during 1983, nearly half the teachers responding reported that student misbehavior interfered with teaching to a "moderate or great extent." And the percentage of teachers polled by the NEA who reported being physically attacked during the preceding year increased by 53% between 1977, the year of the NIE study, and 1983. The percentage reporting malicious

damage to their personal property increased by 63% over the same period. The 1983 report of the Boston Commission of Safe Public Schools, mentioned earlier, indicates that 50% of a large sample of Boston teachers who had responded to the panel's mail survey reported that they had been victims of robbery, assault, or larceny during the course of the past school year.

By the same token, the cost of school crime to taxpayers is overwhelming. Taxpayers pay teachers to teach, but teachers cannot because they are too busy working as disciplinarians. Taxpayers buy books and equipment, and student vandals destroy them. Taxpayers pay their taxes for education, but buy burglar alarms, break-proof glass, and police patrols for the halls instead. In fact, the National PTA recently observed that the annual cost of vandalism -- something in the vicinity of $600 million per year -- exceeds the nation's total expenditure on textbooks. Security personnel, security systems, and the cost of lost teacher time and the demoralization of schools and school systems is probably even a greater expense.

As the Cabinet Council Report to the President points out, school discipline is a civil rights issue. Minority students are substantially more likely to be the victims of school crime than are non-minority students. Students in predominantly minority schools are twice as likely to be victims, for example, of serious crimes as students in predominantly white schools. Teachers in these schools are five times more likely to be victims of attacks requiring medical treatment, and three times more likely to be robbed.

Minority families, particularly those who live in the inner city, depend on the public school to a far greater degree than do middle class

whites or others to assist their children in their fight for upward mobility in society toward a successful and self-sufficient life. Where discipline breaks down in their public school, where crime and drugs are rampant, the students who want to be educated cannot be, and students who may not even have a predisposition to be unruly not only fail to get an education, but get drawn into criminal activity themselves. Restoring order in such schools, on the other hand, as many schools have already done, by consistently and fairly enforcing rules that are understood and known by the students and by giving the students a structured environment where they know what is expected of them and they know the consequences of their actions if they misbehave, will -- and has proven to -- reduce suspensions and dismissals while at the same time raising educational standards.

The problem of lack of discipline and crime in public schools also directly affects the issue of busing. Schools where voluntary busing programs exist have found that where discipline problems are acute with a commensurate lack of educational standards, it is the good students -- those who want to be educated -- who are bused to white schools in other neighborhoods, leaving only the more marginal and less ambitious students in the old schools. The upshot, obviously, is to make a bad school worse by literally encouraging the good students -- those who often have a positive influence on the others -- to leave. By the same token, where such schools have gotten control of their discipline problems, and restored order, thereby increasing educational standards, they have found that good students prefer to stay in their own neighborhood and help to further improve the standards of their school.

Discipline is a key factor in the abandonment of urban public

education for private schools. The report of the Secretary of Education to Congress on the financing of private elementary and secondary education reported that discipline was considered to be a very important factor in choosing their children's current school by 85.6% of public school parents who had considered other schools, and 87.1% of private school parents. Among parents who had transferred children from public to private schools, discipline was the second most frequently cited reason. As the report to the President of the Cabinet Council on Human Resources concluded, "The hard-won right of minority children to an equal educational opportunity is being erroded by unsafe and disorderly schools. Permitting the current deterioration of order in the public schools to continue would be anti-minority in the most fundamental sense."

The Cabinet Council Report to the President on School Discipline indicates, in the strongest terms, that disorder in the schools has a very direct impact — perhaps the most direct — on the question of educational quality. As James Coleman concludes in his recent book, High School Achievement:

> "When study of the effects of school characteristics on achievement began on a broad scale in the 1960's, those characteristics that were most studied were the traditional ones : per pupil expenditures as an overall measure of resources, laboratory facilities, libraries, recency of textbooks, and breadth of course offerings. These characteristics showed little or no consistent relation to achievement. The characteristics of schools that are currently found to be related to achievement, in this study and others ... are of different sort."
>
> "The reasons for superior academic achievement in private as opposed to public schools can be broadly divided into two areas: academic demands and discipline. For these are not only major differences between the public and private sectors; as stated earlier, the schools within the public sector that impose greater academic demands (such as greater homework) and stronger discipline (such as better attendance) bring about greater achievement than does the average public school with comparable students."

As the report to the President pointed out, there is general

agreement with Coleman's view of the importance of an orderly environment to learning. The Excellence in Education Commission, for example, found that improved discipline is a prerequisite for improving our nation's schools. A bipartisan Merit Pay Task Force of the U.S. House of Representatives cited improved discipline as essential to upgrading the quality of teachers and teaching. In fact, there is little debate that educational excellence cannot be achieved without order, and that discipline of students is an integral part in their education generally, and of a quality education in particular. Many schools across the country which have had serious discipline problems have been able to restore order and discipline, with a consequence of restoring educational excellence to an astounding degree. As the report to the President points out:

> "The striking feature of the measures involved is their basic common sense. These do not require massive spending -- only motivation and leadership. These include such simple steps as staff agreement on the rules students are to follow and the consequences for disobeying them, and involvement in support of principals and teachers in the disciplinary process."

The Cabinet Council Report speaks of several schools which have been able to restore order; let me discuss one of those.

George Washington Preparatory High School in the Watts section of Los Angeles, a school whose student body is 95% black and 5% hispanic was, five years ago, one of the worst schools in Los Angeles. It had a serious drug and gang problem, and was a school where disruptive students were, in essence, in control. As Time magazine, in its April 25, 1983, issue said, "Only four years ago, Washington High would have matched most people's Hollywood image of the blackboard jungle. 'Morale here was terrible,' recalls Margaret Wright, a leader of the parents' group. 'The rooms were dirty and 90% of the teachers were rotten.' "

In 1979, George McKenna, who Time magazine describes as "a

tough-minded civil rights activist" became principal, and moved quickly to restore order. He imposed a strict discipline code, requiring both students and parents to sign an agreement that they would abide by it. I have a copy of that contract, which is a fascinating document, and would ask that it be included in the hearing record. McKenna got rid of bad teachers and recruited new ones. He and a group of students painted out all the graffiti in the school, and he made it clear that no graffiti would reappear. Teachers were instructed to assign homework everyday, students were instructed that they could not cut classes or school, and teachers were required to call parents if students did not attend. There was to be no evidence of gang membership or gang activity whatever, and a host of other reforms were put in place. Improvement in both discipline and educational standards was dramatic.

Suspensions, for example, are now 40% below what they were two years ago. Truancy, in 1982, was only half of what it was in 1979, and is substantially lower during this school year. Five years ago, 43% of the senior class even expressed an interest in going to college. Last year, 80% of the senior class did go to college. George Washington boasts the Los Angeles school district's biggest increase in the number of students taking the SAT tests and the inner city's lowest percentage of students barred from extracurricular activities by poor grades. The list of improvements goes on and on.

I visited George Washington Preparatory High School in early December, and spent the morning with Principal George McKenna. He is a strong and visionary person who has raised student expectations, enforced rules fairly and consistently, and made the students realize, more than anything else, that they need a good education to make their way in the

world. The students are proud of their school, are well-behaved and well-dressed, and respect the school's fair and consistent enforcement of rules that they understand.

I asked Mr. McKenna about the cost of making such reforms. He told me that there was virtually no cost. I asked him what the effect would have been of spending any amount of money in 1979 to improve the school, and he responded that any amount of money spent would have been like pouring money down a rat hole. The school did not need money, he explained, it needed discipline and discipline made all of the difference.

Interestingly, but not surprisingly, as truancy at George Washington has gone down, so has crime in the neighborhood. McKenna estimates that breaking and entering, perhaps the most common juvenile offense, is down by over 60% in the school neighborhood, largely because the students who might otherwise be committing such offenses are now in school. McKenna also discovered, after reviewing the data, that of some 800 students who were being bused away from George Washington in 1979 to largely white schools, most were good students who wanted an education, but felt an education was not available at George Washington. Since the school has been turned around, virtually nobody wants to be bused away, and in fact, the school has a waiting list of over 200 students to get <u>in</u>.

One of the things recommended to the President in the Cabinet Council Report, and one of the things the President requested that the Department of Justice do in his radio speech on January 7, was to establish a National School Safety Center. We are now in the process of planning such an undertaking. We anticipate that such a center would have the following functions:

- act with the Department of Justice and Department of Education to encourage an effective and cooperative

interagency effort to improve campus safety;

- gather and analyze nationwide information on school safety and crime prevention techniques and programs that may, in turn, be utilized by education, law enforcement, and other criminal justice practitioners and policymakers;

- gather and analyze nationwide legal information regarding school discipline, campus safety, and criminal law, rules, and procedures and proceedings in federal, state, and local jurisdictions;

- develop and confer with a carefully recruited, distinguished National School Safety Information Network representing 58 states and territories;

- participate in relevant conferences;

- create a national awards program to recognize and publicize outstanding school safety and campus-related juvenile delinquency prevention leaders from everywhere in America;

- publish a National School Safety Bulletin to inform the nation's 75,000 leading opinion-shapers about emerging school safety issues and campus crime prevention programs identified by the National School Safety Center;

- prepare and/or promote school crime and safety materials for use by educators, law enforcers, criminal justice leaders, and other interested practitioners and professionals;

- conduct a nationwide, multi-media school safety advertising campaign; and

- visit with key education, law enforcement, criminal justice, and other professionals as well as community leaders in the 58 states and territories to discuss and help seek answers to their particular school crime and violence problems.

My office may also undertake other initiatives, and is looking at other projects that we might undertake which would be beneficial.

The President requested the Department of Justice file amicus curiae briefs in cases in both federal and state courts dealing with school discipline. A task force has been established at the Department of Justice to monitor such cases and to make recommendations to the Solicitor General's office when such cases arise. Remaining issues raised in the report to the President are still being discussed and planned.

In conclusion, we at the Justice Department are certainly very pleased to be able to participate in this initiative to restore discipline in the schools. School discipline is one of the things that Congress set forth in the Juvenile Justice and Delinquency Prevention Act, and is certainly something that can have a strong impact on juvenile crime generally. Schools are, after all, after the family, the greatest influencing factor on young people's lives, and to fail to provide young people with a safe and structured environment, with a set of rules that is consistently and fairly enforced and with the guidance to become law-abiding citizens, is to do a disservice to our youth and to neglect our duties in preventing juvenile crime.

THE WHITE HOUSE

WASHINGTON

January 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of J. Paul McGrath Regarding Department of Justice Authorization for Fiscal Year 1985

OMB has asked for our views on the attached testimony that Assistant Attorney General McGrath plans to deliver before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee on February 2. That Subcommittee is holding the annual hearings on the Antitrust Division's authorization.

McGrath's proposed testimony reviews the Division's budget request and enforcement priorities. Those priorities, as under William Baxter, focus on cartel activities and review of mergers. The most significant aspect of McGrath's testimony concerns resale price maintenance. Baxter pursued a policy of not treating resale price maintenance as per se illegal, contending that the Supreme Court decision establishing the per se rule for such schemes was ill-reasoned and undermined by later developments. The issue was presented to the Supreme Court last fall in the Monsanto v. Spray-Rite case. McGrath announces in his testimony that he:

> will enforce the law as interpreted by the Supreme Court unless and until its prior interpretation is altered. Thus, we will enforce existing legal precedent holding agreements between manufacturers and distributors regarding the price at which the manufacturers' products are to be resold to be unlawful per se.

This should remove for McGrath an issue that had been a considerable irritant in relations between Baxter and the Hill.

I have no objection. The resale price maintenance issue is before the Supreme Court, and there is no reason for McGrath to confront the issue in the brief interim before the Court offers guidance.

Attachment

THE WHITE HOUSE

WASHINGTON

January 30, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. Signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of J. Paul McGrath
Regarding Department of Justice
Authorization for Fiscal Year 1985

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 1/30/84

cc: FFFielding/JGRoberts/Subj/Chron

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U.S. Department of Justice

DRAFT

Washington, D.C. 20530

STATEMENT OF

J. PAUL MCGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

DEPARTMENT OF JUSTICE AUTHORIZATION FOR
FISCAL YEAR 1985

ON

FEBRUARY 2, 1984

Mr. Chairman and Members of the Subcommittee:

I am delighted to be here this morning in connection with your oversight and authorization hearings. I would like to discuss with you the Antitrust Division's budget request for Fiscal Year 1985, as well as the policies I will follow and the priorities I have for the Division.

The Antitrust Division's budget request for Fiscal Year 1985 is for $45,620,000, which figure includes a request for 669 full-time permanent positions and 646 workyears. This request reflects net uncontrollable increases after savings from management initiatives in the amount of $3,475,000 required to maintain current operating levels. Major items included in this category are increased general service administration charges for rental space and a general pricing level adjustment. Our budget request also reflects a transfer from the Civil Aeronautics Board of 20 positions, 15 workyears, and $775,000. Under the terms of the Airline Deregulation Act of 1978, on January 1, 1985, the Civil Aeronautics Board's authority to approve mergers and collective activities involving air carriers will be transferred to the Antitrust Division. We also have a program decrease of 55 positions, 55 workyears, and $2,841,000 in the Preservation of Competitive Market Structure in Fiscal Year 1985. While our request

reflects the Administration's continuing commitment to reducing the size of the federal government, I am confident that we will be able vigorously and effectively to enforce the antitrust laws with the resources we have requested.

As you know, I have been at the Justice Department for almost three years, serving first as Assistant Attorney General in charge of the Civil Division from Mid-1981 to December 16, 1983, when I assumed my present responsibilities. Before that, I was engaged in the private practice of law in New York City for approximately 16 years, primarily in the areas of antitrust litigation and counseling. From my experience both in and out of government, I believe I have developed a sound understanding of the nature and workings of the Antitrust Division, as well as of our economy, how businesses operate and what they hope to achieve. I intend to continue this Administration's strong commitment to a vigorous yet rational enforcement of the antitrust laws by prosecuting seriously anticompetitive activity in order to enhance consumer welfare.

The clearest example of the kind of behavior that restricts competition is cartel-type activity, such as minimum price-fixing, horizontal market allocations, bid rigging, and other comparable agreements among competitors. Such activity will continue to be the primary focus of our enforcement efforts. Other activity that does not fall within the above-described category has the potential for both competitive

harm as well as economic benefits. Such activity will continue to be evaluated carefully to determine its overall economic effects in order to decide whether it should be prohibited or permitted to occur. Obviously, an overly restrictive enforcement policy that deters conduct that will not restrain competition but which is efficiency-enhancing not only wastes scarce enforcement resources, but also deters firms from engaging in activity that could benefit our economy and consumers. Accordingly, in evaluating mergers and acquisitions, joint ventures, non-price vertical arrangements, intellectual property licensing and most forms of single-firm conduct, our antitrust enforcement policy will be premised on careful analysis and appropriate sensitivity to the ultimate economic effects of prosecution.

Having set forth our overall policy, I would like to discuss how the Division's major areas of activity reflect and will continue to reflect the balanced approach I have described to sound antitrust enforcement.

Cartel Behavior

Vigorous enforcement of the antitrust laws against clearly harmful agreements among competitors of the type described above has been, and will continue to be, the primary focus of the Antitrust Division. Detection, prosecution and deterrence of such activity is fundamental to our nation's reliance on competitive markets in which all firms are free to utilize

their talents and resources to satisfy consumer demand for goods and services. Because such conduct significantly harms consumer welfare and economic efficiency, we will continue to pursue cartel-type behavior, seeking indictment of responsible individuals wherever possible and recommending jail sentences and substantial fines as a matter of course to punish past conduct as well as to deter it in the future.

During Fiscal Year 1983, the Department filed 98 criminal cases against 122 corporations and 113 individuals. I am pleased to report that during the past fiscal year, we recovered fines totaling approximately $21 million and jail sentences in excess of 216 months actual incarceration have been imposed.

Our bid-rigging investigations and prosecutions, an area which accounts for most of these cases, began in the area of highway and airport construction and have spread to other categories of federally-funded projects, as well as to utility and electrical construction projects. We have worked closely in these matters with Inspectors General of other federal and state agencies, both in an effort to combine our resources and expertise in seeking out and prosecuting such activity, as well as in counseling other agencies on how they can better be able to identify when such activity is occurring.

Notwithstanding the Division's considerable success in this area, I believe that our effectiveness in finding and prosecuting price fixing can be increased. Accordingly, I

recently announced as one of my first priorities the formation of a task force of lawyers and economists from the Antitrust Division, as well as lawyers from the Criminal Division, to consider ways in which we might improve our ability to identify industries that should be investigated for possible collusive activity. I intend to take an active role in this endeavor in the hope that it can yield an even greater return on our investment of resources in this important area.

Mergers and Related Activities

As the Subcommittee is aware, our law enforcement efforts regarding mergers and acquisitions also account for a large portion of the Antitrust Division's resources. During Fiscal Year 1983, we received nearly 2,500 notifications of mergers, including Hart-Scott-Rodino filings and bank merger applications, resulting in some seventy-one investigations. The Department filed suit challenging three mergers, and advised federal bank regulatory agencies that nine proposed transactions would have significantly adverse effects on competition. Seven other proposed transactions were abandoned or restructured to eliminate our expressed competitive concerns. In addition, a proposed joint venture involving pay television services was abandoned following our announced intention to challenge it. During the past fiscal year we also obtained decrees in three merger cases, two of which were filed during Fiscal Year 1982.

We were particularly gratified by the recent successful resolution of one related matter to which we devoted considerable attention during the previous fiscal year. Several months ago, we learned that two publishers were planning to discontinue publication of the St. Louis Globe-Democrat and to continue publication of the St. Louis Post-Dispatch pursuant to an amended joint newspaper operating agreement. Following a careful study of the antitrust issues presented, we concluded that the appropriate test for judging the legality of that proposed action was whether the Globe-Democrat as a free-standing newspaper satisfied the criteria of a failing firm annunciated in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). Accordingly, we informed the publishers that before we would agree to their discontinuing publication of the Globe-Democrat, they would have to make a good faith effort to sell that newspaper to someone prepared to continue its publication. That effort was made, and negotiations were successfully concluded on January 12, 1984, with the announcement that the Globe-Democrat will continue to be published through late February, when it is scheduled to be transferred to a new owner.

The Division has made a significant contribution to merger analysis in the promulgation of our Revised Merger Guidelines. I intend to continue the Division's reliance on the principles articulated in those Guidelines. One of my priorities is to

identify and to challenge mergers that would create undue market concentration and increase the likelihood of collusion. At the same time, however, we will avoid governmental interference with mergers that do not pose competitive concerns. I also intend to continue the Division's so-called "fix it first" policy. Under this policy, the Division informs the parties to a merger or acquisition of whatever competitive problems have been uncovered during our investigation. If these problems are eliminated prior to consummation of the transaction, we will not file suit to block it. This policy has avoided unnecessary and costly litigation while ensuring that competitive overlaps are removed before the acquisition takes place. Of course, if the competitive problems are not resolved to our satisfaction, we have not and will not hesitate to file suit to block the underlying transaction.

Monopolization and Other Forms of Predatory Conduct

Another area to which the Antitrust Division has devoted considerable resources is our enforcement program against activity that monopolizes or attempts to monopolize trade in violation of Section 2 of the Sherman Act. Again, the analysis requires a proper definition of the geographic and product markets as to which the alleged anticompetitive activity is directed. I should emphasize, however, that the Division's enforcement efforts will be directed at truly anticompetitive

conduct that unreasonably threatens to eliminate competition in particular markets. Merely "hard competition" that epitomizes the competitive process at its keenest, and which benefits consumers through improved goods and services at lower costs, is highly desirable and should not be prevented.

Vertical Arrangements

The Supreme Court has recognized that the legality of most forms of vertical arrangements between suppliers and their customers turns on an analysis, under the rule of reason, of their likely anticompetitive effects weighed against their likely procompetitive, efficiency-enhancing effects. The Court's articulation of the legal standard by which to evaluate the legality of non-price vertical arrangements is an eminently reasonable and workable one, and our enforcement efforts in this area will continue fully to recognize this fact.

The exception, of course, is in the area of resale price maintenance, to which the Court has continued to apply a test of per se illegality. As you are aware, the Department filed an amicus brief in Monsanto v. Spray-Rite, in which we asked the Supreme Court to reexamine its prior holdings on this issue. While the Division continues to believe in the merits of the legal and economic arguments advanced in that brief, we will enforce the law as interpreted by the Supreme Court unless and until its prior interpretation is altered. Thus, we will

enforce existing legal precedent holding agreements between manufacturers and distributors regarding the price at which the manufacturers' products are to be resold to be unlawful per se.[6] We will evaluate whether to challenge such agreements as we do other cases, taking into account the factual circumstances presented, the sufficiency of the evidence, the amount of commerce involved, the likelihood that we would prevail, and any other factors that play a part in the sound exercise of our prosecutorial discretion.

I do not anticipate that the Division will be required to devote a large portion of our enforcement resources in this area. As you know, relatively few resale price agreements have come to our attention over the years, probably due to the deterrent effect of the per se rule and the treble damage remedy. I would also add that the Division has, for some time, been studying the area of vertical arrangements in great detail. Our review is continuing, and I anticipate that we will issue guidelines sometime this year with regard to non-price vertical arrangements. Those will review the current state of the law and hopefully will help advise courts and antitrust practicioners as to our likely enforcement posture.

Mr. Chairman, before concluding I would like briefly to touch upon three other areas in which expenditure of Division resources can promote sound competition policy. First, the Division will continue to devote substantial resources to the

important task of promoting competition and efficiency in key regulated industries through advocacy before federal regulatory agencies and the Congress of approaches that maximize competition while achieving necessary regulatory goals. We will continue this Administration's strong efforts to deregulate industries that are capable of performing competitively, and we believe continued governmental regulation to be appropriate only where social losses from competitive failure exceed regulatory costs. We also will continue our efforts to secure passage of the National Productivity and Innovation Act. As you know, that legislation is intended to clarify and reform the antitrust and intellectual property laws, and encourage desirable joint research and development activities.

Second, the Division will continue its efforts to review systematically the hundreds of outstanding decrees in government antitrust cases to identify those decrees that may be having anticompetitive effects, that may otherwise disserve the public interest, or that simply no longer serve any useful purpose. A good example is the recently terminated Safeway decree, which was not only unnecessary but was also harmful to consumers by deterring that company from offering legitimate price reductions. At the same time, our review will seek to identify other decrees that merit special enforcement attention.

We have made significant progress in this important task. To date, we have reviewed approximately 350 decrees, have identified approximately 250 as likely candidates for termination or modification and have some 125 under active investigation. Thus far, 16 decrees have been terminated or modified by the courts as a result of this review.

Finally, the Division will continue its efforts to systematically and effectively review private antitrust cases. This activity is not new, for the Department historically has been asked to provide its views on significant legal issues and questions of statutory interpretation, principally by the Supreme Court. Because of our strong interest that the law evolve in a reasoned manner, we seek to identify cases that raise issues of such general importance meriting government participation before the Supreme Court as well as the lower federal courts. The courts are free, of course, to accept or reject our analysis. Our participation in appropriate selected cases costs us relatively few resources, and I believe it will assist the courts in assessing the antitrust issues before them in a manner consist with principles of competition and consumer welfare.

Mr. Chairman, I am very much looking forward to working with you and the other members of the Subcommittee in the coming year. I extend my sincere appreciation for your long-standing support of the Antitrust Division's law

enforcement and competition advocacy efforts. I would, of course, be happy to address any questions you or other members of the Subcommittee may have.

THE WHITE HOUSE

WASHINGTON

February 7, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft CIA Statement (John McMahon) for the House Intelligence Committee on H.R. 3460 and H.R. 4431, Bills to Regulate Public Disclosure of Information Held by CIA

OMB has asked for our views by noon today on the attached testimony, which CIA Deputy Director McMahon proposes to deliver tomorrow before the House Select Committee on Intelligence. The testimony concerns H.R. 3460 and H.R. 4431, two bills designed to exempt CIA operational files from the Freedom of Information Act. H.R. 4431 is a companion to S. 1324, the Administration-supported bill that passed the Senate by unanimous consent. McMahon's testimony is substantially the same as testimony and reports previously cleared in the course of securing Senate passage of S. 1324.

The testimony cites four principal reasons in support of exempting CIA operational files from FOIA. First, review of such files imposes an enormous burden on the agency with practically no benefit to the public under FOIA. All the files must be painstakingly reviewed, by properly cleared and knowledgeable intelligence officers (not FOIA clerks), and yet the result is almost always that nothing meaningful can be released because of the applicability of existing exemptions from disclosure. Exempting the files from review under FOIA would remove the burden of processing FOIA requests, with little loss of disclosure.

Second, an exemption from FOIA review for operational files would help restore the confidence of CIA sources in the ability of our government to keep a secret. At present, CIA operatives cannot give their agents blanket assurances that secrets will be kept, because all operational files are subject to FOIA review. While the information can usually be kept from disclosure by an exemption, it is far more reassuring to be able to tell potential sources that the files are not even subject to FOIA review.

Third, there is always the possibility of error in the FOIA review process. Under FOIA, segregable material not subject to an exemption must be disclosed. The usual result is

disclosure of a highly expurgated document. Each black mark on a document, however, requires careful consideration, and there is always the possibility of letting important information slip out during review of files subject to a FOIA request.

Finally, exempting operational files from FOIA review would permit much quicker processing of other FOIA requests by the agency. Again, since the laborious review of operational files typically yields little disclosable material, the loss to achieve this significant gain in processing other requests is minimal.

I have reviewed the testimony and have no objections. It is, as noted, substantially similar to previous testimony we have cleared.

Attachment

THE WHITE HOUSE

WASHINGTON

February 7, 1984

MEMORANDUM FOR JAMES C. MURR
CHIEF, ECONOMICS-SCIENCE-GENERAL
GOVERNMENT BRANCH, OMB

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Draft CIA Statement (John McMahon) for the House Intelligence Committee on H.R. 3460 and H.R. 4431, Bills to Regulate Public Disclosure of Information Held by CIA

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 2/7/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
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Subject: Draft C.I.A. statement (John McMahon) for the House Intelligence Committee on H.R. 3460 and H.R. 4431, bills to regulate public disclosure of information held by CIA.

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

February 6, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Defense
Department of State
National Security Council
Department of Justice

SUBJECT: Draft CIA statement (John McMahon) for the House Intelligence Committee on H.R. 3460 and H.R. 4431, bills to regulate public disclosure of information held by the CIA.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

Noon - Tuesday, February 7, 1984.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Ceceila Wirtz
Arnold Donahue
Fred Fielding
Karen Wilson

DRAFT
2/6/84

STATEMENT OF

JOHN N. MCMAHON

DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

BEFORE THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

UNITED STATES

HOUSE OF REPRESENTATIVES

ON

THE FREEDOM OF INFORMATION ACT

FEBRUARY 8, 1984

Mr. Chairman, Members of the Subcommittee on Legislation, it is a pleasure to appear before you today to discuss H.R. 3460 introduced by you, Mr. Chairman, and H.R 4431, introduced by Representative Whitehurst. As you know, both pieces of legislation seek to provide relief to the CIA from some of the most serious problems the Agency has encountered in working to comply with the Freedom of Information Act (FOIA). And, at the same time, both Bills are designed to ensure that the public's access to records of the CIA is preserved. Neither bill would totally exclude the CIA from the requirements of the FOIA, but rather each is based on a carefully crafted approach which would exclude from the FOIA process only our sensitive operational files contained in three specific components of the Agency. Removing these operational files from the FOIA search and review process would substantially lessen the ever-present risk that a human error might result in the exposure of intelligence sources and methods. Most importantly, I believe that this legislation would go far toward alleviating the perception of our sources and potential sources that the United States Government cannot be trusted to protect them from exposure. At the same time, Mr. Chairman, the public would receive improved service from the Agency under the FOIA because requesters would no longer have to wait two to three years to receive whatever responsive information that could be released to them. Furthermore, it is important for everyone to

understand that enactment of this legislation would not result in any meaningful loss of information now released under the Act.

Mr. Chairman, last June I testified before the Senate Select Committee on Intelligence on S. 1324, a Bill which, at that stage, was very similar to your Bill. The problems we have with the FOIA are no different from the ones we faced several months ago. Therefore, my testimony before you today will basically reiterate the points I made last summer to the Senate. After doing so, I would also like to briefly discuss the differences between the two Bills under consideration today.

Under present law any FOIA requester can cause a search and review to be made in all CIA files, including operational files, and the Agency must defend a denial of our most sensitive information to anyone who asks for it line by line, sometimes word by word. We, of course, attempt to assure our sources, who live in fear of this process, that the exemptions available under the FOIA are sufficient to protect their identities, but that assurance is too often seen as hollow. They ask, with justification in my view, that, in exchange for the risks which they undertake on our behalf, we provide them with an absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as

potentially public documents, we are unable to provide the iron-clad guarantee which is the backbone of an effective intelligence service. In addition, the review of operational files withdraws uniquely capable personnel from intelligence operations, and compels us to violate our working principles of good security. Let me explain these points in more detail.

For security reasons, Agency information is compartmented into numerous self-contained file systems which are limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific files only on a "need to know" basis. Operational files are more stringently compartmented because they directly reveal intelligence sources and methods. Yet a typical request under the FOIA will seek information on a generally described subject wherever it may be found in the Agency and will trigger a search which transgresses all principles of compartmentation. A relatively simple FOIA request may require as many as 21 Agency records systems to be searched, a difficult request can involve over 100.

In many instances the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search (Exhibit 1). Although, in the case of records

gleaned from operational files, virtually none of this information is released to the requester, security risks remain which are inherent in the review process. The documents are scrutinized line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source-revealing and other sensitive information. These reviewing officers must proceed upon the assumption that all information released will fall into the hands of hostile powers, and that each bit of information will be retained and pieced together by our adversaries in a painstaking effort to expose secrets which the Agency is dedicated to protect. At the same time, however, the reviewing officer must be prepared to defend each determination that an item of information is classified or otherwise protected under the FOIA. Furthermore, the officer must bear in mind that under the FOIA each "reasonably segregable" item of unprotected information must be released. Sentences are carved into their intelligible elements, and each element is separately studied. When this process is completed for operational records, the result is usually a composite of black markings, interspread with a few disconnected phrases which have been approved for release. Here is a typical example. (Exhibit 2)

The public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we never cease to worry about these fragments. We can never be completely certain what other pieces of the jigsaw puzzle our adversaries already have, or what else they need to complete the picture. Perhaps we missed the source-revealing significance of some item. Perhaps we misplaced one of the black markings. The reviewing officer is confronted with a dizzying task of defending each deletion without releasing any clue to the identity of our sources. He has no margin for error. Those who have trusted us may lose their reputation, their livelihood, or their lives; the well-being of their families is at stake if one apparently innocuous item falls into hostile hands and turns out to be a crucial lead. As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated. The harm done to the Agency's mission by such errors is, of course, unknown and uncalcuable. The potential harm is, in our judgment, extreme.

Aside from this factor of human error, we recognize that under the current Freedom of Information Act, subject to judicial review, national security exemptions do exist to protect the most vital intelligence information. The key

point, however, is that those sources upon whom we depend for that information have an entirely different perception.

I will explain how that perception has become, for us, a reality which hurts the work of the Agency on a daily basis. The gathering of information from human sources remains a central part of CIA's mission. In performance of this mission, Agency officers must, in essence, establish a secret contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the United States Government.

This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationship is trust. To build such a relationship, which in many cases entails an individual putting his life and the safety of his family in jeopardy to furnish information to the U.S. Government, is a delicate and time-consuming task. Often, it takes years to convince an individual that we can protect him. Even then, the slightest problem, particularly a breach or perceived breach of trust, can permanently disrupt the relationship. A public exposure of one compromised agent will obviously discourage others.

One must recognize also that most of those who provide us with our most valuable and, therefore, most sensitive information live in totalitarian countries. In such places individuals suspected of anything less than total allegiance to the ruling party or clique can lose their lives. In societies such as these, the concepts behind the Freedom of Information Act are totally alien, frightening, and indeed contrary to all that they know. It is virtually impossible for most of our agents and sources in such societies to understand the law itself, much less why the CIA operational files,in which their identities are revealed, should be subject to the Act. It is difficult, therefore, to convince one who is secretly cooperating with us that some day he will not awaken to find in a U.S. newspaper or magazine an article that identifies him as a CIA spy.

Also, imagine the shackles being placed on the CIA officer trying to convince the foreign source to cooperate with the United States. The source, who may be leaning towards cooperation, will demand that he be protected. He wants absolute assurance that nothing will be given out which could conceivably lead his own increasingly sophisticated counter-intelligence service to appear at his doorstep. Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, the deliberate exposure of our

people by Agee and his cohorts, and espionage activities by foreign powers all contribute, but the perceived harm done by the FOIA is particularly hard for our case officers to explain because it is seen as a deliberate act of the United States Government.

Although we try to give assurances to these people, we have on record numerous cases where our assurances have not sufficed. Foreign agents, some very important, have either refused to accept or have terminated a relationship on the grounds that, in their minds -- and it is unimportant whether they are right or not -- but, in their minds the CIA is no longer able to absolutely guarantee that they can be protected. How many cases of refusal to cooperate where no reasons are given are based on such considerations, I cannot say. I submit, however, that knowing of numerous such cases, there are many more instances where sources who have discontinued relationships or reduced their information flow have done so because of their fear of disclosure. No one can quantify how much information vital to the national security of the United States has been or will be lost as a result.

The FOIA also has had a negative effect on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation over what

is seen as an inability to keep information entrusted to us secret. Again, the unanswerable question is how many other services are now more careful as to what information they pass to the United States.

This legislation will go a long way toward relieving the problems that I have outlined. The exclusion from the FOIA process of operational files will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the process. They will know that their identities are not likely to be exposed as a result of a clerical error and they will know that the same information will be handled in a secure and compartmented manner and not be looked at by people who have no need to know that information. In his decision in a lawsuit brought by Phillip Agee against the CIA, FBI, NSA, Department of State, and Department of Justice, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia summarized the problem this way: "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails."

At the same time, as I have explained before, by removing these sensitive operational files from the FOIA process, the public is deprived of no meaningful information whatosever.

The paltry results from FOIA review of operational files are inevitable. These records discuss the describe the nuts and bolts of sensitive intelligence operations. Consequently, they are properly classified and are not releasable under the FOIA. The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. The simple fact is that information in operational records is by and large exempt from release under the FOIA, and the few bits and pieces which are releasable have no informational value.

When I speak of reviewing officers absorbed in this process, it is important to stress that these individuals are not and cannot be simply clerical staff or even "FOIA professionals." In order to do their job, they must be capable of making difficult and vitally important operational judgments, and, consequently, most of them must come from the heart of the Agency's intelligence cadre. Moreover, before any item of information is released under the FOIA, the release must be checked with a desk officer with current responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources of our operating components. That is so because we have a practice in the Operations Directorate which

requires that every piece of paper which is released, even including those covered with black marks like the one I showed you before, must be reviewed by an officer from the particular desk that wrote the documents or received it from the field, and we cannot alter this practice because the risk of compromise is so great. You can imagine the disruption, for example, on the Soviet desk when the people there must take time off from the work they are supposed to do to review a document prepared for release under the FOIA. And it is obvious, of course, that when a CIA operation makes the front pages of the newspapers, the FOIA requests on that subject escalate. This loss of manpower cannot be cured by an augmentation of funding. We cannot hire individuals to replace those lost, we must train them. After the requisite years of training, they are a scarce resource needed in the performance of the Agency's operational mission.

Let me make clear that this legislation exempts from the FOIA only specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not exempted from search and review will remain accessible under the FOIA even if documents taken from an operational file are placed in them. This will ensure that all disseminated intelligence and all matters of policy

formulated at Agency executive levels, even operational policy, will remain accessible under FOIA. Requests concerning those covert actions the existence of which is no longer classified would be searched as before. And, of particular importance, a request by a U.S. citizen or permanent resident alien for personal information about the requester would trigger all appropriate searches throughout the Agency.

I would also like to address the benefit to the public from this legislation. As I mentioned earlier in my testimony, FOIA requesters now wait two to three years to receive a final response to their requests for information when they involve the search and review of operational files within the Directorate of Operations. We estimate that with enactment of appropriate legislation the CIA could, in a reasonable time, substantially reduce the FOIA queue. Indeed, I can assure you that following enactment, every effort will be made to pare down the queue as quickly as possible. This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and efficient manner. The public would continue to have access to the disseminated intelligence product and all other information in files which would not be exempted under the terms of these Bills.

I would also like to address the issue of how it would be possible for the American public to have access to information concerning any Agency intelligence activity that was improper or illegal. My firm belief is that, given the specific guidance which we now have in Executive Orders and Presidential directives, along with the effective oversight provided by this Committee and its counterpart in the Senate there will not ever again be a repeat of the improprieties of the past. And let me assure you, as I did the members of the Senate Intelligence Committee, that Bill Casey and I consider it our paramount responsibility that the rules and regulations not be violated. However, should there be an investigation by the Inspector General's Office, the Office of General Counsel, or my own office of any alleged impropriety or illegality, and it is found that these allegations are not frivolous, records of such an investigation will be found in nonexempted files. In such a case, information relevant to the subject matter of the investigation 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 exempted under the terms of the legislation before this Subcommittee. The same would be true, for similar reasons, Mr. Chairman, whenever a senior Intelligence Community official reports an illegal intelligence activity to this Committee or to the Senate Intelligence

Committee pursuant to the requirements in Section 501 of the National Security Act.

As I mentioned earlier, I testified last June before the Senate Intelligence Committee on S. 1324, which, as introduced, was very similar to your bill, Mr. Chairman, H.R. 3460. After two days of testimony on that bill it was clear that there were differences of opinion and issues which had to be addressed. For the next five months a great deal of effort was spent by Committee staff, Agency personnel, and interested non-government organizations to work out solutions to the remaining issues. Several Senators personally participated in this process as well. Committee staff were given detailed briefings on our records systems and inspected our files. Just last week the staff of your Committee were given briefings on our file systems. In addition, we responded to numerous pages of detailed questions from the Committee as a whole, as well as from individual Members. The result of this lengthy process was unanimous Committee (SSCI) approval of a substitute bill containing several amendments. These amendments were achieved through good faith negotiations and compromise on the part of all parties involved. S. 1324, as amended and reported out of the Intelligence Committee, then passed the Senate by unanimous consent. It has now been referred to your Committee. One of the two bills you are considering today is Representative

Whitehurst's bill, H.R. 4431, which is virtually identical to S. 1324 as passed by the Senate.

This concludes my testimony, Mr. Chairman. I have with me the Deputy Director of the Office of Legislative Liaison, Ernest Mayerfeld, who is prepared to answer any questions you may have regarding the differences between the two bills. Also with me are Deputy Director for Operations, John H. Stein, Deputy Director for Science and Technology, R. Evan Hineman, Director of Security, William Kotapish, and Chief, Information and Privacy Division, Larry Strawderman. We will be pleased to answer any specific questions you or the other Members may have.