H.R. 1281, WAR CRIMES DISCLOSURE ACT, HEALTH INFORMATION PRIVACY PROTECTION ACT, AND S. 1090, ELECTRONIC FREEDOM OF INFORMATION IMPROVEMENT ACT OF 1995

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 1281

TO AMEND TITLE 5, UNITED STATES CODE, AND THE NATIONAL SECURITY ACT OF 1947 TO REQUIRE DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT OF INFORMATION REGARDING CERTAIN INDIVIDUALS WHO PARTICIPATED IN NAZI WAR CRIMES DURING THE PERIOD IN WHICH THE UNITED STATES WAS INVOLVED IN WORLD WAR II

AND ON

S. 1090

TO AMEND SECTION 552 OF TITLE 5, UNITED STATES CODE (COMMONLY KNOWN AS THE FREEDOM OF INFORMATION ACT), TO PROVIDE FOR PUBLIC ACCESS TO INFORMATION IN AN ELECTRONIC FORMAT, AND FOR OTHER PURPOSES

JUNE 14, 1996

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H.R. 1281, WAR CRIMES DISCLOSURE ACT, HEALTH INFORMATION PRIVACY PROTECTION ACT, AND S. 1090, ELECTRONIC FREEDOM OF INFORMATION IMPROVEMENT ACT OF 1995

FRIDAY, JUNE 14, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn and Maloney.

Staff present: J. Russell George, staff director and counsel; Mark Uncapher, professional staff member and counsel; Council Nedd and Mark Brasher, professional staff members; Andrew G. Richardson, clerk; and Mark Stephenson and Les Humanis, minority professional staff members.

Mr. HORN. Good afternoon. A quorum being present, the Subcommittee on Government Management, Information, and Technology will come to order. Today, we will hold the second day of hearings to consider the Federal Government's policies toward public dissemination of information which it maintains.

During yesterday's oversight hearing, we received testimony on the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act. The witnesses included representatives of groups which frequently have made requests for information pursuant to the four Federal information access laws just mentioned.

We also heard from the Government agencies which administer those laws, and from agencies which have the greatest demand and delay in responding to requests for information. What we learned yesterday disturbs me. Several of our witnesses recounted how information they sought had been denied them. The Federal Bureau of Investigation reported that it has a 4-year backlog of Freedom of Information and Privacy Act requests.

This year marks the 30th anniversary of the enactment of the Freedom of Information Act. The problems which were discussed at yesterday's hearings and the testimony which we will receive today make it clear the need for legislative proposals which the subcommittee will consider this afternoon.

We will receive testimony on three bills. The first is H.R. 1281, the War Crimes Disclosure Act, which has been introduced by Representative Carolyn Maloney, the subcommittee's ranking minority member. This legislation would require a disclosure of information under the Freedom of Information Act about individuals alleged to have participated in Nazi war crimes.

We will hear from three witnesses on this proposal. The first witness is our distinguished colleague from California, Representative Tom Lantos; we will next hear from former Representative Elizabeth Holtzman; and, finally, Dr. Robert Herzstein, professor of history, University of South Carolina at Columbia.

A second proposal we will consider this afternoon is S. 1090, the Electronic Freedom of Information Improvement Act. This legislation would amend the Freedom of Information Act to ensure that this most essential tool for public access to Government information keeps pace with the advances in technologies which have occurred since its promulgation.

Among its provisions is the establishment in law of the existing policy that Government records maintained in an electronic format are subject to Freedom of Information Act requests in the same manner as are paper records.

Yesterday, we heard from the Senate sponsor of the legislation, Senator Leahy of Vermont. Today, we will hear from three other knowledgeable experts on Government information policy.

The third legislative proposal the subcommittee will consider is a draft bill that addresses the protection of the confidentiality of medical records. Despite the belief of many Americans, the personal health records of most Americans are not protected by law. The legal and ethical rules which govern the confidentiality of health records are unclear, incomplete, and simply inadequate.

The Health Information Privacy Protection Act would establish Federal standards for protecting the health records of individuals in our society. We will receive testimony from representatives of four organizations which have been actively involved in this issue.

I might add at this point in the record I am going to include the statement of Representative Gary A. Condit of California as if read. He has spent more time on the Health Records Confidentiality Act than any single Member of Congress.

We are delighted to have his statement. I served on his committee in the last Congress where we brought this before the full committee. We want to work very closely with Representative Condit in crafting this legislation. Without objection, Mr. Condit's statement will be entered at this point in the record.

[The prepared statement of Hon. Gary A. Condit and the texts of H.R. 1281 and S. 1090 follow:]

Statement of

Congressman Gary A. Condit

before the

House Committee on Government Reform and Oversight
Subcommittee on Government Management, Information, and Technology

concerning

Fair Health Information Practices

June 14, 1996

I want to thank the Subcommittee for holding this hearing on health information privacy. There is no question that this is an important issue. We are going to have to pass legislation in the near future and I look forward to working closely with Chairman Horn in this important effort.

Several recent studies document the need for uniform federal health confidentiality legislation. The Office of Technology Assessment, the Institute of Medicine, and this Committee during the last Congress all found that the present system of protecting health care information is based on a patchwork quilt of laws. The simple truth is that **health information has little meaningful legal protection today.**

In the 103rd Congress, I proposed the Fair Health Information Practices Act. The legislation passed the Government Operations Committee, but it died with the rest of health reform. In this Congress, my bill is H.R. 435. It is a long complex bill because this is not a simple issue.

The **purpose is to establish a uniform federal code of fair information practices** for individually identifiable health information treatment and payment process. For those who want

more details, I suggest you read House Report 103-601 Part 5. The report has a complete explanation of the legislation and its background.

What I have proposed is not pie-in-the-sky privacy code. It is a realistic bill for the real world. We have to recognize that we cannot elevate each patient's privacy interest above every other societal interest. That would be impractical, unrealistic, and expensive. The right answer is to **strike an appropriate balance that protects each patient's interests** while permitting essential uses of data under controlled conditions.

One of my goals in developing health information privacy legislation is to **change the culture** of health records so that professionals and patients alike will be able to understand the rights and responsibilities of all participants. Common rules will facilitate broader understanding and better protection. Professionals will be able to learn the rules with the confidence that the same rules will apply wherever they practice. Patients will learn that they have the **same rights** in every state and in every doctor's office.

It is critical as we develop this legislation that there will be **no loopholes** for protected health information. As data moves through the health care system and beyond, it will remain subject to a common set of rules. This may be the **single most important** feature of the bill.

We have to accept the limits of legislation. The health care system is tremendously complex, and much of the activity is necessarily fueled by identifiable data. We need to **minimize the use of data**, but we cannot eliminate it.

It would be wonderful if we could restore the old notion that what you tell your doctor in confidence will remain secret. In a health care environment, characterized by third party payers, medical specialization, high cost care, and increasing computerization, **absolute privacy is simply not possible**. What is possible is to assure people that information will be used in

accordance with a code of fair information practices.

The promise of that code to professionals and patients alike is that identifiable health information will be **fairly treated**. There will be a clear set of rules that protect the confidentiality interests of each patient to the greatest extent possible. While we may not realistically be able to offer any more than this, we surely can do no less.

Mr. Chairman, I thank you for the opportunity to testify today, and I look forward to working closely with you as we develop legislation to address this important issue.

I

104TH CONGRESS
1ST SESSION

H. R. 1281

To amend title 5, United States Code, and the National Security Act of 1947 to require disclosure under the Freedom of Information Act of information regarding certain individuals who participated in Nazi war crimes during the period in which the United States was involved in World War II.

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1995

Mrs. MALONEY introduced the following bill; which was referred to the Committee on Government Reform and Oversight, and in addition to the Permanent Select Committee on Intelligence and the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend title 5, United States Code, and the National Security Act of 1947 to require disclosure under the Freedom of Information Act of information regarding certain individuals who participated in Nazi war crimes during the period in which the United States was involved in World War II.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "War Crimes Disclosure Act".

SEC. 2. REQUIREMENT OF DISCLOSURE UNDER FOIA OF INFORMATION REGARDING INDIVIDUALS WHO COMMITTED NAZI WAR CRIMES.

(a) IN GENERAL.—Section 552 of title 5, United States Code, is amended—

(1) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(2) by inserting after subsection (c) the following new subsection:

"(d)(1)(A) Notwithstanding subsection (b), this section shall apply to any matter that relates to any individual who, because the individual is potentially excludable from the United States under section 212(a)(3)(E)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)(i)), is listed in a Watch List.

"(B) For purposes of subparagraph (A), section 212(a)(3)(E)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)(i)) shall be applied by substituting 'December 11, 1941' for 'March 23, 1933'.

"(2) Paragraph (1) shall not apply to—

"(A) any matter that is referred to in subsection (b)(6);

"(B) any matter the disclosure of which would—

"(i) reveal an intelligence agent whose identity currently requires protection;

"(ii) by revealing the name or identity of a living person who provided confidential information to the United States, constitute a substantial risk of harm to such person; or

"(iii) compromise the existence of an understanding of confidentiality currently requiring protection between an agent of the Government and a cooperating individual or a foreign government, and cause harm that outweighs the public interest in the disclosure;

"(C) any matter regarding which there is clear and convincing evidence that the threat to national security, military defense, intelligence operations, or the conduct of foreign relations of the United States outweighs the public interest in disclosure of the matter; or

"(D) any portion, of any matter, that—

"(i) does not relate to any individual referred to in paragraph (1); and

1 "(ii) is reasonably segregable from any
2 other portions of the matter that relate to an
3 individual referred to in paragraph (1).
4 "(3) Any reasonably segregable portion of a matter
5 referred to in subparagraph (A), (B), or (C) of paragraph
6 (2) shall be provided, after deletion of all portions of the
7 matter that are referred to in such subparagraph, to any
8 person requesting the matter under this section if the rea-
9 sonably segregable portion of the matter would otherwise
10 be required to be disclosed under this section.
11 "(4) For purposes of this subsection, the term 'Watch
12 List' means the Automated Visa Lookout System, or any
13 other system or list that maintains information about the
14 excludability of aliens under the Immigration and Nation-
15 ality Act (8 U.S.C. 1101 et seq.) and is maintained by
16 the Department of State or the Department of Justice.".
17 (b) INAPPLICABILITY OF NATIONAL SECURITY ACT
18 OF 1947 EXEMPTION.—Section 701 of the National Secu-
19 rity Act of 1947 (50 U.S.C. 431) is amended—
20 (1) by redesignating subsections (e) and (f) as
21 subsections (f) and (g), respectively; and
22 (2) by inserting after subsection (d) the follow-
23 ing new subsection:
24 "(e) Subsection (a) shall not apply to any operational
25 file, or any portion of any operational file, required to be

1 disclosed under section 552(d) of title 5, United States
2 Code (Freedom of Information Act).".

3 **SEC. 3. EFFECTIVE DATE.**

4 The amendments made by this Act shall take effect
5 180 days after the date of the enactment of this Act.

○

104TH CONGRESS
1ST SESSION

S. 1090

To amend section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), to provide for public access to information in an electronic format, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 28 (legislative day, JULY 10), 1995

MR. LEAHY (for himself, Mr. BROWN, and Mr. KERRY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), to provide for public access to information in an electronic format, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electronic Freedom of Information Improvement Act of 1995".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the purpose of the Freedom of Information Act is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies (subject to statutory exemptions) for any public or private purpose;

(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

(6) Government agencies should use new technology to enhance public access to agency records and information.

(b) PURPOSES.—The purposes of this Act are to—

(1) foster democracy by ensuring public access to agency records and information;

(2) improve public access to agency records and information;

(3) ensure agency compliance with statutory time limits; and

(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

SEC. 3. PUBLIC INFORMATION AVAILABILITY.

Section 552(a)(1) of title 5, United States Code, is amended—

(1) in the matter before subparagraph (A) by inserting "by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "Federal Register";

(2) by striking out "and" at the end of subparagraph (D);

(3) by redesignating subparagraph (E) as subparagraph (F); and

(4) by inserting after subparagraph (D) the following new subparagraph:

"(E) a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection

(b)(3) of this section, together with a specific description of the scope of the information covered; and".

SEC. 4. MATERIALS MADE AVAILABLE IN ELECTRONIC FORMAT AND INDEX OF RECORDS MADE AVAILABLE TO THE PUBLIC.

Section 552(a)(2) of title 5, United States Code, is amended—

(1) in the matter before subparagraph (A) by inserting ", including, within 1 year after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1995, by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "copying";

(2) in subparagraph (B) by striking out "and" after the semicolon;

(3) in subparagraph (C) by inserting "and" after the semicolon;

(4) by adding after subparagraph (C) the following new subparagraphs:

"(D) an index of all major information systems containing agency records regardless of form or format unless such an index is provided as otherwise required by law;

"(E) a description of any new major information system with a statement of how such system shall enhance agency operations under this section;

"(F) an index of all records which are made available to any person under paragraph (3) of this subsection; and

"(G) copies of all records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records under paragraph (3) of this subsection;";

(5) in the second sentence by striking out "or staff manual or instruction" and inserting in lieu thereof "staff manual, instruction, or index or copies of records, which are made available under paragraph (3) of this subsection"; and

(6) in the third sentence by inserting "and the extent of such deletion shall be indicated on the portion of the record which is made available or published at the place in the record where such deletion was made" after "explained fully in writing".

SEC. 5. HONORING FORMAT REQUESTS.

Section 552(a)(3) of title 5, United States Code, is amended by—

(1) inserting "(A)" after "(3)";

(2) striking out "(A) reasonably" and inserting in lieu thereof "(i) reasonably";

(3) striking out "(B)" and inserting in lieu thereof "(ii)"; and

(4) adding at the end thereof the following new subparagraphs:

"(B) An agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency.

"(C) An agency shall make reasonable efforts to search for records in electronic form or format and provide records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format.".

SEC. 6. DELAYS.

(a) FEES.—Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end thereof the following new clause:

"(viii) If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of paragraph (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.".

(b) PAYMENT OF THE EXPENSES OF THE PERSON MAKING A REQUEST.—Section 552(a)(4)(E) of title 5, United States Code, is amended by adding at the end thereof the following: "The court may assess against the United States all out-of-pocket expenses incurred by the person making a request, and reasonable attorney fees incurred in the administrative process, in any case in which the agency has failed to comply with the time limit provisions of paragraph (6) of this subsection. In determining whether to award such fees and expenses, a court should consider whether an agency's failure to comply with statutory time limits was not warranted and demonstrated bad faith or was otherwise unreasonable in the context of the circumstances of the particular request.".

(c) DEMONSTRATION OF CIRCUMSTANCES FOR DELAY.—Section 552(a)(4)(E) of title 5, United States Code, is further amended—

(1) by inserting "(i)" after "(E)"; and

(2) by adding at the end thereof the following new clause:

"(ii) Any agency not in compliance with the time limits set forth in this subsection shall demonstrate to a court that the delay is warranted under the circumstances set forth under paragraph (6) (B) or (C) of this subsection.".

(d) PERIOD FOR AGENCY DECISION TO COMPLY WITH REQUEST.—Section 552(a)(6)(A)(i) is amended by striking out "ten days" and inserting in lieu thereof "twenty days".

(e) AGENCY BACKLOGS.—Section 552(a)(6)(C) of title 5, United States Code, is amended by inserting after the second sentence the following: "As used in this subparagraph, the term 'exceptional circumstances' means circumstances that are unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.".

(f) NOTIFICATION OF DENIAL.—The last sentence of section 552(a)(6)(C) of title 5, United States Code, is amended to read: "Any notification of any full or partial denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and the total number of denied records and pages considered by the agency to have been responsive to the request.".

(g) MULTITRACK FIFO PROCESSING AND EXPEDITED ACCESS.—Section 552(a)(6) of title 5, United States Code, is amended by adding at the end thereof the following new subparagraphs:

"(D) (i) Each agency shall adopt a first-in, first-out (hereafter in this subparagraph referred to as FIFO) processing policy in determining the order in which requests are processed. The agency may establish separate processing tracks for simple and complex requests using FIFO processing within each track.

"(ii) For purposes of such a multitrack system—

"(I) a simple request shall be a request requiring 10 days or less to make a determination on whether to comply with such a request; and

"(II) a complex request shall be a request requiring more than 10 days to make a determination on whether to comply with such a request.

"(iii) A multitrack system shall not negate a claim of due diligence under subparagraph (C), if FIFO processing within each track is maintained and the agency can show that it has reasonably allocated resources to handle the processing for each track.

"(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and a showing by the person making such request of a compelling need for expedited access to records, the agency shall determine within 5 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request, whether to comply with such request. No more than one day after making such determination the agency shall notify the person making a request for expedited access of such determination, the reasons therefor, and of the right to appeal to the head of the agency. A request for records to which the agency has granted expedited access shall be processed as soon as practicable. A request for records to which the agency has denied expedited access shall be processed within the time limits under paragraph (6) of this subsection.

"(ii) A person whose request for expedited access has not been decided within 5 days of its receipt by the agency or has been denied shall be required to exhaust administrative remedies. A request for expedited access which has not been decided may be appealed to the head of the agency within 7 days (excepting Saturdays, Sundays, and legal public holidays) after its receipt by the agency. A request for expedited access that has been denied by the agency may be appealed to the head of the agency within 2 days (excepting Saturdays, Sundays, and legal public holidays) after the person making such request receives notice of the agency's denial. If an agency head has denied, affirmed a denial, or failed to respond to a timely appeal of a request for expedited access, a court which would have jurisdiction of an action under paragraph (4)(B) of this subsection may, upon complaint, require the agency to show cause why the request for expedited access should not be granted, except that such review shall be limited to the record before the agency.

"(iii) The burden of demonstrating a compelling need by a person making a request for expedited access may be met by a showing, which such person certifies under penalty of perjury to be true and correct to the best of such person's

knowledge and belief, that failure to obtain the requested records within the timeframe for expedited access under this paragraph would—

"(I) threaten an individual's life or safety;

"(II) result in the loss of substantial due process rights and the information sought is not otherwise available in a timely fashion; or

"(III) affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage.".

SEC. 7. COMPUTER REDACTION.

Section 552(b) of title 5, United States Code, is amended by inserting before the period in the sentence following paragraph (9) the following: ", and the extent of such deletion shall be indicated on the released portion of the record at the place in the record where such deletion was made".

SEC. 8. DEFINITIONS.

Section 552(f) of title 5, United States Code, is amended to read as follows:

"(f) For purposes of this section—

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

"(2) the term 'record' means all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics; and

"(3) the term 'search' means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a)(3)(A) of this section.".

Mr. HORN. We thank you all for joining us. We look forward to your testimony. Does the ranking minority member have an opening statement?

Mrs. MALONEY. I most certainly do, Mr. Chairman, and thank you very much. I am extremely grateful that you have convened this important legislative hearing on bills concerning the Freedom of Information Act, the Electronic Freedom of Information Act, and the draft bill on Medical Privacy Records.

All of these deal with important and new ethical and technological components of the freedom of information debate. I am extremely pleased, Mr. Chairman, that the subcommittee will have the opportunity today to discuss a bill that I introduced, the War Crimes Disclosure Act. I introduced H.R. 1281 to close what I perceive is a tremendous loophole in the Freedom of Information Act.

Under current law, the Freedom of Information Act allows Government agencies to block the release of information for a wide variety of reasons. Included in these reasons is the outdated national security arguments that are no longer valid in the post-cold war era.

Because of the circumstances, researchers investigating Nazi war criminals, like Kurt Waldheim, were denied information that was sitting in U.S. Government files. I am indebted to A.M. Rosenthal, the New York Times columnist, for his series of articles which brought this problem to light.

The Waldheim case is instructive. For years, the CIA was keeping its information on Waldheim a secret, even as other Government agencies, namely the Department of Justice, were placing Waldheim on the watch list of individuals forbidden to enter this country. Waldheim was given that distinction because of his direct involvement in the deportation and murder of Jews and others during World War II.

It is not difficult to imagine how recent history might have been changed if Waldheim's secret past had become public. Most notably, Waldheim would probably not have been elected to the post of Secretary General of the United Nations—one of the most shameful events in the history of that world body.

Mr. Waldheim's shameful story continues. Just this week, we learned that in his brand new autobiography, "The Answer," he whitewashes his Nazi past and blames the American Jewish community for his banishment from the United States.

Mr. Waldheim's book is a dishonest answer to the overwhelmingly credible charges that he persecuted and facilitated the murder of Jews, Italians, Serbs, and others during World War II. I drafted H.R. 1281 to ensure that the entire Waldheim file is finally closed.

It is also my hope that the enactment of this will help those who research the horrors of the Holocaust ensure that cases like Waldheim do not occur in the future.

My bill is narrowly drawn. It would exclude from disclosure requirements any material that is strictly private and personal. Similarly, information pertaining to current intelligence, national security, and critical foreign relations issues could remain secret.

The Clinton administration is moving in the right direction with respect to declassifying hidden documents. The President's Execu-

tive order of April 20, 1995, will in 4 years declassify many documents that are 25 years old. But I believe when it comes to the Nazi war crimes we can and should move more swiftly.

Mr. Chairman, I am well aware that the Office of Special Investigations of the Justice Department has expressed concerns about this legislation. The Justice Department's letter to the subcommittee details OSI's view that if it were made to adhere to the requirements of the bill, the mandate of the office to investigate, prosecute, and help find Nazi war criminals would be compromised. Obviously, this would represent an unintended consequence.

I am a strong supporter of OSI. Just this week, for example, I called upon the Lithuanian Government to extradite two Nazi war criminals living in the United States that were exposed by OSI's long and painstaking work.

I look forward to working with the OSI to amend this bill, so that it can accomplish its purpose of disclosing Nazi war crime files that reside in the intelligence and national security agencies without hindering the valuable work of the OSI.

I hope our witnesses can also make suggestions on how this can be accomplished. I am delighted, Mr. Chairman, to welcome our three witnesses. Congressman Tom Lantos, the only Holocaust survivor to be elected to Congress, is a strong friend and mentor of mine and one of the strongest moral voices in Congress. Thank you for coming.

Elizabeth Holtzman is a friend and colleague from New York City. During her years in Congress in the 1970's, she literally wrote the laws that created the watch list. She has been an outstanding leader on so many issues.

Finally, Professor Robert Herzstein, who is a distinguished scholar and professor of history at the University of South Carolina. His efforts to uncover the secret files of Kurt Waldheim have played an instructive role in the formation of this legislation. I welcome all of you and look forward to your testimony.

There are a number of organizations, Mr. Chairman, which support the bill and which have submitted statements here today, and these groups include the Simon Wiesenthal Center, the Anti-Defamation League, the Jewish Community Relations Council of New York, the Orthodox Union, the American Jewish Committee. I would like to ask your consent to have their statements as part of the permanent record.

Mr. HORN. Without objection. We are delighted to have the statements in the record.

[The information referred to follows:]

Statement of Rabbi Marvin Hier
Dean and Founder
Simon Wiesenthal Center

before the
House Committee on Government Reform and Oversight

June 14, 1996

On behalf of the 400,000 member families of the Simon Wiesenthal Center, I would like to add my support to Representative Carolyn Maloney's bill to open War Crimes information to the general public. We believe this is a reasonable compromise between the necessity for secrecy in government investigations and the absolute imperative that information be disclosed when it involves individuals who are concealing their heinous past.

We are not interested in allowing those guilty to hide behind government secrecy; we are interested in protecting those who are innocent. We assume that as this bill winds its way through the committee, safeguards will be provided so that investigations can continue but, at the same time, those of us who are vitally interested in protecting this country from the vermin of Nazis will be able to rely on the government to identify those individuals who may have participated or aided and abetted in the commission of crimes against humanity.

Ours is an organization devoted to teaching the lessons of the Holocaust and one of those lessons in the necessity of government to be truthful. There can be little doubt that, had the American people known what the Government knew in 1939, we would have risen in a mighty roar of condemnation of what Hitler and his Nazi henchmen were doing to the poor people of Europe.

It is not possible to speculate how many lives might have been saved from slaughter had our own government been open with us.

The victims and their families cry out for this kind of help and assistance. What did we know and when did we know it? This question has become a cliche but it is also fundamental to rebuilding faith and trust in government. If we are to be a government of the people then we must be a people armed with the information necessary to make intelligent and informed judgements.

It is tragic that more than 50 years later we are still fighting the same fights of disclosure and accountability. Government has responsibility to prosecute those who committed War Crimes and we have a responsibility to make sure that the Government does it job.

We commend Congresswoman Maloney for giving us the tools for letting us live in a better society.

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Statement of the Jewish Community Relations Council of New York
on H.R. 1281, War Crimes Disclosure Act

Subcommittee on Government, Management, Information and Technology
of the Committee on Government Reform and Oversight
June 14, 1996

Mr. Chairman: The Jewish Community Relations Council is pleased to support H.R. 1281, the War Crimes Disclosure Act, sponsored by New York Congresswoman Carolyn Maloney. This important legislative measure would prohibit Federal agencies from withholding information about individuals whose wartime experience has warranted placement on the Watch List of the Immigration and Natural Service. The case of Kurt Waldheim inspired the formulation of this bill in the hope that the complete story of Waldheim's bizarre rise to power, as yet to be fully told, be made public. It is, moreover, highly probable that other stories of Nazi war criminals remain obscured for reasons which include the public's lack of accessibility to government files. At this sensitive juncture in history, full disclosure of wartime records is a moral imperative.

Concern has been raised regarding the possibility that the bill might undermine the critical work of the Office of Special Investigation by interfering with some of their investigations. We understand that this is not the intention of the legislation and that some changes will be made to guarantee that no such interference arise in OSI's operations.

MARK A. EDELMAN
Director, Marketing and Communications

MYRNA SHINBAUM
Director, Media Relations

FOR IMMEDIATE RELEASE

Contact: Myrna Shinbaum (212) 490-2525, ext. 7747
Jess Hordes (202) 452-8320

ADL CALLS FOR SUPPORT OF WAR CRIMES DISCLOSURE ACT, TESTIFIES AT HEARINGS ON NEED FOR ACCESS TO INFORMATION WITHOUT COMPROMISING OSI'S ABILITY TO PROSECUTE

Washington, DC, June 14...**The Anti-Defamation League (ADL) called today for support of legislation which would prohibit federal agencies from withholding information about Nazi war criminals. The bill would close gaps in current law which now allow government agencies to hide information on such criminals. ADL commended the House Subcommittee holding hearings on the bill, noting that as the Holocaust fades into the pages of history, it is imperative to have "broad access to government information which might be helpful to researchers in documenting atrocities and the role of individuals in these crimes against humanity." At the same time, ADL testified, Congress needs to be sensitive to the interests of the Justice Department's Office of Special Investigations (OSI) concerning pending cases.**

In testimony submitted today before the Subcommittee on Government Management, Information and Technology, ADL National Chairman David H. Strassler and ADL National Director Abraham H. Foxman cautioned that as the War Crimes Disclosure Act moves forward, "It is critical to safeguard the ability of OSI to continue their work without compromising information related to ongoing investigations."

Citing OSI's 17-year history of bringing to light the identities of Nazis living in the U.S., stripping them of their citizenship and deporting them to face trial for their involvement in war crimes, the ADL leaders noted "the prosecution of remaining war criminals becomes a race against time."

Mr. Strassler and Mr. Foxman praised the initiative of Rep. Carolyn Maloney (D-NY) in authoring the bill, which addresses a loophole revealed when researchers investigating Kurt Waldheim's Nazi past were unable to obtain pertinent information that was in the hands of the U.S. government.

The Anti-Defamation League, founded in 1913, is the world's leading organization fighting anti-Semitism through programs and services that counteract hatred, prejudice and bigotry.

June, 11, 1996

FOR IMMEDIATE RELEASE

Contact: Betty Ehrenberg

212-613-8124

ORTHODOX UNION SUPPORTS WAR CRIMES DISCLOSURE ACT

The Orthodox Union strongly supports a bill introduced by Congresswoman Carolyn B. Maloney (D-NY) called the War Crimes Disclosure Act. This bill would amend the Freedom of Information Act to prohibit Federal agencies from withholding information about individuals - like Kurt Waldheim - whose wartime activities earned them a place on INS Watch List. This bill is crafted to prevent disclosure of currently viable intelligence information as well as personal and private material. More than half a century after the Holocaust, it is imperative that we do all that we can to learn the lessons of this terrible era.

There are numerous loopholes within the Freedom of Information Act which allow government agencies to hide information - even data on Nazi war criminals that has no current national security or intelligence importance. Researchers who were investigating Waldheim were stymied by the government bureaucrats who blocked the release of important information. The War Crimes Disclosure Act would set up a system whereby information about a certain group of individuals could not be hidden from the public.

- more -

Orthodox Union • 333 Seventh Ave • New York, New York 10001 • (212) 563-4000 • Fax (212) 564-9058

These individuals are those who participated in Nazi war crimes during the time our country was at war with Germany and, because of this activity, were placed on the "Watch List" of aliens forbidden to enter the U.S.

Congresswomen Carolyn B. Maloney (D-NY) has introduced HR 1281, the War Crimes Disclosure Act. This bill would simply prohibit agencies from withholding information about those individuals whose war time activities earned them a place on the "Watch List."

The Institute for Public Affairs of the Orthodox Union strongly urges our members to contact their elected officials to support HR 1281. Letters and phone calls should go out to representatives urging them to support and help pass this important bill.

Fifty years after the end of World War II and the defeat of the Nazi war machine, we must still do everything in our power to expose the horrors of the Holocaust so that its lessons can be passed on to the next generation.

-30-

The American Jewish Committee
OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS
1156 Fifteenth Street, N.W., Washington, D.C 20005, Telephone (202) 785-4200, Fax (202) 785-4115

June 12, 1996

The Honorable Steve Horn
Subcommittee on Government Management,
Information and Technology
House Committee on Government Reform and Oversight
B-373 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Horn:

I write on behalf of the American Jewish Committee, a national organization committed to protection of the rights of Jews throughout the world and to combatting anti-Semitism and bigotry, in support of H.R.1281, the War Crimes Disclosure Act.

The Act, as you know, would amend the Freedom of Information Act to prohibit Federal agencies from withholding information about individuals who appear on the "Watch List" of aliens excluded from the United States because of war crimes they committed during World War II. The Act would, at the same time, provide exceptions to the disclosure requirement so as to prevent the disclosure of currently sensitive intelligence information as well as personal and private information irrelevant to the individual's wartime record. In so doing, the Act would remedy provisions of current law that allowed the CIA to withhold critical information from researchers about Kurt Waldheim's history of Nazi collaboration, even as other government agencies were placing Waldheim on the INS Watch List of individuals forbidden to enter our country.

Had the public had access at an earlier time to information on Waldheim in government files, we might have been spared the shameful spectacle of his election to the position of Secretary General of the United Nations. The War Crimes Disclosure Act will mean that those responsible for war crimes will be more likely to be called to account, at least in some minimal way, for their offenses. As *New York Times* columnist A. M. Rosenthal said almost two years ago, this "is an overdue piece of legislation, important to justice and history." We urge that Members of Congress support this initiative.

We respectfully request that this letter of support be included in the record of the upcoming hearing on H.R.1281.

Sincerely,

Richard T. Foltin
Legislative Director and Counsel

cc: The Honorable Carolyn B. Maloney

Mrs. MALONEY. Finally, Mr. Chairman, the Second World War ended 51 years ago. It is finally time for the entire story of this, the most horrible era in the history of man's inhumanity to man, to emerge.

Mr. Chairman, the great philosopher George Santayana taught us that, "those who do not remember the past are condemned to repeat it." I thank you once again for convening this hearing, Mr. Chairman.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

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Congress of the United States
House of Representatives
Washington, DC 20515–3214

Statement of Congresswoman Carolyn B. Maloney
H.R. 1281 -- The War Crimes Disclosure Act
Subcommittee on Government Information, Management, and Technology
Friday, June 14, 1996

Mr. Chairman, I am grateful that you have convened this important legislative hearing on bills concerning the Freedom of Information Act. The Electronic Freedom of Information Act and the draft bill on medical records privacy matters deal with important new ethical and technological components of the FOIA debate.

I am particularly pleased that the Subcommittee will have the opportunity to discuss a bill I introduced, the War Crimes Disclosure Act.

I introduced H.R. 1281 to close what I perceive is a tremendous loophole in the FOIA. Under current law, the FOIA allows government agencies to block the release of information for a wide variety of reasons, including outdated "national security" arguments that are no longer valid in the post Cold War era.

Because of this circumstance, researchers investigating Nazi war criminals, like Kurt Waldheim, were denied information that was sitting in U.S. government files. I'm indebted to A.M. Rosenthal, the *New York Times* columnist, for his series of articles which brought this problem to light.

The Waldheim case is instructive. For years, the CIA was keeping its information on Waldheim a secret, even as other government agencies, namely the Department of Justice, were placing Waldheim on the "Watch List" of individuals forbidden to enter our country. Waldheim was given that dubious distinction because of his direct involvement in the deportation and murder of Jews and others during World War II.

It is not difficult to imagine how recent history might have been changed if Waldheim's secret past had become public. Most notably, Waldheim would probably not have been elected to the post of Secretary General of the United Nations, one of the most shameful events in the history of that world body.

And Mr. Waldheim's shameful story continues. Just this week, we learned that in his brand new autobiography, *The Answer*, he whitewashes his Nazi past, and blames the American Jewish community for his banishment from the United States.

(OVER)

PRINTED ON RECYCLED PAPER

Waldheim's book is a dishonest answer to the overwhelmingly credible charges that he persecuted and facilitated the murder of Jews, Italians, Serbs, and others in World War II.

I drafted H.R. 1281 to ensure that the entire Waldheim file is finally disclosed. It is also my hope that the enactment of this bill would help those who research the horrors of the Holocaust ensure that cases like Waldheim do not occur in the future. My bill is narrowly drawn. It would exclude from disclosure requirements any material that is strictly private and personal. Similarly, information pertaining to current intelligence, national security, and critical foreign relations issues could remain secret.

The Clinton Administration is moving in the right direction with respect to declassifying hidden documents. The President's Executive Order of April 20, 1995 will, in four years, declassify many documents that are 25 years old. But I believe, when it comes to Nazi war crimes files, we can and should move more swiftly.

Mr. Chairman, I am well aware that the Office of Special Investigations of the Justice Department has expressed concerns about this legislation. The Justice Department's letter to the Subcommittee details OSI's view that if it were made to adhere to the requirements of the bill, the mandate of the Office to investigate, prosecute and help extradite Nazi war criminals could be compromised.

Obviously, this would represent a unintended consequence of my bill. I am a fervent supporter of OSI. Just this week, for example, I called upon the Lithuanian government to extradite two Nazi war criminals living in the United States that were exposed by OSI's long and painstaking work. I look forward to working with the OSI to amend this bill so that it can accomplish its purpose of disclosing Nazi war crimes files that reside in the intelligence and national security agencies without hindering the valuable investigatory work of the OSI. I hope our witnesses can also make suggestions on how this can be accomplished.

I'm delighted, Mr. Chairman, to welcome our three witnesses. Congressman Tom Lantos, the only Holocaust survivor to be elected to Congress, is a moral mentor to me and to all of our colleagues. Elizabeth Holtzman is a political institution in Washington and New York. As an outstanding Member of this body in the 1970s, Liz was a pioneer in the efforts to expose Nazi war criminals. It was her legislation, in fact, that created the Watch List. Robert Herzstein is a distinguished scholar and Professor of History at University of South Carolina. His efforts to uncover the secret files of Kurt Waldheim have played an instructive role in the formation of this legislation. I welcome all of you and look forward to your testimony.

There are a number of organizations which support my bill, and which have submitted statements here today. This groups include: the Simon Wiesenthal Center, the Anti-Defamation League, the Jewish Community Relations Council of New York, the Orthodox Union, and the American Jewish Committee. I ask your consent, Mr. Chairman, to include these statements in the record.

The Second World War ended fifty one years ago. It's finally time for the entire story of this, the most horrible era in the history of man's inhumanity to man, to emerge.

Mr. Chairman, the great philosopher George Santayana taught us that "those who do not remember the past are condemned to repeat it." I thank you once again for convening this hearing and giving us the opportunity to heed Santayana's warning.

END

Mr. HORN. Well, we thank you for a splendid example of when citizens come to you with concerns something happens on the legislative front that affects not only and helps that citizen, in this case scholarship and Professor Herzstein, but it helps all Americans and all humanity. I commend you for pursuing this.

We do have a letter, as you suggested, a copy was sent to you under the name of Andrew Fois, the assistant attorney general for the Office of Legislative Affairs, where they comment on this bill. Some of their comments probably we will take into account, some we probably will not.

I do want to insert it at this point in the record for reference. Without objection, that letter, which was delivered today, June 14th, a four-page, single-spaced letter, will be put in the record at this point.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Stephen Horn
Chairman, Subcommittee on Government
Management, Information and Technology
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter of May 30, 1996, to the Attorney General requesting the views of the Justice Department on H.R. 1281, "The War Crimes Disclosure Act," and S. 1090, "The Electronic Freedom of Information Improvement Act." This letter presents the Department's views on H.R. 1281.

Please note at the outset that the Department strongly supports the goal of informing the public about the horrors of the Holocaust. We believe that disclosing information about those atrocities is in the best interest of the nation and will ensure that the world never forgets the crimes committed. Moreover, the Attorney General is deeply devoted to bringing the perpetrators to justice.

It is precisely because of this devotion that the Department would like to bring to your attention several concerns that we have with the legislation as drafted. We would be happy, of course, to work with you and your colleagues to modify the legislation ensuring that information is disseminated while at the same time ensuring that the Department has the requisite tools to prosecute those involved with Nazi war crimes.

H.R. 1281, "The War Crimes Disclosure Act," would amend the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, to require, with certain exceptions, the disclosure of information regarding individuals who committed Nazi war crimes between December 11, 1941 and May 8, 1945. The bill would accomplish this by taking this information outside the exemptions to the FOIA set forth at 5 U.S.C. 552(b) so disclosure would be required. We fully support declassifying and releasing information pertaining to Nazi war crimes at an appropriate time. However, as drafted, H.R. 1281 would have significant consequences that we are certain its supporters did not intend.

The Honorable Stephen Horn, Page 2

The Attorney General has designated the Office of Special Investigations ("OSI") as the sole office charged with prosecuting Nazi war criminals in the United States and enforcing Public Law No. 95-549, 92 Stat. 2065, sections 101-105 (1978), commonly known as the "Holtzman Amendment" to the Immigration and Nationality Act. The Holtzman Amendment renders excludable or deportable aliens who participated in Nazi persecution. It is the Department of Justice and primarily OSI that would be most affected by H.R. 1281.

Pursuant to H.R. 1281, OSI would be required to disclose case strategy documents which ordinarily would be protected by attorney work product and attorney-client privileges. Because the FOIA requires disclosure to anyone who requests information, H.R. 1281 could provide an enormous advantage to Nazi persecutors by disclosing the Government's investigation and litigation strategies prior to the questioning of persons properly excludable. Similarly, H.R. 1281 would provide information about and insight into the Government's files to persons properly expelled from the United States who seek to attack judgments, orders of deportation, and consent agreements collaterally.

Because H.R. 1281 would include within its coverage, information having nothing to do with the commission of Nazi war crimes, the Department is concerned that the bill is overbroad. Under Section 2(a)(2), the bill covers "<u>any</u> matter that relates to any individual who is potentially excludable from the United States" as a Nazi war criminal, regardless of whether the "matter" relates to the commission of Nazi war crimes (emphasis added). Thus, for example, if an individual were excludable as a Nazi war criminal and also were the subject of an FBI investigation relating to espionage or terrorism, then under the bill, classified information pertaining to that espionage or terrorism investigation would be swept out of the FOIA exemptions at 5 U.S.C. 552(b) and swept into the very different provisions of the bill.

Furthermore, the Department is concerned that H.R. 1281 would burden OSI's declining resources substantially by requiring the review, segregation, redaction, copying, and production of huge quantities of documents. Given unchanged resource levels, these activities would require an enormous investment of the current staff's time when time is the greatest enemy of OSI's prosecution effort. Virtually all of the subjects and key witnesses in these cases are now more than 70 years of age. Enactment of this legislation effectively would mean that some Nazi persecutors might never be prosecuted since key OSI personnel would be diverted from their crucial investigatory and prosecutorial roles to the dissemination of documents. H.R. 1281 would fundamentally disable the very effort -- disclosure of information to the public about those who assisted in Nazi-sponsored persecution -- which the bill seeks to enhance and which the Department supports.

Unwarranted invasions of individual privacy rights could also be affected by the bill's scope because H.R. 1281 provides access to individuals listed on the Watchlist. The Watchlist is a collection of names of tens of thousands of individuals who are suspected of having participated in persecution during World War II. The purpose of the Watchlist is to afford the government the opportunity to investigate the individuals further should they attempt to enter the United States. In the vast majority of cases, the watchlisting of an individual signifies only that there is a "reasonable basis to suspect" involvement in Nazi persecution, usually because the individual is believed to have served in a certain unit or organization. Because the threshold required for entering someone on the Watchlist is minimal, certain persons listed could actually establish their innocence of involvement in Nazi persecution. Thus, subjecting all those watchlisted to disclosure might unfairly tarnish or ruin their reputations. OSI has already had the experience, on a number of occasions, of watchlisted individuals (some of whom were, in fact, victims of Nazi persecution) establishing that they were the subject of mistaken identity or were otherwise almost certainly innocent of committing Nazi-sponsored acts of persecution. Therefore, the Department is concerned that Section 2(a)(2) of the bill would not protect the privacy interests of these individuals.

Section 2(a)(2) provides for disclosure of classified information pertaining to Nazi war criminals unless "there is clear and convincing evidence that the threat to national security, military defense, intelligence operations, or the conduct of foreign relations of the United States [presented by disclosure] outweighs the public interest in the disclosure." By amending the FOIA in this manner, the bill would permit the courts to review decisions by Federal agencies not to declassify information pertaining to Nazi war criminals under the bill's balancing analysis, without limiting the ability of the courts to look behind the Executive's national security determinations. The judicial examination of the Executive's national security determinations potentially raises separation of powers concerns.

Moreover, we believe that H.R. 1281 would hinder the Department's efforts to denaturalize, deport and exclude Nazi persecutors significantly. It would give those who seek to obstruct this program a new and potentially powerful weapon for impeding or even disabling it. It could unfairly ruin the reputations of innocent persons. It could set a dangerous precedent for jettisoning the FOIA scheme for other categories of law enforcement documents. Ironically, passage of the bill would undermine its very purpose: exposing the horrors of the Holocaust.

In our view, Executive Order No. 12958 (issued in April 1995), governing the standards for classifying and declassifying information, moves significantly in the direction of striking the

appropriate balance in cases covered by the bill. Specifically, the Order establishes a framework to declassify information if "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." This language strikes the appropriate balance for those instances in which the prospect of declassifying implicates both a public interest militating in favor of declassifying and national security-related concerns militating in favor of classifying. In such situations, the Order allows an agency to declassify information otherwise meeting the standards for declassification where the public's interest in disclosure outweighs the need to protect the information.

Additionally, President Clinton issued a statement on October 4, 1993 supporting the release of information under the FOIA. This Department supports the principles articulated in President Clinton's announcement. Moreover, in response to the President's statement, the Attorney General issued new guidelines restricting the Department's ability to withhold information based upon an existing legal basis. Instead, the Attorney General said that "it shall be the policy of the U.S. Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." This policy, together with Executive Order No. 12958, would, in effect, provide for the release of information when appropriate.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

I look forward to working with you as we move forward in the legislative process and please let me know if I may be of further assistance in this matter.

Sincerely,

Andrew Fois
Assistant Attorney General

cc: Honorable Carolyn Maloney
Ranking Minority Member
Subcommittee on Government
Management, Information and
Technology
Committee on Government Reform and Oversight

Mr. HORN. Now I am going to have to swear the two witnesses. Mr. Lantos is automatically sworn when he takes the oath to support the Constitution at the beginning of each Congress. If you will stand and raise your right hands?

[Witnesses sworn.]

Mr. HORN. The clerk will note that both witnesses affirmed. Now, if I might, I am going to let you handle the introductions if we just want to go in order with Congressman Lantos first, if that is acceptable.

Mrs. MALONEY. Well, Congressman Lantos is the only Member of Congress who is a Holocaust survivor. He is an outstanding leader on many, many issues and is one of the strongest moral voices in the U.S. Congress. I am really honored that you are here. Thank you for coming.

STATEMENTS OF HON. TOM LANTOS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA; HON. ELIZABETH HOLTZMAN, FORMER MEMBER OF CONGRESS; AND ROBERT E. HERZSTEIN, DEPARTMENT OF HISTORY, UNIVERSITY OF SOUTH CAROLINA AT COLUMBIA

Mr. LANTOS. Thank you very much, Mr. Chairman and Congresswoman Maloney.

Let me first say, Mr. Chairman, I want to commend you for holding this extremely important hearing. You have been one of the leaders in this Congress in this entire field. I think it is only fitting and appropriate that you have chosen to devote a hearing to this most important issue.

I also want to express my pleasure at testifying with my very distinguished former colleague who has done so much to enhance the prestige and reputation of this body during her all-too-short service in the Congress of the United States, Congresswoman Holtzman.

I particularly want to commend my dear friend and most distinguished colleague from New York for introducing this extremely important piece of legislation. Those of us who have been dealing with this issue feel guilty that we have not done this a long time ago. We owe her a deep debt of gratitude and thanks for taking this issue to the Congress and for being as persuasive and as persistent as she has been.

Congresswoman Maloney, we are deeply in your debt.

Mr. Chairman, these days are days of a half a century of remembrance. It was just a couple of years ago that President Clinton appointed me to lead a United States delegation to the 50th commemoration of the Warsaw ghetto uprising.

My delegation was a very interesting delegation, made up of half of distinguished members of the Polish-American community and distinguished members of the Jewish-American community.

We flew to Warsaw for a remarkable 50th commemoration of one of the key events of heroism against the Nazi war machine that occurred during the Second World War by a suppressed people.

The last year or two we have been commemorating the 50th anniversary of the landing in Normandy. We have been commemorating the 50th anniversary of V–E Day and the victory over Japan.

Of course, what we are dealing with in this legislation is a desperate race against time, because those who are guilty of the most heinous atrocities against fellow human beings in the history of mankind are rapidly reaching an age where they are passing on and will be no longer with us.

Congresswoman Maloney's legislation, of which I am very proud to be an original cosponsor, has an enormously significant time dimension and urgency attached to it. It will not be many years before these war criminals will no longer be prosecutable, because they no longer will be here.

While the value of discovering everything purely for historic research in itself is a powerful enough reason for passing this legislation, we are still in the waning years of the decade when individuals who committed the most outrageous crimes against their fellow human beings could be found, prosecuted, and at least symbolically punished. There is no proper punishment for what they did during the Holocaust.

Now, I believe that Congresswoman Maloney's emphasis on the Waldheim case is very appropriate. Here we have an individual who has risen to the highest position in the international community as Secretary General of the United Nations, a position which should be accorded individuals of probity, integrity, unquestioned commitment to human rights.

Yet, retroactively, we discover that Kurt Waldheim conveniently forgot 3 years of his lifetime during which he served in the Balkans as a Nazi intelligence officer, participating in the perpetration of the deportation of utterly innocent children, women, and men to concentration camps and gas chambers.

A man who even at this late stage, at age 77, instead of engaging in some candid introspection and finally coming clean, is still blaming the victim rather than accepting his own responsibility for the outrage in which he played, not a major, but a significant and demonstrable part.

I think the Maloney bill will do all of us proud in this Congress. It has, as it must have, total bipartisan support. I strongly urge you, Mr. Chairman, and all of my colleagues, to do our utmost to facilitate its passage.

This is one of these items where the moral voice of the American people needs to be heard. It is different only in scope from the action we took last night condemning the burning of black churches in many of our southern States.

We simply cannot look away. We cannot pretend indifference. We cannot be too busy to deal with the key moral issues of our times: the burning of black churches in our own South and the hiding of the facts of the Holocaust, the shielding of the criminals 50 years ago.

I am delighted that Congresswoman Maloney has crafted this very carefully tailored legislation which I think shows great legislative skill. I strongly urge you and others to support it. I will do my personal best to bring it to the floor for a successful vote.

Thank you, Mr. Chairman.

Mr. HORN. Thank you for the leadership you have provided in these chambers since the day you entered in terms of human

rights. You have certainly been a mentor to a lot of us, regardless of party.

We now call on a former member, and it is nice to see you here again. The Department of Justice, I might add, suitably mentions your contribution in its letter with name.

Ms. HOLTZMAN. Thank you.

Mr. HORN. Elizabeth Holtzman, please proceed.

Ms. HOLTZMAN. Thank you very much, Mr. Chairman.

I am very pleased to associate myself with the extremely eloquent remarks of Congressmember Tom Lantos. Let me salute you and commend you for your leadership in convening these hearings, and of course to commend my good friend and former colleague in Government, Representative Carolyn Maloney, who has done such an important service to the people of this country by bringing this issue forward in the War Crimes Disclosure Act.

Let me begin by saying that I commend her as well for recognizing that the legislation as drafted needs to accommodate some unintended results so that the important work of bringing Nazi war criminals to justice can go forward unimpeded as long as there is time left to bring these murderers to justice. I want to offer whatever help I can be to Carolyn Maloney in revising the legislation.

As we look around us today, Mr. Chairman, we see that the world has not learned completely the lesson of World War II. We see genocide repeated in Cambodia. We see genocide in Bosnia and in the former Yugoslavia. We see it in Africa. We see acts of prejudice and hatred continuing around us.

The United States of America, I believe, has to play a role of moral leadership. It took far too long, Mr. Chairman, for the United States of America to act against the Nazi war criminals in our midst. Thousands came here after World War II. Some were aided in their presence here by U.S. Government agencies, some were aided abroad.

I am proud to say that the U.S. Government has now begun and is continuing a systematic effort to bring them to justice and to expel the Nazi war criminals in our midst. Our actions in this country have become a model for the rest of the world.

That work of bringing Nazi war criminals to justice and telling the whole story of what happened during World War II and the effort to bring those Nazi war criminals to justice is not completed.

If we are to send a warning to all the would-be war criminals of today and tomorrow, the work of pursuing justice with regard to the Nazi Holocaust has to be completed properly.

One aspect of that is getting the United States of America to disclose the information in its files on Nazi war criminals. This is something I have been trying to do since I was a Member of Congress and after I left the U.S. Congress.

As recently as 1992, I wrote a letter to the Central Intelligence Agency, as well as the President of the United States, making exactly the points that Congresswoman Maloney made.

The cold war is over. Eastern European governments have opened their Nazi war crimes archives. Even Argentina has opened its Nazi war crimes archives. What are we waiting for?

The CIA, in 1992, promised me in a letter that they would begin the effort to declassify their records on Nazi war criminals. To this day, that effort has not, to my knowledge, been achieved.

Other intelligence agencies, the State Department, and the Defense Department may have significant information about Nazi war criminals. The whole record has to be made public.

If we want to play the moral leadership role that we are with respect to bringing the Bosnian and Yugoslavian war criminals to justice, then we have to be prepared to say that we are ready to see the whole truth about what happened in World War II come out 51 years later. There is no reason for any delay.

Some of the information would be extremely important. Because dealing with the issues of genocide in the end is not only for individuals to stand up against acts of prejudice, but it is also for governments to stand up against other governments that commit these terrible crimes.

One of the lessons, I believe, that we will learn when these war crimes files are finally opened is why it took so long for the U.S. Government to do the right thing in these cases.

Perhaps, we will learn a lesson to make sure that that never happens again so that no matter where genocide is taking place in the world, God help us if it does again, and we hope that it will never happen, but that our Nation is in the forefront of trying to put a stop to that. That is what this is about.

Again, I salute this subcommittee and you, Mr. Chairman, and you, Congresswoman Maloney, for your leadership here.

[The prepared statement of Ms. Holtzman follows:]

Let me begin by thanking the chair and members of this subcommittee for the opportunity to appear before you to discuss H.R. 1281, the War Crimes Disclosure Act. I am honored to be here.

Representative Carolyn Maloney, the author of H.R. 1281, is to be congratulated for her leadership and vision in introducing the bill and focusing attention on the serious problem it seeks to address. She has done the nation a great service.

The bill grew out of our government's decision to bar Kurt Waldheim from entering the United States. Our government acted under the legislation I wrote that prevents those who engaged in Nazi war crimes from coming into this country.

Although the U.S. issued a report justifying the decision to place Waldheim on the watch list, many believe that the government is still concealing information about Waldheim, particularly information that might suggest that our government knew about his past activities as an intelligence officer with Nazi army units involved in the deportation of Jews from Greece and in the targeting of Balkan villages for reprisals. It defies credulity to believe that our government knew nothing about these activities by a man who later became the Secretary General of the United Nations. Yet a wall of silence still meets efforts to unravel the whole truth about what the U.S. government knew about Waldheim and when it knew it--and what it did with the knowledge it had.

The War Crimes Disclosure Act seeks to correct that problem by enlarging the Freedom of Information Act's applicability to persons such as Waldheim who were placed on the watch list for acts of Nazi persecution. The bill's objectives are wholly laudable, and I strongly support them. It is critical that we be permitted to learn the whole truth about our government's connection with Waldheim and his ilk.

When it comes to Nazi war criminals, our government should not be able to keep secrets from the American people.

I believe, however, that with some modifications the bill can be even stronger and achieve its important objectives more efficiently.

The bill as drafted could unintentionally undermine the important work of the Justice Department's Office of Special Investigations in tracking down and expelling Nazi war criminals from our midst. The bill could interfere with investigations and with the effort to keep Nazis from our shores. Thousands of Nazi murderers came to the United States, mostly in a surreptitious manner, after World War II; more than 100 Nazis have already had their citizenship removed or been expelled from our country; hundreds of cases are now under investigation. With the collapse of the former Soviet Union, archives once closed to us are now

available. I know this committee and Carolyn Maloney do not want to impede in any way OSI's critical efforts to bring Nazi war criminals to justice.

The Justice Department has spelled out its concerns in greater detail; I believe they are justified.

These concerns can easily be resolved. The bill should focus on opening the files of the agencies that may have been directly involved with Waldheim and other alleged Nazi war criminals. These agencies are the Central Intelligence Agency (and its predecessor the OSS), the Defense Department, the National Security Agency, the National Security Council, the State Department and the FBI.

That each of these agencies at some point had information about--or worked with, employed, or protected-- Nazi war criminals either here or abroad or brought them to our shores is documented for example by reports of the General Accounting Office, and by OSI's report on Klaus Barbie, the Butcher of Lyons, who was employed by the Army's counter-intelligence corps in violation of U.S. law. The whole story of these actions by the U.S. government agencies has never been made public.

World War II ended 51 years ago. Isn't it time for the truth to come out?

Ironically, the Soviet Union has opened its archives, Eastern European countries have opened their archives, even Argentina has begun to open its files on Nazis. Why are ours still closed?

Even the CIA concedes the files should be open--in theory at least. In 1992, in response to a letter from me, Admiral Studman, the deputy director of the CIA, promised that the long secret files on Nazi war criminals would be opened to historians' scrutiny. But four years have gone by and that still has not happened.

President Clinton, in a recent executive order, stated that classified files more than twenty-five years old should be opened to the public. Although the executive order hasn't taken effect yet, the premise that twenty-five years of secrecy is enough is compelling.

I would propose that with regard to Nazi war criminals, the committee adopt a blanket rule: any information in the files of any U.S. agency as of 1966--thirty years ago--be made public--no ifs, ands or buts. And made public immediately. Properly drafted, this formulation, which enlarges FOIA's scope only with respect to the government agencies that had the material before 1966, should achieve the goal of Representative Maloney's bill. This would inform the public without impairing OSI's important mission by opening it up to a flood of FOIA requests during the limited remaining time that it will be conducting investigations and trials.

With the terrible specter of war crimes in Bosnia and Rwanda--not to mention the genocide in Cambodia--how can our government press for justice in these cases and continue to cloak in secrecy and silence the story of its connection with Nazi war criminals. The sooner we get the government's dirty linen out in public the more Americans will have the moral authority to press other nations to stand up to genocide today.

Thank you.

Mr. HORN. Well, we thank you for that excellent, passionate, and well-organized and dedicated testimony on this issue. You are an expert, along with Professor Herzstein, whom we will hear now.

Welcome.

Mr. HERZSTEIN. Thank you, Mr. Chairman and Representative Maloney. I have a longer statement I would like to submit for the record, if I may?

Mr. HORN. Please do. Without objection, it is automatically part of the record.

Mr. HERZSTEIN. If H.R. 1281 had been the law of the land in decades past, Waldheim would not have been able to deceive the world until uncovered by private efforts in 1986. For almost 10 years, I have been told that national security concerns prevent me and the public from learning about the involvement of this Government with Kurt Waldheim.

I can tell you this, for at least 44 years individuals working for at least two agencies of the U.S. Government protected Waldheim by propagating false information about him.

For example, in 1952 the State Department official biography of Kurt Waldheim indicated he never served at all in the Second World War. What national security interest justifies the protection of Waldheim five decades after his first contacts with U.S. intelligence officials, or do officials wish to shield themselves from embarrassment or worse?

I believe that we could reach a point where the historian gains responsible access to these records without compromising legitimate security concerns. In my view, H.R. 1281 will lead to the accessibility of important records.

For the past 9 years, I have been researching the elusive career of the Austrian diplomat, Kurt Waldheim. I was the researcher consulted by the American Jewish Congress in its investigations in 1986. In 1988, I published my book on Waldheim. I concluded that the Austrian President had facilitated the commission of war crimes and crimes against humanity.

As a result of the research conducted by myself and others, Waldheim was in 1987 placed on the watch list. This decision was mandated by the Holtzman amendment, which has contributed in a major way to addressing past mistakes and injustices. Facilitating atrocities such as illegal deportation carried out by or on behalf of Nazi Germany or its allies falls within the purview of this amendment.

The second question is, how could someone so prominent as Waldheim bury his past? State Department clerks would from time to time update that 1952 résumé by adding to Waldheim's list of achievements. The résumé was never corrected, either in the records of the CIA or the State Department on the basis of present information that I have.

Personnel in the State Department, whether through incompetence or malfeasance, helped to fabricate and disseminate the false biography that enabled Waldheim to become head of the United Nations. Waldheim could thus evade the implications of his wartime record until cornered by the work of the World Jewish Congress and other entities in 1986.

Why did U.S. officials protect a man of this nature, especially when war crimes lists produced by and for the State Department listed Waldheim as an accused war criminal? Even the few documents provided to me under the current FOIA rules enable us to answer this question. Kurt Waldheim, according to the State Department, "Understood American thinking and has proven most cooperative," and this is a quote, "and is helpful in promoting U.S. interests."

Not to be outdone, the CIA, in one of the few documents it has released on this case, admits that Waldheim was "particularly effective in confidentially working out Austrian formulations acceptable to the United States."

In its files, the CIA had information proving that Waldheim had served as an intelligence officer in the Balkans. Had there been a tradeoff of silence in return for cooperation? Until H.R. 1281 becomes law, we will not know. My attempt to obtain documentation from the CIA met with a blanket refusal until about 1994.

Now things have begun to change, though at a glacial pace. Why? Because under title VII, section 701, of the CIA Information Act, "operational files" of the Agency may be exempted from FOIA. Unfortunately, the President's new Executive order leaves major exemptions in place. I will be happy to discuss this problem during questioning.

Placed in sensitive centers of cold war intrigue, Waldheim informed American contacts about difficult diplomatic negotiations, and provided them with information about Austrian personnel stationed in places like Moscow.

Senior American diplomats at the United Nations assumed that Waldheim was working for the CIA, that he was cooperative and a good source of information. One need not make a moral judgment about the propriety of such an arrangement. Let scholars and the public see the relevant documentation, and they can decide for themselves.

The CIA was certainly loyal to Waldheim. The Agency rescued the Secretary General in 1980. At that time, the CIA's 1980 report to Representative Solarz, who had inquired into Waldheim's biography, cleared Waldheim. What is interesting is that the inaccurate information in the CIA's letter to Waldheim paralleled Waldheim's own equally inaccurate account.

Waldheim, a candidate for a third term as Secretary General, bragged to a CIA informant that he had the Western powers "in his pocket," but was less certain of the support of the Soviet Union and China.

After supporting Waldheim on the first ballot in 1981, the Russians abstained. Britain and France deserted him at the same time. On the second ballot, which destroyed Waldheim's chances, only one permanent member remained loyal to him: the United States.

In such cases as the Waldheim matter, H.R. 1281 would shift the burden from the researcher to the Government.

As a researcher and a historian, I want to pay particular tribute to Representative Maloney, whose dogged insistence upon righting past wrongs has done credit to her and to the institution of Congress.

I am certainly very proud to be here with Ms. Holtzman, whose Holtzman amendment has been absolutely crucial in making possible the research we have been able to do.

I hope that this pending reform of the CIA Information Act will pass in this session of Congress, and that the subcommittee and other responsible monitors will thereafter oversee the enforcement of H.R. 1281. Historians will benefit, so will the public interest. Historical memory will no longer fall victim to misused concepts of national security. Thank you, Mr. Chairman.

[The prepared statement of Mr. Herzstein follows:]

Statement on H.R. 1281, by Professor Robert E. Herzstein, before the Subcommittee on Government Management, Information and Technology of the U.S. House of Representatives, June 13, 1996

Mr. Chairman, distinguished members of the Subcommittee:

Thank you for inviting me to testify here today. I have a statement which I would like to submit for the record. I will summarize it briefly, and will be happy to answer your questions.

Let me make my basic point: If H.R. 1281 had been the law of the land in decades past, Kurt Waldheim would not have been able to deceive the world. This bill will make sure that the shameful history of the Waldheim case--and of related cases--never repeats itself.

Scholars conducting research in contemporary diplomatic history often require access to relevant intelligence data. Yet governments resist sharing such information with their publics. Let me cite a typical response to one of my requests for documents, written by a high government official. "I can understand your disappointment that information potentially valuable to your scholarly work is unavailable because of national security concerns," wrote this gentleman. He then bid me farewell, wishing me "every success as you continue your

work." Of course, this kind of denial meant that I could not continue my work in a thorough manner.

The concern for national security is legitimate. No one wants to compromise important intelligence data. But persons placed on the so-called "Watch List" of the INS by reason of their involvement in wartime atrocities should not be shielded from the light that may one day be cast by historians and other interested parties. What national security interest justifies the protection of Kurt Waldheim, five decades after his initial contacts with U.S. intelligence officials? Or do officials wish to shield themselves from embarrassment or worse? The latter motive, while quite understandable, does not justify the evasions which have greeted my inquiries into the Waldheim scandal.

Let me quickly note that this issue has no partisan overtones. So far as I can tell, the agency that most concerns me here today operates in its own way, oblivious to changes in the White House or on the Hill. (I can say this after having worked on the Waldheim issue during the tenures of three presidents.)

I believe that we can reach a point where the historian gains responsible access to these records, without compromising legitimate security concerns.

In my view, H.R. 1281 will lead to the accessibility of important, hitherto concealed records. If passed, Congressional oversight will be essential to its

implementation. How does H.R. 1281 relate to the Waldheim matter?

For the past nine years I have been researching the elusive career of the Austrian diplomat Dr. Kurt Josef Waldheim. Basically, I have been trying to answer two questions.

First, what was the nature of Waldheim's activities while serving in the Wehrmacht between 1939 and 1945?

I was the researcher consulted by the World Jewish Congress in its investigation of Waldheim in 1986. In 1988, when I published my book Waldheim: The Missing Years, I concluded that the Austrian president had facilitated the commission of war crimes and crimes against humanity. As a result of the research conducted by myself and others, Waldheim was in 1987 placed on the "Watch List." This decision was entirely appropriate, indeed, it was mandated by the Holtzman Amendment. Let me point out that one need not be labeled a "war criminal" in order to qualify for this listing. Facilitating atrocities, such as illegal deportations, carried out by or on behalf of Nazi Germany or its allies falls within the purview of the amendment.

The second question has been more difficult to answer.

How could someone so prominent as Dr. Waldheim--an ambitious diplomat in a country occupied by four great powers; foreign minister in a city at the center of Cold War intrigue; head of a world organization in the media

capital of the planet--bury his wartime past?

In an op-ed piece I wrote for the New York Times back in 1986, I suggested that the concealment of Waldheim's exploits in the Balkans during World War II could not have been the work of one man, acting alone. I asked, "Did [Waldheim] now put his skills to work for the West, with the understanding that war crimes allegations would be allowed to drift into oblivion?"

Thanks to the imperfect but indispensable Freedom of Information Act, complemented by interviews with former American officials, I have since 1990 obtained information that points toward a remarkably close collaboration between Waldheim and the United States government. I might add that a series of articles about my research, by columnist A.M. Rosenthal in the New York Times, has helped matters. The CIA has begun to disgorge a tiny part of its vast documentation on Kurt Waldheim. But one cannot discover the full truth unless H.R. 1281 passes the Congress and is signed into law by the President. Here is some essential background information.

Early in 1948, persons representing the Department of State received information--forwarded to the United Nations War Crimes Commission--implicating Kurt Waldheim in alleged war crimes. Thus, we know that State Department files showed that Lt. Waldheim had served in the Balkans, in bloody campaigns of reprisal and extermination. Secondly,

from its inception, the CIA was in possession of an OSS-transmitted document, dated 1945, showing that Kurt Waldheim had served on the staff of the High Command of Army Group E, in the Balkans.

Subsequently, another U.S. agency, either by design or through incompetence, altered Waldheim's wartime biography. He emerged as an innocent non-combattant. In 1952, the State Department noted that Waldheim received his law degree from the University of Vienna in 1940, married in 1944, and entered the reborn Austrian Foreign Service in November, 1945. What else was he doing during the war? According to the State Department, Waldheim was working in the legal system, assisting judges and the like. This misleading and incomplete information was supplied by the Personnel Office of the Austrian Foreign Ministry. At that time, the head of this agency was the 33-year old Kurt Waldheim. No one asked any questions, so far as I can tell.

The State Department's recording clerk in Washington added an interesting comment: Waldheim had little contact with American diplomatic personnel, but more information would be forthcoming. This proved to be a false prophecy. The internal biographical information distributed in subsequent years to interested parties in the government continued to omit any reference to Waldheim's wartime service. He could thus evade the implications of his

wartime record, until cornered by the work of the World Jewish Congress and other entities in 1986.

State Department clerks would from time to time update the 1952 resume by adding to Kurt Waldheim's growing list of achievements. Later, when memories of the war had grown dimmer, Waldheim freely acknowledged his service in the Wehrmacht during the early stages of the Russian campaign. He never mentioned the bloody Balkan episodes. The State Department, which had access to its own file on Waldheim's Balkan service, remained silent. The incomplete biography went forward when Kurt Waldheim became Secretary-General of the United Nations in 1971. In 1972, the CIA did a superficial job of investigating rumors about the new Secretary-General's alleged National Socialist ties. In 1976, the United States solidly supported Waldheim's bid for a second term.

Clearly, a protective curtain had descended over Mr. Waldheim. Yet official American reticence about Waldheim's war is far less remarkable than another aspect of his biography.

Kurt Waldheim, according to the State Department, understood American thinking, and was especially "receptive to our way of approaching problems," more so than anyone else in the Foreign Ministry. Later, Waldheim's service apparently improved, for one cable, released to me in 1990, observes that "[Waldheim] has proven most cooperative and

helpful in promoting U.S. interests." Other phrases fell into the same mold: "cooperative and receptive to U.S. interests," and "has an understanding of American thinking and foreign policy objectives," which by 1970 has been upgraded to "an excellent understanding of American thinking and foreign policy objectives." By 1974, when U.N. Secretary-General Waldheim was campaigning for a second term, the State Department described him as "a good friend of the United States," and as man who "was cooperative in promoting U.S. interests." After more research and a number of useful interviews, it became apparent that these euphemisms pointed to a confidential relationship, not just with the State Department, but with the Central Intelligence Agency.

My attempt to obtain documentation from the CIA met with a blanket refusal between 1986 and 1994. Now, things have begun to change, though at a glacial pace. Here are some of the salient facts.

Under Title VII, Section 701 (b) of the CIA Information Act (passed by the Congress in 1984, see 50 U.S.C. 431, "Protection of Operational Files of the Central Intelligence Agency"), "operational files" of the Agency may be exempted from the Freedom of Information Act. The much used and abused Executive Order 12356 enables the CIA to shield these materials from disclosure.

The CIA defines these files as materials which

> "document the conduct of foreign intelligence or counterintelligence operations of intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services,"

and as

> "files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources..."

The researcher can appeal a particular denial, and I repeatedly did so. One may then file suit in a U.S. District Court, but besides incurring great expense, such a challenge would probably be futile. Not even a court may order the CIA "to review the content of any exempted operational file or files..."

A typical response to one of my requests was dated October 21, 1986. The CIA's Information and Privacy Coordinator rejected my latest demand for information. "One document," added Mr. Lee S. Strickland, "was located [pursuant to my request], release of which was denied in toto." In response to subsequent requests for further documents, the CIA would neither confirm nor deny their existence. The Agency, using the current law, had determined that disclosure might:

> Damage the national security; lead to the release of information about sources and methods used in intelligence work; provide information about foreign governments; expose foreign intelligence materials produced by nations with whom the United States enjoys an "equivalent protection" relationship.

This language is so broad enough to shield almost anything from public scrutiny. Yet further concealment only whets the researcher's appetite, for the order's language fits the Waldheim case perfectly. Indeed, throughout the Cold War, the U.S. enjoyed a close relationship with various Austrian intelligence and foreign policy agencies.

Like the State Department, the CIA agreed that Waldheim understood American "foreign policy objectives," and had been useful in furthering American interests. Even more striking is the Agency's statement that Waldheim was "particularly effective in confidentially working out Austrian formulations acceptable to the United States." This is not surprising. Waldheim owed his early career to Karl Gruber, an informant for the U.S. Army's Counter-Intelligence Corps' 430th Detachment, and to Fritz Molden, who worked for the CIA's predecessor organization, the Office of Strategic Services. But how do we know whether the CIA was copying the State Department's biography, or the other way around?

Kurt Waldheim was a Foreign Ministry official and a diplomat, so the State Department would ordinarily have been the agency most concerned with his resume. Surprisingly, however, the CIA's information on Waldheim was far more complete; that of State was sketchy at best. It seems probable that State was summarizing information provided Washington by the CIA's station chief in Vienna,

and by the Agency's confidential biographers in Langley, Virginia. Because of the Agency's "operational interest" in Waldheim, State received what it needed to know, and nothing more. This explains why State's post-1952 biographies contained no information about Waldheim's exploits with the Twelfth Army and Army Group E in 1942-1945.

Kurt Waldheim denied any connection with American intelligence when I asked him about this matter nine years ago. In fact, he was being less than forthright. Placed in sensitive centers of Cold War intrigue, Waldheim informed American contacts about difficult diplomatic negotiations, and provided them with information about Austrian personnel stationed in places like Moscow. Senior American diplomats at the United Nations assumed that Waldheim was working for the CIA, that he was cooperative and a good source of information. I am not prejudging the ethical side of this putative equation. One need not make a moral judgment about the propriety of such an arrangement. Let scholars and the public see the relevant documentation, and they can decide from themselves.

The CIA certainly was loyal to Kurt Waldheim. The Agency rescued the Secretary-General in 1980. At that time, Rep. Stephen Solarz of New York asked Waldheim about allegations charging him with concealed Nazi ties. In its letter to Solarz, the CIA subsequently allayed the

Congressman's suspicions. When I inquired about this matter about seven years later, the Agency noted that its biographical data on Mr. Waldheim were based upon "open source materials." When I asked about the identity of those sources, I learned from David D. Gries, Director of Congressional Affairs for the CIA, that "we are not able to identify open source materials the researcher may have used to prepare his 1980 response [to Solarz]." This alone was bizarre; even more tantalizing was the fact that the CIA's 1980 report to Solarz, which cleared Waldheim, contained inaccurate information which to my knowledge did not then or now exist in "open source materials." The CIA had collaborated with Waldheim in the production of parallel alibis. Waldheim was safe for almost six more years.

If the United States could secure Waldheim's cooperation, was he not equally beholden to other great powers, such as the Soviet Union? At present, there is not one iota of public evidence to support an affirmative answer to this question. Everything points in another direction.

In the summer of 1980 Waldheim, a candidate for a third term as Secretary-General, bragged to a CIA informant that he had the Western powers "in his pocket," but was "less certain of the support of the Soviet Union and China..." This is no wonder, when one heeds the testimony of Arkady N. Shevchenko, a high-ranking Soviet Foreign

Ministry official assigned to the U.N. Secretariat. A close associate of Waldheim, Shevchenko also worked with the CIA, which managed his defection to the United States. In a memoir published after Waldheim left the U.N. (Breaking with Moscow, 1985), Shevchenko described how Foreign Minister Andrei Gromyko, along with leaders like Leonid Brezhnev, disdained Waldheim. According a memorandum prepared for the Politburo, the Soviet Foreign Ministry concluded that Waldheim was "flirting with the Americans" (an understatement). In fact, the Soviets backed Waldheim during his first (1971) campaign only because they feared the advent of another unpredictable activist--like the late Dag Hammarskjöld. In 1976, the Russians accepted Waldheim for a second term, but only because no more acceptable (and viable) candidate had emerged.

In 1981, Waldheim's famous luck took a turn for the worse. The Secretary-General, who yearned for a Nobel Peace Prize, was doggedly campaigning for a third term. In order to secure this unprecedented honor, Waldheim needed the support of the majority of the Security Council. This he could secure, but Waldheim could not be recommended to the General Assembly for a third term if a permanent member of the Council vetoed his candidacy. The Chinese wanted him out, however, for they demanded his replacement by a person from the Third World. Finally, the Russians also turned against the incumbent. After supporting Waldheim on the

first ballot (October 13, 1981), the Russians abstained, as did their German Democratic Republic. Britain and France deserted him at the same time.

On the second ballot, which destroyed Waldheim's chances, only four powers remained loyal to him: The United States, the Philippines, Spain, and Japan. This information, provided by the mission of a power friendly to the United States, completely contradicts the wild rumors regarding a Soviet connection.

Certain facts have become clear. The State Department and the CIA, whether through incompetence or malfeasance, helped to fabricate and disseminate the false biography that enabled Kurt Waldheim to deceive the world and lead the United Nations.

H.R. 1281, called the "War Crimes Disclosure Act," is a proposed amendment to the 1947 National Security Act, The amendment would apply to anyone liable to exclusion from the U.S. under the "Holtzman Amendment." In other words, the legislation concerns individuals whose wartime activities on behalf of Nazi Germany or its allies earned him/her a place on the "Watch List" of the Immigration and Naturalization Service. According to H.R. 1281, researchers could no longer be denied access to documentation concerning such persons. Sources and methods and agents would be protected, but the government would now need to

show why other information about that subject should not be released.

This shift of the burden from the researcher to the government will show that the Freedom of Information is no longer a casualty of postwar history.

Your subcommittee, Mr. Chairman, can help to make this happen. I hope that this pending reform of the CIA Information Act will pass in this session of Congress, and that this subcommittee, and other responsible Congressional monitors will thereafter oversee the enforcement of H.R. 1281. Historians concerned with American diplomacy and U.S. intelligence operations (they often overlap) during World War II and the Cold War will benefit. So will the public interest, for historical memory will no longer fall victim to misused concepts of national security.

Mr. HORN. Thank you very much. I am going to ask Representative Maloney to begin the questioning, 10 minutes to a side.

Mrs. MALONEY. Thank you very much, Mr. Chairman. First of all, Ms. Holtzman, you made reference in your statement that many governments have opened up their files on Nazi war criminals. I just wanted to mention that a letter that I authored to the President of Argentina, which was cosigned by 35 of my colleagues, helped persuade him to open up those files.

As you said, it is embarrassing, really, that all of these other countries—we can learn more about what happened from the KGB files now than we can from our own Government.

I would like to ask both Professor Herzstein and Ms. Holtzman, am I to understand that you believe that individuals employed in the U.S. Government are hiding documents? What would be their motive now to hide these documents from the public or to keep them from becoming public?

Ms. HOLTZMAN. Well, I do not know that anyone is actually hiding in a kind of—in that sort of nefarious sense. I think that there is no question, in my judgment, and I say that in my testimony, which I understand has already been incorporated in the record, there is no question in my judgment that there is substantial information in Government files on Nazi war criminals, and some of that information has not been made public.

We know, for example, that the U.S. Government worked with Klaus Barbie, employed him, protected him, sheltered him. We know that they worked with Arthur Rudolph. He may even have been brought to the United States because one Government agency lied to another. We do not even know whether the President of the United States was ever lied to with respect to the work of lower level Government agencies and Nazi war criminals.

There is an enormous amount of information that has to be disclosed. Who knows whether there will be names of other potential war criminals who can still be brought to justice in those files? There is no question in my mind that those archives exist. Other countries have made them public. I want to congratulate you for your letter to the Government of Argentina and your work in that respect.

Having myself been responsible for the creation of OSI, and worked hard to see that we finally ended this chapter on World War II with dignity and with respect to the memory of the victims and respect to the memory of the U.S. soldiers who sacrificed their lives, that we finally make public for historians, for the public, for the future of the world the whole story of why after World War II in the face of the revelation of the concentration camps, and the opening of the concentration camps and the understanding of the horrors of the Holocaust, why all these people were not brought to justice, what role our own Government played in their escape from justice, and how we can make sure that that never, never happens again.

Mrs. MALONEY. Professor, would you like to comment?

Mr. HERZSTEIN. Yes. There is substantial evidence pointing to ties between Mr. Waldheim and individuals in the State Department as early as 1952, as I mentioned earlier, and throughout the

1950's, 1960's, 1970's, and perhaps later with the Central Intelligence Agency.

Most of the evidence contained in these files points to a very close relationship. It appears to be based upon Waldheim's willingness to provide information that was considered useful for cold war purposes.

One of the interesting sidelines in this is, that even though Waldheim was a diplomat, the internal biographies of him in the State Department files appear to be copied from the far more detailed information in the CIA's files. It should be the opposite if he was a diplomat and nothing else by the order of things.

I think one of the reasons for concealment of this information, I would not call it hiding, I would call it concealment of the information is obviously it is embarrassing. Beyond that, under the current legislation that is on the books, the CIA is well within its rights to hide this material or conceal it from the general public.

In fact, if you try to get this material, most of it they turn you down and tell you to appeal. When you are turned down and appeal, they tell you to go to the district court.

If you talk to an attorney who reviews the legislation, if you go to a district court, what can the judge say except this was quite proper under these broad loopholes for foreign counterintelligence, et cetera?

The CIA has to tell you under FOIA why they turned you down. They give you a list of reasons, and they say this information may relate to one or more of the following, among them foreign intelligence sources, counterintelligence, et cetera. Of course, this is what we want to know. Unless your legislation passes, the CIA is well within its rights under the current legislation in turning down researchers, journalists, and historians.

Mrs. MALONEY. Based on your research and an updated bill, what agencies would you like to see covered in the legislation?

Mr. HERZSTEIN. Since I am most familiar with this case, and there may be others where you get a different answer, I would say the State Department, the Central Intelligence Agency, and the Counterintelligence Corps of the U.S. Army, in other words Army intelligence records, would be the most germane, as far as I can see.

Mr. MALONEY. Would you like to comment on what you think should be covered in the bill, what agencies?

Ms. HOLTZMAN. Yes. Representative Maloney, I believe from my own experience and the reports that have been done on this subject by the GAO, which show the assistance provided by various agencies of the U.S. Government, I believe that the agencies, at least to begin with, should be the Central Intelligence Agency and its predecessor, the OSS, the Defense Department, including the Army Counterintelligence Corps, the National Security Agency, the National Security Council, the State Department, and the FBI.

I also would include Radio Liberty and Radio Free Europe, since as recently as the late 1970's one of those organizations decided to publicize and actually broadcast a program with a man called Bishop Trifa and use him as pro-U.S. propaganda at the same time the Justice Department was trying to expel him from the United States for alleged war crimes.

Now, how could they continue to do that? If we could get a disclosure of this information, that is what we would begin to find out—how it was that U.S. Government agencies, despite the truth about the Holocaust, managed to hide from the Congress, from the American people, from the world, their secret efforts to protect, to employ, to deal with former murderers?

Mrs. MALONEY. Given President Clinton's Executive order of April of last year, do you believe we still need to amend the FOIA with respect to the National Security Act, Professor Herzstein?

Mr. HERZSTEIN. I do. I have read the President's Executive order, and I think it goes in the right direction. I noticed that some of the language, presumably suggested by affected agencies, repeats the language in the exemptions under the existing FOIA law very closely, and they are very broad.

Your legislation, I think, would absolutely be necessary. Of course, Executive orders can be changed in a way the legislation cannot. For those two reasons, I think your legislation would be appropriate.

Ms. HOLTZMAN. In addition, Representative Maloney, I do not believe the President's order actually takes effect for a few years. There is no reason, since time is running out there is no reason, for us not to act immediately, which is what your bill would do.

In addition, I am of the mind, given how effectively U.S. agencies have alluded the obligation to disclose, I am of the mind that we ought to have some sort of absolute requirement, at least for the early years, perhaps up to 1950 or 1955, of just total disclosure in opening these files without any loopholes that would allow these agencies to continue to conceal and continue not to let the public know what the real truth was.

Mrs. MALONEY. It is very noteworthy that in a book very recently published last week, actually Mr. Waldheim essentially professed his innocence and blamed his banishment from the country on the World Jewish Congress. Based on your research, Professor, how would you counter this claim?

Mr. HERZSTEIN. Well, the claim is absolutely absurd, Representative Maloney. Waldheim says in the book you cite, "Many Americans cannot really understand what happened in Europe during the 1930's and the 1940's, others simply do not wish to do so."

Some of us have spent most of our careers studying people such as Waldheim or tracking them down, and I take that as a very offensive comment, particularly since Waldheim was the top-ranking transport officer in West Bosnia, involved in a unit that carried out these horrendous deportations.

I do not know if the camera—or if you can see this, Mr. Chairman and Representative Maloney—these were some of the worst deportations carried out in World War II. They took place in July 1942 in Yugoslavia, where Lieutenant Waldheim was a second-ranking transport officer with Army Group West Bosnia. Some of us have not forgotten what happened in Europe in the 1930's and the 1940's.

From what I have seen of his book, and I have not read the whole thing but I have read substantial parts of it, his talk about being obligated to the truth, saying, "The charges against me lack

the weight of truth," and then not being specific at all in rebuttal, is vintage Waldheim.

Ms. HOLTZMAN. Representative Maloney, just to follow up, I am proud as the author of the Holtzman amendment that Kurt Waldheim has been barred from the United States because of his participation, direct or indirect, in war crimes during World War II.

One of the interesting things we might learn if the files on him were opened is whether he was also working with the other side, whether we knew it, and to what extent really our intelligence agencies, aside from the moral issue, on a practical level were doing the right thing.

I think there is a lot to be learned here and a lot to understand. In a way, this represents one of the most sordid chapters in our Government's history, the question of its relations with Nazi war criminals. The more quickly we can get that out in the open and learn from it, the more we can make sure it never happens again.

Mrs. MALONEY. Well, I want to thank both of the witnesses. I would really like to put on the record Professor Herzstein's really invaluable contribution to this legislation. It was actually his research and his inability to gain access to important papers that were instrumental in the drafting and the writing that pointed out the need for this legislation.

Often in these hearings it is hard to put a human face on what we are trying to accomplish, but I wanted to share with all of you an experience that we had just a half-hour ago.

The chairman and I were having a press conference on the hearing and on the legislation, and a gentleman was walking by. He was a survivor, a Holocaust survivor. His name was Walter Hacker. He happened to be walking by, and he recognized Kurt Waldheim's picture from the cover of his book.

He came by to see what was happening. He proceeded to show us the numbers that were written on his arm and to share the horrible experiences that he had during World War II and to publicly state that he remembers Kurt Waldheim, his pictures in the paper at the time. He thanked the professor and Ms. Holtzman for their work on this.

I wanted to share his experience. He did not feel comfortable coming to the hearing, but he wanted to put on record his gratitude that we are moving forward to open up these files.

Thank you again, Mr. Chairman, for opening—for having this hearing.

Mr. HORN. Let me pursue a few questions on what is available on Mr. Waldheim. Have the KGB files been examined?

Mr. HERZSTEIN. I am not aware that they have. I do not know what material might lie in that direction. I can tell you, Mr. Chairman, that I have asked in the past that the Austrian Government be as generous in a limited way as the United States Government is with information, and have not been able to get anything from their Federal Intelligence Service about Mr. Waldheim. I do not know about the Austrians and the KGB.

Mr. HORN. All three of you might want to talk to Senator Daniel Patrick Moynihan. I heard him eloquently the other night speak on what we have learned from the KGB files about our own Government in the Second World War, and who were some of them work-

ing for. With all this information flooding out, I think we will finally get at the truth.

I am interested, just for those that are hearing this problem for the first time if you could explain a little bit about the watch list. How names are added to it, and how many suspected war criminals are listed on it. Could you give us a little dialog on that?

Ms. HOLTZMAN. Thank you, Mr. Chairman. I guess as a distinguished professor yourself you are concerned about making sure that the public is well informed. I think that is a very well-taken point.

As a result of the law that I wrote called the Holtzman amendment, people who engage in persecution under the Nazis, broadly defined including all the countries of Eastern Europe who were their Allies, are not permitted to enter this country.

The law also, by the way, provides explicit authorization for the deportation of people who engage in persecution under the Nazis. The watch list contains, and here I am guessing, but I believe about 200,000 names or so.

They are mostly gleaned from files that became available after the war that we captured, for example, listing the concentration camp guards at Auschwitz, Treblinka, Bergen-Belsen, and the rest, whatever official Nazi files we had and could get the names from.

In addition, I guess, are cases that crop up and other names become public, other names are added. With the opening now of the war crimes files, for example, in Lithuania, additional names have been given to us. As new information becomes available the Department of Justice, and OSI in particular, adds these names to the watch list.

What that means is that people coming to our borders are questioned, stopped at our borders, questioned, given the right to rebut or respond. But if the information turns out to be true, they are deported.

Of course, the Government can make mistakes. We all make mistakes. From time to time, there can be errors in terms of the names that appear on the watch list. That is why people have an opportunity to rebut. In addition, if they are on the watch list, of course they cannot be given a visa to the United States, to begin with.

Do you want to add to that?

Mr. HORN. Go ahead.

Mr. HERZSTEIN. No; you made a good summary of it.

Mr. HORN. OK. In your testimony, Ms. Holtzman, you seem to suggest you would modify H.R. 1281 to make the records of some departments and agencies available to the Freedom of Information Act requesters, but not the records of some other agencies. If that is correct, could you elaborate on which agency files you believe should be opened up and which ones should not be made available?

Ms. HOLTZMAN. Mr. Chairman, I believe that the focus should be on those agencies that were the primary recipients of the information to begin with: the intelligence agencies, the Department of State, and so forth, the Army Counterintelligence Corps. Subsequently, some of that information may have been transferred to the Office of Special Investigation for the purpose of bringing deportation and denaturalization actions.

I am just concerned with the limited resources that OSI now has, the "Office of Special Investigations," that if they then now become flooded with requests under this bill, as opposed to the agencies that originally had the information, they will have to spend all of their time answering Freedom of Information Act requests, rather than pursuing these cases of investigation and deportation and denaturalization.

Since time is running out, these people are getting older and older, this relatively short window of opportunity to continue these prosecutions and bring to justice those who are here. After that work is done, the Freedom of Information Act ought to apply entirely to them.

My concern now, and I think it is a legitimate concern and it is a concern the Department of Justice I believe has raised as well, that if we flood OSI with Freedom of Information Act requests, we will clog up the effort to bring Nazi war criminals to justice. We could just as well get the information from, directly from, the Central Intelligence Agency, the State Department, and the Defense Department. That is where the focus ought to be.

Mr. HORN. Now, the argument is made by the Department of Justice that in requesting some of these files we endanger any prosecution strategies that they might have. Now you are a skilled prosecutor and attorney. How do you feel about that?

Ms. HOLTZMAN. Well, I actually discussed that with the Office of Special Investigations, and I believe that is a very legitimate concern. I think we do not want in any way, shape, or form either to divert the limited resources that OSI has away from tracking Nazi war criminals into answering Freedom of Information Act requests, neither do we in any way, shape, or form want to prejudice the Government's case, neither do we want to allow—so I would agree with that concern.

As I say, I think we have a relatively short period of time in which such a bar should apply to the Office of Special Investigations. I agree with the concern.

Mr. HERZSTEIN. May I add something, Mr. Chairman?

Mr. HORN. Yes.

Mr. HERZSTEIN. I agree. I think this is a very reasonable compromise and a very rational way of going about this. I think that historians are interested in this particular case in Mr. Waldheim's contact with specific agencies, let us say, in the 1940's and the 1950's. These would be the intelligence agencies primarily, and the State Department.

We might be curious about internal deliberations in the U.S. Government about the Waldheim case in 1987, but that does not come under the purview of this legislation, as I conceive it. I think that Ms. Holtzman's comment lays the groundwork for a very reasonable compromise. In other words, documents generated by Waldheim's contacts with American agencies is what we are after in this legislation.

Mr. HORN. Does it mean we should really be going after the big fish and not the little fish? How do we sort that out? You are absolutely right. I am sure when we get into a negotiating session with them and the four pages single-spaced response we already have, it is going to be very difficult.

You have laid out some of the problems yourself. If they get flooded with requests, we will have what we might call FBItis; that is, FBItis, meaning you've got a request to the FBI? Great. We put you in the queue, and 4 years from now you will hear from us. Well, we will all be on Medicare, be dead 4 years from now, conceivably. That is not going to help us solve the problem.

The question would be: Do we need priority language in this legislation in any way to give specific guidance as to what types of files they provide information on, at least in priority? Because there is no question, you are right. There could be a real problem with everybody wanting to know everything.

Mr. HERZSTEIN. I think that I would use the language of the Holtzman amendment. In other words, I would cite individuals whose complicity or involvement in actions described by the Holtzman amendment, I think that this legislation should be the successor to that amendment, and should build upon it. It has worked well. It has been very useful to historians, and I think of great value to the public.

I think if we take the language about individuals who either committed atrocities or were involved in units that committed atrocities in concentration camps, a whole list, just take that amendment and restrict it to those individuals' involvement in that, I think that might address, Mr. Chairman, some of your concerns.

Mr. HORN. Well, that is a very good suggestion, and we will take a look at that. Has the Central Intelligence Agency ever had an outside review of its past contacts with suspected war criminals or of records about them in its possession?

Ms. HOLTZMAN. Not to my knowledge, Mr. Chairman. I think that particularly given what we know, namely that Klaus Barbie, the "Butcher of Lyons," was prosecuted by the French Government, actually worked for the United States. He was protected after the war.

U.S. Government officials committed U.S. crimes to protect this mass murderer, spirited him out of Europe into South America, and protected him. That story has mostly been told, but who knows whether all the information has come out.

We know that in the case of Arthur Rudolph, who was a director of a slave labor camp in Germany where 20,000 inmates were worked to death, he was brought here and made a top administrator in our space program—although there were certainly many Americans who learned their administrative skills not working people to death and certainly could have been more qualified than he to do this.

Why were these people—why did we work with them? Who else was involved? What agencies were involved in this? What was the President of the United States told? What was the Secretary of State told? What was the head of the Central Intelligence Agency told? Do we have rogue operatives operating? Was this a national policy? Why wasn't Congress told?

I mean, there are an enormous number of questions here, really serious questions, that go to the basic workings of a democracy, and our democracy. We will never know them, unless this information is made public, and it has not been. I think that the CIA, par-

ticularly because we are talking about events that took place 50, 40, 30, 50 years ago.

I think it would be healthful for the country and for our democratic process to get the whole truth out. To the best of my knowledge, the CIA has never examined this issue either internally. Certainly, there has never been a full, external exposé. The General Accounting Office when it looked at this subject was never allowed access to the actual files.

Mr. HORN. As you know there is a lay body that the President appoints overlooking the CIA. Has there ever been any contact by either of you writing to them as to why they do not take this up as a question with the CIA?

Ms. HOLTZMAN. I have never addressed it. You mean, the Foreign Intelligence Advisory Board?

Mr. HORN. Yes.

Ms. HOLTZMAN. I have never addressed it with them, but they may be a perfectly useful agency to get the CIA to examine this.

Mr. HORN. Let me suggest to staff that they send a letter that I and Mrs. Maloney can sign; just to ask them to take a look at it.

Ms. HOLTZMAN. A very useful suggestion, Mr. Chairman.

Mr. HORN. Alas, their agenda is only set by the President, but you raise some very legitimate questions.

Could the release of information contained in the Government files about suspected war crimes even inadvertently, as we discussed this before, affect the investigations of suspected Nazi war criminals as opposed to what we talked about earlier, the strategy that might relate to the particular case? Because they are arguing strategy too.

I just wonder, again, how you would sift that out? Do you just withhold those files, say they are not released because they affect pending prosecution, or what?

Ms. HOLTZMAN. Yes; obviously, if anything affected the pending prosecution, that would be a different story in my judgment. I don't believe that information in the files of the CIA or of the other intelligence agencies that have not been transferred to the OSI for purposes of prosecution could matter. If they do, then I think they should be exempted.

Mr. HORN. I think one——

Mr. HERZSTEIN. Mr. Chairman, if I——

Mr. HORN. Yes?

Mr. HERZSTEIN. I do not know if there is a slight difference. I would say in the case where individuals had contacts with U.S. agencies those files should not be exempted under any circumstances, allowing for security declassification methods in personnel. That is just my opinion. In the cases of investigations of individuals, I agree completely with Ms. Holtzman, that they should be totally exempted while the case is pending.

Mr. HORN. I think on any exemption we are only talking if there is active investigation, active prosecution until they get into court, and then they have to follow whatever the court's rules are, as far as giving evidence to the defense attorney in the case that might be brought up in court.

The more I think about this—there comes some point to release it all. Yesterday, I was a little shocked to learn we are still sitting on First World War records. I told them I did know of a bugler from the First World War, who appears at a number of Long Beach events, and is in good shape in his nineties.

It just seems to me at some point we need to say 50 years, whatever it is, after the event the records ought to be released, period. I think we have had various rules like that on the immigration files over the years. It was a 75-year rule for a while; I am not sure what it is now.

Twenty-five years after the death of the person involved, whatever, there ought to be something that says, hey, enough is enough. Let us get the records out in the public to people that are studying the First World War and the Second World War.

As I said earlier, I never could understand why one administration contests the release of records of historical interest of nine prior administrations. I thought the day the Pentagon papers came out, Nixon ought to have said, "Hey, it isn't our show, let them print it." Instead, they were in court on some strained theory that, presumably, that will prevent maybe their papers from being exposed. Well, in the age of Xerox anything gets out, I guess.

Do you have any more questions?

Mrs. MALONEY. Just one last question I would like to ask of the witnesses. What is your reaction to the recent autobiography of Kurt Waldheim? Do you believe that this legislation is needed to refute some of the statements in his new book, and other statements that are out there? By the way, the professor translated Mr. Waldheim's book that we were able to acquire last night. I just wondered, what is your reaction to the book?

Mr. HERZSTEIN. My reaction is one of disappointment that when he refers to himself as "in the evening of his life," that he doesn't refer to the accusations that placed him in the deportation of Italians illegally in September 1943, and various other illegal acts.

The book, as far as I can see, and I have not seen the whole thing so I reserve judgment, except for what I have read, excuses himself, sees himself as a martyr, but says nothing about any intelligence contacts, says nothing about being protected by foreign governments.

He attacks the World Jewish Congress and other interests in the United States, but says nothing about the protection which enabled him to conceal his past during the war for 41 years. Your bill would change that.

Ms. HOLTZMAN. I agree. I am not surprised. Kurt Waldheim during the entire time that this matter was raging here in the United States and abroad, in terms of his being placed on the watch list, never said he was sorry, never really acknowledged the extent of his own involvement and the involvement of the Nazi Government in the most heinous crimes of civilization.

It is not surprising that he would come out with another book, in essence, covering it up. That, it seems to me, is essentially what the purpose of this hearing and your bill is designed to do, and that is to say, no more cover-ups.

No matter whether we are talking about a former Secretary General of the United Nations and President of Austria or whether we

are talking about a concentration camp guard, one of tens of thousands, big murderer, little murderer—the truth has to come out. I think that for our Government to continue to maintain its position of moral leadership we ought to be in the forefront of making sure that the truth is out.

Again, Mr. Chairman, thank you and Representative Maloney for your leadership here.

Mr. HORN. Well, on your eloquent summary there, we thank you and thank you, Professor Herzstein. We thank you both for joining with us. We will be in touch with you as this evolves, and welcome your advice along the way.

Ms. HOLTZMAN. Thank you.

Mr. HERZSTEIN. Thank you, Mr. Chairman.

Mr. HORN. We now turn from discussion of H.R. 1281, which covers the release under the Freedom of Information Act of records about Nazi war criminals, to another proposal which would amend the Freedom of Information Act, S. 1090, the Electronic Freedom of Information Improvement Act authored by Senator Leahy. If the members in panel II will come forward, we will swear them in.

Gentlemen, if you would, rise and raise your right hands.

[Witnesses sworn.]

Mr. HORN. All three witnesses affirmed. We will begin with Mr. Robert Gellman, a privacy and information policy consultant, and rather well-known to this committee. Welcome.

STATEMENTS OF ROBERT GELLMAN, PRIVACY AND INFORMATION POLICY CONSULTANT; ALAN ROBERT ADLER, ATTORNEY; AND JAMES LUCIER, DIRECTOR OF ECONOMICS RESEARCH, AMERICANS FOR TAX REFORM

Mr. GELLMAN. I thank you, Mr. Chairman. It is very interesting to be back in this room after 17 years on the staff of the committee. I appreciate the opportunity to speak on the record. [Laughter.]

I have three points I would like to make about the legislation, about the FOIA process.

Mr. HORN. Do not tell me as a staff member you never spoke off the record to something? [Laughter.]

Mrs. MALONEY. I thought you looked familiar.

Mr. GELLMAN. The first point I want to make is that the problems with the Freedom of Information Act, the principal problems with the FOIA are administrative problems, and not legislative problems.

I do not mean to suggest that the law is perfect, by any means. In fact, I think the bill is rather poorly drafted and filled with problems. But from the administrative point of view, most of the problems are administrative, and you cannot solve administrative problems through legislation. You cannot micromanage the administrative process.

I think all of the problems that are identified in the legislation could, in fact, be dealt with at the administrative level. The truth is that there is simply no substitute for a cooperative bureaucrat. When you get a reasonable requester and a cooperative bureaucrat together, they can solve a lot of problems and a lot of documents can get disclosed. That is one point to keep in mind.

My second point is that the real constraints of the FOIA process are resources. No agency has enough resources to process requests. I was not here yesterday, but I am sure you heard that from the FBI.

There are simply too many requests and not enough staff people to handle it. There is nothing in this bill that is going to change that. Everybody recognizes that there are limited resources in the Government these days, even more so than in the past.

The FOIA process has taken its cuts, just like everything else. If you take a limited set of resources and you add a bunch of additional administrative requirements to it, the result is that you get less disclosure. That is one of my principal concerns with S. 1090.

You can take a look at the time limits in the bill. Currently, the time limits are 10 days. Now, everybody knows that this is unrealistic, and it is a real problem. Changing the time limits to 20 days, as proposed in S. 1090, will simply not solve any problems. Agencies that take 10 days now, and there are some, will simply take longer. Agencies like the FBI that take months, will continue to take months, years.

Mr. HORN. Four years before you get the answer from the FBI.

Mr. GELLMAN. The result is that extending the time limit will make some people worse off and nobody better off. I think that essentially the Congress painted itself into a corner, painted everybody into a corner, many years ago with an unrealistic set of time limits, and there is no way out of that corner. I think we should just recognize that and move on.

Let me turn to some other features in S. 1090, and this is sort of the third issue I want to talk about. First of all, I want to say that I think Senator Leahy's bill is very well-intended. I think Senator Leahy is a real hero of the FOIA process.

I worked with him and his staff in the 1980's. I think he was principally responsible for saving the FOIA from the onslaught in that period. But I think as well-intended as his bill is, it is filled with problems. His diagnosis of problems is actually accurate, I think. I think that the law is behind the technology.

I think, unfortunately that the solutions that he proposes are out of date. The administrative side of this is the most troublesome part of it. Let me give one example to talk about in detail.

The bill would allow agencies, would require agencies, to take requests for expedited access, to treat some requests faster than they treat others. One of the standards in the bill would allow expedited access in a case, and I am going to quote here, where the requester says that, "Disclosure would affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread contemporaneous media coverage."

This phrase from the bill is just filled with words that do not have any apparent meaning. It is a very low standard. Almost any request could meet this standard. I do not know why we would allow allegations to control the FOIA process and to get a higher standard. Let me give you some examples.

Suppose somebody alleges that the President just returned from a trip to Mars, and this is on the front page of 12 supermarket tabloids. Is that something the would constitute widespread contemporaneous media coverage?

Suppose you have a more serious story, and the Associated Press runs this story, and the story runs in 100 newspapers, does that qualify? What about 50 newspapers? What about 10 newspapers? What if it appears on the front page of some newspapers, and the back page of others?

The question here is, do we want bureaucrats and courts making decisions about what is widespread, contemporaneous media coverage? I think the answer is no. I think that these standards simply will not help. By imposing on agencies a requirement to consider expedited access requests, they will have to spend time deciding which requests get expedited access. Few are likely to qualify.

That time means there will be less time spent on processing other requests. The result may be that a lot of requesters will get slower service and fewer documents, and a very small number of people may get faster responses.

Is it worth the cost? There will be litigation over every single one of these words that I read in this particular provision, because there has been litigation over every word in the FOIA just about.

It can take 10 years before the courts turn to these issues and decide what is actual or alleged government actions, what is widespread, contemporaneous media coverage. I think that that will just burden the process, and the process is already substantially burdened.

I think, overall, that many of the administrative provisions of S. 1090 impose significant administrative costs, and I think there are not enough benefits to justify passing them. I think that portions of this bill really need to be looked at very closely. I have more details in my testimony about other provisions. I will stop there. Thank you.

[The prepared statement of Mr. Gellman follows:]

Introduction

I thank the Subcommittee for the opportunity to testify at this hearing. From 1977 through 1994, I served on the staff of the House Government Operations Subcommittee with jurisdiction over the Freedom of Information Act. During most of that time, I was the principal staff person assigned to information policy issues, including FOIA and privacy.

In addition, I have written and spoken extensively about information policy issues, both here and abroad. Attached to this statement is a list of my publications in this area. I now work as an independent privacy and information policy consultant in Washington, DC. I am here today representing no one other than myself.

Background on the FOIA

The FOIA is one of three foundations for federal government information activities. The other two are the First Amendment to the Constitution, which limits the ability of the government to regulate speech, and section 105 of the Copyright Act,[1] which prohibits the federal government from copyrighting its own works. The Paperwork Reduction Act of 1995[2] -- which originated in Government Reform and Oversight Committee earlier in this Congress -- may be a candidate for that list because it reinforces the policy that dissemination of information by federal agencies is an essential government function.

The FOIA provides an engine that makes publicly available much of the vast and otherwise inaccessible storehouse of government information. Any person can make a request for any record in the possession of a federal agency. The FOIA permits the public to ask for the information that they want to have and not just the information that the government wants to disclose. The law keeps bureaucrats and politicians from being the sole arbiters of what government information will be available.

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[1] 17 U.S.C. §1705 (1994). The importance of the prohibition against government copyright of its own information cannot be overstated. According to the Register of Copyrights, the statutory provision reflects "a conclusion by Congress that the public interest is served by keeping governmentally created works as free as possible of potential restrictions on dissemination." Letter from David Ladd, Register of Copyrights, to Sen. Charles Mathias (Oct. 11, 1983), reprinted in *The Freedom of Information Reform Act: Hearings on S.774 Before a Subcommittee of the House Committee on Government Operations*, 98th Cong., 2d Sess. 1138 (1984). See also Morris Schnapper, Constraint By Copyright (1960).

[2] I refer specifically to the information dissemination policy provisions to be codified at 44 U.S.C. §3506(d)(1)-(4), 104 Stat 163.

The FOIA is not, however, without its problems. In many respects, the law is poorly drafted, inadequately funded, and sometimes unenthusiastically implemented. Yet, I do not want to suggest that the FOIA is a failure as a result. In fact, the opposite is true. The law actually works well because most requesters receive the documents that they seek. At Cabinet departments for which statistics were available, over ninety percent of requesters received everything they request.[3]

To be sure, the time limits in the law are not always honored, fee waivers are not always granted when appropriate, and improper denials are still too frequent. Unquestionably, there is plenty of room for improvement. However, we should not overlook the successes of the FOIA disclosure process. It has produced a vast improvement over earlier bureaucratic secrecy practices. Too often, people listen only to the criticism of the FOIA and come away with the conclusion that the law does not work. Much of the criticism is valid. Although the FOIA does not always work well, it does work.

General Considerations For Amendments

When considering any amendments to the FOIA, there are some hard realities that must be confronted. Three specific points are most important.

First, most of the problems with the FOIA are administrative and not legislative. Congress cannot legislate good administration of a law. The existing law has considerable flexibility, and agencies can always go the extra mile to identify a requester's needs and to satisfy a reasonable request. There is no substitute for a cooperative bureaucrat.

Several features of the law designed to encourage better administration have not worked. The best example is the sanctions provision designed to punish the arbitrary and capricious withholding of documents.[4] I do not believe that sanctions have ever been successfully applied to anyone. It was a great idea in theory, but the bureaucracy just

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[3] A calculation done for calendar year 1984 showed that for eight cabinet departments, over 91% of requests were granted in full. The percentage of requests granted in full ranged from 29.1% at the Department of State to 98.9% at the Department of Health and Human Services. See House Committee on Government Operations, *Freedom of Information Act Amendments of 1986*, House Report 99-832, 99th Cong., 2d Sess. 6 & n.2 (1986).

[4] 5 U.S.C. §552(a)(4)(F) (1994).

chewed up and spit out the requirement. Trying to micromanage the administrative process in the law is not likely to work and may be counterproductive.

Second, the fundamental reality of the FOIA is that the processing of requests is limited mostly by the lack of resources. This is the principal constraint with the Act. With more resources, agencies could do a better job of processing requests. However, many FOIA offices, like other government offices, do not have the staff they need to do their job as well as they might like. This is not a surprise to anyone here, and it is not likely to change any time soon. Every government function is affected by the budget deficit.

The issue of time limits offers a case in point. No matter what the law says about how long an agency may take to respond to requests, the real factor will be the number of requests received and the available staff. With a given level of resources, only so many requests can be processed. Raising or lowering the time limits in the law will not change this fundamental reality.

Third, amending the law is not an easy thing to do. I am not referring to the process of moving a bill through the Congress. No Member needs any reminder about the perils of the legislative process. Instead, I refer to the administrative process. There is a modest bureaucratic establishment that oversees and implements the FOIA in the agencies. Much of the success of the FOIA is due to dedicated, hard-working, disclosure officials who carry out the day-to-day processing of requests.

As with any other bureaucratic process, there are rules spelled out in regulations and implemented in internal procedures. Changes to the procedural requirements of the law do not occur quickly or easily. When the FOIA was amended in 1986, it took some agencies as long as six years to amend their own regulations to reflect the new requirements. I don't mean to suggest that the law should never be changed. Still, it is important to consider the drain on FOIA resources that results when the law is amended. The Congress should carefully compare the cost of change with the benefits that will result.

Technology and Information Law

I have a lot to say about the legislation, but I want to begin with a word about its Senate sponsor. Senator Patrick Leahy is a true hero of the FOIA. His work during the 1980s when the FOIA was under heavy attack from the Reagan Administration was outstanding. If not for his tireless efforts and the skill and dedication of his staff, the FOIA might be much less useful than it is today. The 1986 amendments made modest changes, both good and bad, to the FOIA. Without question, the result was much better because of Senator Leahy.

I would also like to applaud the Senator's early recognition of the effects of technology on the FOIA. Changing technology is making many of our information policy laws obsolete. There are many examples. The Privacy Act of 1974[5] was designed in the era of mainframe computers, when only a high priesthood of programmers and operators were able to use computers. The approach of the Privacy Act was mostly geared to regulating gigantic, hard-to-change personal data systems. Now that personal computers are everywhere, the Act is no longer effective. New systems of records can be created with a few keystrokes, but no one bothers to comply with the law's outdated requirements. The law isn't useless, but it needs to be revised.

Our laws governing the archiving of government records are also technologically behind the times. Archives laws assume that information is maintained on paper because that was the dominant medium in use when the laws were passed. This deficiency was recognized in 1990 by the House Government Operations Committee in a report entitled *Taking a Byte Out of History: The Archival Preservation of Federal Computer Records*.[6] The report recommended more attention to the challenge of preserving electronic records and suggested that the law needs to be updated. There has been some positive response at the National Archives and Records Administration, but more needs to be done administratively.

Access laws too are becoming obsolete. The first congressional recognition of the problem came in 1985, when a predecessor to this Subcommittee held hearings on issues

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[5] 5 U.S.C. §552a (1994).

[6] House Report 101-978, 101st Cong., 2d Sess (1990).

about federal agency electronic information activities.[7] A report followed the next year that offered the first comprehensive recognition that computers and electronic information were a new policy area that needed special attention.[8] That report has had a significant and continuing influence on the development of electronic information policy. I offer two paragraphs from that report to demonstrate its continued vitality:

> A principal goal of government information policy is the maintenance of general public availability of information in the possession of the government except where confidentiality is appropriate in order to protect a legitimate governmental or privacy interest. The report finds that there is a risk that agencies may be able to exert greater control over information in electronic information systems than is possible with data maintained in traditional, hard-copy formats.
>
> Legal ambiguities, practical limitations, and economic constraints may allow Federal agencies to restrict unduly the public availability of government data maintained electronically. The result could be diminished public access to federally operated public data bases; increased agency power over data users and information system contractors; and unnecessary government interference in the marketplace for information products and services.[9]

That report was prepared when Rep. Glenn English was Chairman of the Subcommittee. The next Chairman, Rep. Bob Wise, took the recommendations of the report and developed a legislative proposal that eventually became part of the Paperwork Reduction Act reauthorization effort in 1990. That legislation passed the House, but failed in the Senate because of other disputes. It took five more years before the paperwork law was reauthorized. The guts of the information dissemination policy language that became law last year came from the legislative language that Rep. Wise proposed.[10]

The new paperwork law takes several positive steps by prohibiting questionable agency practices that unduly interfered with public access. At the same time, the new law

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[7] *Electronic Collection and Dissemination of Information by Federal Agencies*, Hearings before a Subcommittee of the House Committee on Government Operations, 99th Cong., 1st Sess. (1985).

[8] House Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2d Sess. (1986).

[9] Id. at 1-2.

[10] See *Paperwork Reduction and Federal Information Resources Management Act of 1990*, House Report 101-927, 101st Cong., 2d Sess. (1990) (report to accompany H.R. 3695).

offers an illustration of how the relentless pace of technology makes it difficult to keep legislation current. The information dissemination provisions were designed when personal computers were more commonplace and more integral to government activities. Computer files were largely maintained on disk or tape. The law, however, was designed before the computer network era was in full blossom. The policies are still useful, but they are not reflective of the new dissemination opportunities.

For example, the law requires adequate notice before initiating a significant information dissemination product. When creating new information products or services was cumbersome and expensive, there was plenty of opportunity for public notice and discussion. With the Internet, however, it is possible for an agency to create a home page with no more than a few days effort and to make new information resources publicly available just as easily. What does public notice mean in this environment? How much of a barrier do we want to erect before agencies can share information through the Internet? The idea of notice is still reasonable, but it may need some rethinking.

Problems with S.1090

A. Technology

The failure to adequately confront technological change is also a principal problem with S.1090. The law is clearly well intended, but it is already out of date. For example, section 3 of the bill requires publication of some documents by computer telecommunications in addition to the *Federal Register*. The *Federal Register* is already available online. If agencies do not have to lift a finger to comply with this new requirement, then it is not worth passing.

Another provision of S.1090 would exempt from the FOIA "stocks of publications". What does this mean in a networked environment? Does the availability of a document on the Internet or on a bulletin board mean that it is a publication that might be exempt from the FOIA under this provision? If so, then posting a document on the Internet would deny those without computer access the ability to request a copy. That may be a reasonable result someday, but it is premature to draw that line today.

Senator Leahy's views in the Senate Committee report make it clear that it is his intention to include electronic mail within the scope of the FOIA. That is an appropriate

result, although the law already covers government electronic mail. However, many questions raised by electronic mail are not addressed. What is the status of electronic mail under archives and record management laws? When can electronic mail be withheld from disclosure because of privacy laws? Is an agency required to recover deleted electronic mail from backup tapes in response to a FOIA request?

It is unfair to expect a FOIA bill to address all of these questions. What is needed is a comprehensive review of how government electronic mail should be treated under all relevant information policy laws. Piecemeal legislating is not a good approach for electronic mail.

Another complex technology problem, raised but not adequately resolved in the bill, is the requirement that a deletion be marked in the record at the place where the deletion is made. I am sympathetic to this requirement, but it presents some questions for electronic records. It may not be practicable to accomplish the required marking with current hardware and software. Complying with in-place marking for electronic records may actually slow down the processing of some requests. The bill would make it improper to disclose a record without deletion marks in the right places.

Section 5 of the bill would require agencies to provide records in a form or format selected by the requester. The purpose here is to overturn the court decision in *Dismukes v. Department of the Interior.*[11] I completely agree with the purpose of this section. *Dismukes* is a terrible case, and it was criticized previously by this Committee.[12]

The bill goes on to require that an agency must make reasonable efforts to provide records, when requested, in an electronic form or format "even where such records are not usually maintained but are available in such form or format." The scope of this requirement is not clear. The words "not usually maintained" and "available" do not explain the scope of the requirement. For example, suppose that an agency can create new customized CD-

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[11] 603 F. Supp. 760 (D.D.C. 1984).

[12] House Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2d Sess. n. 151 (1986). The *Dismukes* decision was weakened and quite possibly fatally undermined by the Paperwork Reduction Act of 1995. See House Committee on Government Reform and Oversight, *Paperwork Reduction Act of 1995*, House Report 104-37, 104th Cong., 1st Sess. at 108, n.13 (1995) (additional views on information dissemination provision of H.R 830 by Reps. Bob Wise and Gary Condit).

ROMs. The technology has improved and the ability to create CD-ROMs is more widely available. Will an agency be required to take thousands of requested documents, electronic or otherwise, and place them on a newly created CD-ROM if a FOIA requester asks? Can each requester asking for a different set of documents insist on a separate CD-ROM? It is simply not clear from the statute. Newer technologies will only pose additional questions. It would be better if a sharper statutory standard were established that would avoid the need for litigation.

B. Administration

A second set of problems with the legislation relates to the administrative effects. Section 4 would require agencies to affirmatively publish:

> copies of all records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records . . .

The requirement that agencies publish records *likely to become* the subject of subsequent requests is remarkable. Agencies may be required to guess what issues will be of interest to future requesters, stop processing current requests, and devote scarce resources to searching, copying, and reviewing documents no one requested. An agency that guesses wrong about the likelihood of future requests will be wasting its time and effort and delaying other requests.

This provision could be used to avoid processing current requests for controversial documents. An agency could decide that a large set of seemingly boring documents from the 1950s is likely to be requested and begin processing. Other requests relating to current activities and bureaucratic failures might have to sit and wait their turn.

Of course, a requester who disagrees with an agency's assessment of the likelihood of future requests may be able to sue to challenge that assessment. This would just slow the disclosure system down further and expend more resources on litigation rather than disclosure. Remember that virtually every word in the FOIA has been the subject of intense litigation, and the words *likely to become* would just provide another battleground.

Section 6 would allow an agency to keep some of its FOIA fees if the Comptroller General annually determined that the agency is in substantial compliance with the law's time limits. This provision is guaranteed to lose money for the government. Agencies would

likely collect no more in fees than they do today, but the General Accounting Office might be required to conduct dozens of FOIA audits annually. GAO's budget has been substantially cut, and meeting demands for FOIA audits would diminish the agency's ability to carry out other functions. Even worse, an agency could request an audit by GAO without having to pay its cost.

Section 6 would also change the Act's basic time limit for responses from ten to twenty days. For some agencies, the ten day time limit is feasible for some requests. For other agencies, the ten day time limit is an impossibility. By establishing a single deadline for all requests, regardless of size, the Congress made a mistake years ago.

The proposed extension of time limits, however, will make some people worse off and no one better off. Agencies that now respond within ten days will take longer. Agencies with large backlogs that take now months to respond to requests will not have any more resources. No matter whether the time limits are ten or twenty days, these agencies will never be in compliance. In effect, the 1974 amendments painted everyone into a corner with unrealistic time limits. Unfortunately, there is no good way out of that corner.

Another paragraph of Section 6 would amend the part of the Act recognizing that exceptional circumstances may prevent the processing of requests within existing time limits. The amendment provides that a predictable backlog is not an exceptional circumstance. Agencies with regular backlogs would presumably be required to clear them up immediately.

That is a wonderful notion, but where will an agency find the resources to accomplish this task? S.1090 provides no additional money for processing FOIA requests. It says, in effect, that agencies should comply with the time limits by robbing other programs. If the Veterans Administration has a backlog, should it divert funds from patient treatment to respond to requests? Should the Social Security Administration pay retirees less each month to support FOIA? This simply makes no sense.

Section 6(f) requires agencies to adopt a first-in, first-out processing system, with the possibility of separate tracks for simple requests and for complex requests. Each track would be processed independently, but on a first-in, first-out basis. This is a reasonable administrative approach to increase the throughput of large and small FOIA requests. The Federal Bureau of Investigation has used a two-part processing track for years.

What is the purpose of enacting this requirement into law? It has already been adopted by some agencies and recognized by the courts. Any agency that wants a multi-track system can adopt it now. One consequence of adding new statutory language may be to increase litigation. The bill raises the issue of whether an agency has "reasonably allocated resources to handle the processing for each track." This will be a fertile ground for lawyers representing unhappy FOIA requesters. It will provide a new basis for challenging an agency's processing and budgeting system.

The multi-track notion should be left to the discretion of the agencies. No legislation is needed here.

Section 6(f) also adds a requirement that agencies accept requests for expedited access. These requests must be decided within ten days and may be appealed to the head of the agency and then to the courts. This would add enormously to the administrative expense of the FOIA and would reduce the amount of information disclosed.

I estimate that at least half of all requesters would ask for expedited access once allowed by law. There is no extra cost for seeking faster access. Reporters, prisoners, and many other requesters would have nothing to lose by asking for quicker processing. The result would be an increase in administrative expense while requests for expedited access and appeals of denials are processed. Since there are no new resources available, response times for all requests would necessarily be delayed.

It gets worse. One basis for seeking expedited access is if failure to receive records within the time frame would --

> affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage.

This language raises so many difficult questions that it is hard to know where to begin. First, it would only have to *affect* public assessment. It would not even have to *significantly* affect public assessment. The standard so low that it is hard to imagine a legitimate request that would not satisfy this test.

Second, the public assessment must be of the *nature and propriety . . . of governmental actions*. These words are so vague as to be almost meaningless. Almost every request can be construed as affecting the public assessment of the nature and propriety of

some governmental action. Few requests would fail to qualify under this part of the standard.

Third, a governmental action can qualify under the test if it is *actual or alleged*. What standard will be applied to determine when an allegation is sufficiently reputable to qualify? We will only know after years of litigation. Will allegations of flying saucer programs qualify under this standard?

Fourth, the government actions qualify if they are the subject of *widespread, contemporaneous media coverage*. This too has no clear meaning. Here are some possible issues that might arise:

· Ten supermarket tabloids report that the President has appointed an alien to the Cabinet. Is that sufficient media coverage to qualify as widespread and contemporaneous?

· The Associated Press runs a story about travel by a government official, and the identical story appears in 100 newspapers nationwide. Is that enough to qualify? What if the story runs in only 50 papers or 10 or 2? Does it matter if the story ran on the front page or elsewhere? Do we want bureaucrats making these evaluations of the media?

· The Washington Post wants to run a story about a poorly run government program. If no story has yet run, then the Post's FOIA request will not qualify for expedited access because there has been no substantial media coverage. It must run the story first, generate more media attention, and then request expedited access. Newspapers can work together to publicize stories to move requests higher in the queue.

· If talk radio stations devote considerable air time to a current government program, will that qualify as media coverage? How can a requester document the extent of media coverage for radio, television, and other media that are not easily searchable in the library or on computer data bases?

· If a news story attracts extensive local coverage in Charleston, West Virginia, will that qualify as substantial media coverage or does the coverage have to be statewide or national to qualify?

· If a particular government program becomes the subject of thousands of electronic mail messages on the Internet, will that qualify as media coverage? What if the messages appear on a forum devoted to discussion of activities by news reporters?

Enactment of this provision will not improve the disclosure of government information. It will slow it down for nearly all requesters and increase the amount of litigation. In addition, since the provision favors the media, requests from other citizens will suffer the greatest delays. After all, only the media can provide substantial media coverage. An average citizen cannot.

Finally, the definition of *record* in section 8 may contain the most repressive provision in the entire bill. The term *record* would be defined to exclude *library and museum material acquired or received and preserved solely for reference or exhibition purposes*. This language comes from the Records Disposal Act.[13]

Because there is no existing definition of *record* in the FOIA, the courts have sometimes turned to the definition in the Records Disposal Act. In one disastrous case, *SDC Development Corp. v. Mathews* [14] the court found that an agency-created computer database of research abstracts was not an agency record because it was library material. The case was wrongly decided and was criticized by this Committee on legal and policy grounds.[15] In a law journal article that I wrote last year, I explored the meaning of the Record Disposal Act definition in great detail and found it to be improperly applied in the case.[16] The notion that a publicly available computer database created by the government using appropriated funds is not an agency record under the FOIA is absurd.

The effect of the proposed definition would be to codify the terrible precedent of *SDC v. Mathews*. The result might be that every computer database maintained by the government would be completely exempt from disclosure under the FOIA. The law should be amended to expressly overturn this precedent. S.1090 has it backwards.

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[13] 44 U.S.C. §§3301-3324 (1994).

[14] 542 F.2d 1116 (9th Cir. 1976).

[15] House Committee on Government Operations, *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*, 99th Cong., 2d Sess. 32-36 (1986).

[16] Robert Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 Syracuse Law Review 999 (1995).

Obviously, Senator Leahy did not intend to exempt computer databases from the FOIA. Unlike many other problems identified here, this difficulty could be remedied easily.

Conclusion

I want to say again that Senator Leahy's bill is well intended. There is no doubt that the purpose of the bill is to improve the FOIA and bring it squarely into the computer age. Many of the problems that the bill identifies are significant. Legislative fixes may be needed for some, while others could be cured with administrative actions. But S.1090 in its current form will not improve the FOIA and will almost certainly burden the administrative process and delay disclosure.

A more thorough review of the FOIA, including dozens of other problems that are entirely unaddressed in S.1090, would be appropriate. In the meantime, I suggest that this Committee pressure the Department of Justice to do a better job in adhering to the spirit of the law. Too often, the Office of Information and Privacy (OIP) in the Department will defend unreasonable agency denials in court and will make any argument, without regard to the purpose of the FOIA or the policies of the President. OIP and other Department litigators bear a substantial responsibility for much of the bad FOIA case law in recent years. Even when arguments are rejected by the courts, agencies are still encouraged to make unreasonable denials because they know that irresponsible denials will be defended.[17]

History shows that the FOIA is amended in a major way about once every ten years. While it may be time to review the legislation and make some changes, S.1090 needs more work.

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[17] In the 1990 paperwork reauthorization bill, this Committee and the House agreed to a provision that would have eliminated the Justice Department's limited role in encouraging other agencies to comply with the FOIA. The legislative report noted that the Department has an inherent conflict in having both a policy and litigation role for the FOIA. The 1986 FOIA amendments previously transferred some of the policy functions to the Office of Management and Budget, and it would be a good idea to complete the transfer of policy functions. See *Paperwork Reduction and Federal Information Resources Management Act of 1990*, House Report 101-927, 101st Cong., 2d Sess. 64-66 (1990) (report to accompany H.R. 3695). The Senate did not consider the 1990 paperwork bill approved by the House.

Information Policy Publications of Robert Gellman

Journal Articles

· **Disintermediation and the Internet**, 13 *Government Information Quarterly* 1 (1996).

· **Public Records -- Access, Privacy, and Public Policy: A Discussion Paper** 12 *Government Information Quarterly* 391 (1995).

· **Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information**, 45 *Syracuse Law Review* 999 (1995).

· **The Three Pillars of United States Government Information Dissemination Policy**, 72 *Revue Française D'Administration Publique* 593 (1994).

· **Fragmented, Incomplete, and Discontinuous: The Failure of Federal Privacy Regulatory Proposals and Institutions**, VI *Software Law Journal* 199 (1993).

· **Authorizing EDGAR: Information Policy in Theory and Practice**, 5 *Government Information Quarterly* 199 (1988).

· **Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy**, 62 *North Carolina Law Review* 255 (1984).

Other Articles

· **The Battle for Public Access to Government Information Isn't Over**, 22 *Washington Spectator* (5/15/96).

· **Use of the Web by Members of the U.S. House of Representatives**, *CyberNews* (1996) <http://www.DROIT.UMontreal.CA/CRDP/CyberNews/Art2_No296.html> (1996).

· **Confidentiality and Telemedicine: The Need for a Federal Legislative Solution**, 1 *Telemedicine Journal* 189 (1995).

· **Top Ten FOIA Amendments**, *Access Reports* (1/17/96).

· **Public Reporter System Risks Privacy**, *National Law Journal* (10/2/95).

· **Congress, Pecan Pie, Pickups and the Web**, *Government Computer News* (8/28/95).

· **Ethics Committee's Secrecy Oath Ruling Opens Can of Worms**, *Roll Call* (7/24/95).

· **Electronic FOIA Bill Is Already Dated**, *Government Computer News* (7/17/95).

· **Selling Government Data: A Failure of Historic Proportions**, *Government Computer News* (6/19/95).

· **Hill Ushers in Next Generation of Paperwork Reduction**, *Federal Computer Week* (5/8/95).

· **Fair Health Information Practices**, 4 *Behavioral Healthcare Tomorrow* 65 (Jan/Feb 1995).

· **An American Privacy Protection Commission: An Idea Whose Time Has Come...Again**, 11 *Government Information Quarterly* 245 (1994).

Congressional Investigative Reports

· **Designing Genetic Information Policy: The Need for an Independent Policy Review of the Ethical, Legal, and Social Implications of the Human Genome Project** (1992).

· **Taking a Byte Out of History: The Archival Preservation of Federal Computer Records** (1990).

· **A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 To Request Government Records** (1987); second edition (1989); third edition (1991); fourth edition (1993).

· **Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview** (1986).

· **Who Cares About Privacy? Oversight of the Privacy Act of 1974 by the Office of Management and Budget and by the Congress** (1983).

· **Security Classification Policy and Executive Order 12356** (1982).

· **Lack of Guidelines for Federal Contract and Grant Data** (1978).

· **Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits** (1978).

Mr. HORN. Well, it is very helpful testimony. You certainly learned a lot during your staff years, if you had not already, because it is a very thorough job. We appreciate that.

Mr. Adler.

Mr. ADLER. Thank you, Mr. Chairman.

As I have indicated in my submitted statement, I am appearing here today presenting my own personal views. I am not presenting the views on behalf of my employer, the Association of American Publishers. My work on the Freedom of Information Act took place mostly in my private practice of law and when I was legislative counsel for the American Civil Liberties Union.

I am here to make basically four central points to the subcommittee. First is that it is time for the House to begin providing leadership on the establishment of uniform administrative policies for Federal agencies on electronic record FOIA issues.

It has been 6 years now, since the Justice Department disclosed the results of a governmentwide survey that indicated conflict, uncertainty, reluctance on the part of many Federal agencies in applying the Freedom of Information Act to electronic records.

The Justice Department concluded, in fact, that the development and application of uniform administrative policies to clarify these issues was warranted. Yet, since that time, neither the Justice Department nor the Office of Management and Budget has responded to the need. Also, since that time, the need has not lessened.

In my private practice of law before joining AAP, I was counsel to the American Society of Newspaper Editors, and we frequently asked ASNE and its members to keep us informed of the difficulties that they have with Freedom of Information Act requests, and particularly those involving electronic records.

Just to give you an example of some of the continuing problems, USA Today informed us that it had sought an electronic form reports from more than 100 Federal agencies regarding their own Freedom of Information Act activities over the course of the previous 3 years. Most responded with thousands of pages of paper. One sent an inch-thick stack of microfiche. About one-third did manage to send floppy disks, which shows that it is, indeed, possible to respond in electronic form.

The Dayton Daily News told us about a current lawsuit with the U.S. Department of the Army over its refusal to release its court martials data base, including trials regarding murder, rape, child molestation, and other very serious offenses.

These records, by the way, Mr. Chairman, are routinely available at civilian courthouses. Of course, the issue of whether or not military justice is up to the same standards as civilian justice is a matter of great public interest.

The series that the Dayton Daily News published focused on the military paying over $1 million a month to convicted defendants in terms of continuing their benefits as members of the military, something also of a great deal of interest to the public.

After the series, in fact, Congress cut off the paychecks of many of these inmates. Yet, without obtaining the computer data bases regarding this particular material, the Dayton Daily News would not have been able to identify how much the Government was paying the prisoners or which were the worst cases involved.

Just one more example, Cox newspapers indicated that they had made a request to the General Services Administration for its inventory of nonmilitary Government aircraft. GSA declined to release the data base, but offered to release a copy in paper.

Despite the refusal to accept this, GSA sent the paper-dump of thousands of pages of document, which also appeared in very inscrutable computer language. The paper was not even in English. Just prior to a lawsuit, GSA relented and finally decided the Cox newspapers could, in fact, have the data base.

The problem is ongoing. The Federal courts are not going to resolve the issue, although they have generally recognized, of course, that the Freedom of Information Act does apply to records in electronic form.

On particular issues, questions about how to handle requests for records in particular electronic formats, how you treat computer software as a record, and how you deal with the question of programming for searching and processing Freedom of Information Act requests, these require guidance from Congress and should simply not be left to the Federal courts.

The second point I would make is that congressional passage of S. 1090 should not be deterred by concerns about "omnibusitis," as I call it, or the swift pace of related technological change or concerns about anticipated bureaucratic resistance or fear of litigation.

For one thing, the fact that we are trying in S. 1090, Senator Leahy and the people who have worked with him, to address only several targeted issues, is indicative of the fact that the bill has been drafted carefully.

It is deliberately not comprehensive, because we do not want to see this legislation become bogged down. At the same time, concerns about bureaucratic resistance, we think, are greatly overstated.

For example, in the winter 1996 edition of the Justice Department's "FOIA Update," there is a very optimistic report about current activities in several agencies involving the use of technology to deal with the handling of FOIA requests in electronic form.

For example, a report focuses on the use of document imaging, in which agencies have begun using scanners to convert print documents to digital form, then taking the scanned images and storing them on magnetic media in indexed form, indexable and searchable by key words, and then using those images to be viewed on standard computer monitors.

The FBI even was quoted in the Justice Department's piece as saying that by 1999 it will have an electronic imaging system installed at its headquarters and at all of its field offices for tracking and processing information requested under the Freedom of Information Act and Privacy Act.

The Department of Energy has even indicated that all of its 1996 Freedom of Information Act requests are currently being electronically filed. Moreover, all of the records in its public reading room are being scanned into the system so that they can be handled as electronic records.

The reason for this, as the Justice Department's piece says: "As a general rule, electronic documents take much less time to find,

handle, refile, and route. They could also be potentially processed for FOIA disclosure in an automated fashion rather than by hand."

All of this, I think, responds to the concerns about resistance on the part of the agencies. The agencies have a great self-interest in electronic record handling. For one thing, it will make their job easier. It will allow them to use the very limited resources they have in a much more sensible fashion and better serve the public in doing so.

I would also make the point that this legislation has undergone a great deal of refinement since the previous version of it was enacted, was passed by the Senate in 1994. Much of that refinement has been in direct response to some of the criticisms that have come from Federal agencies about the earlier drafts, as well as from people like Mr. Gellman.

The attempt has been to refine the document so that it doesn't create additional burdens, and that it fully recognizes the need for the agencies to be able to comply within the bounds of their current limited resources.

I would add that as far as this subcommittee is concerned its work on this issue has not really yet begun. We look forward to working with the subcommittee, which we believe will have a number of good ideas, to drive this process forward. Hopefully, we will be able to enact legislation this year.

Thank you.

[The prepared statement of Mr. Adler follows:]

Mr. Chairman and Members of the Subcommittee:

I want to thank the Subcommittee for inviting me here today to testify concerning S.1090, the proposed "Electronic Freedom of Information Improvement Act," which was favorably reported by the Senate Judiciary Committee last month.

At present, I am employed as Vice President for Legal and Governmental Affairs for the Association of American Publishers, Inc. -- a trade association representing the nation's book and journal publishing industry. Although AAP members are strong supporters of "freedom of information" laws, I do not appear hear on behalf of the AAP or its members.

Instead, my comments today reflect my own views on the pending legislation, based on my work with the federal Freedom of Information Act ("FOIA") during my years in private law practice (1989-1996) and as Legislative Counsel to the American Civil Liberties Union (1981-1989). I have previously testified before House and Senate committees on FOIA legislation and other related matters and, for the past fifteen years, have been the editor of annual editions of *Litigation Under the Federal Open Government Laws*, a legal handbook covering case law developments in connection with the FOIA and other public access statutes. As a user of the FOIA, a member of the American Society of Access Professionals, and a lecturer at various FOIA training seminars, I have had numerous opportunities to discuss FOIA issues with FOIA users and agency personnel responsible for handling FOIA matters.

With respect to S.1090, the pending Senate bill on the FOIA's application to electronic records, I offer the following comments for the Subcommittee's consideration:

* It is time for the House to provide leadership on the establishment of uniform administrative policies and practices for federal agencies on "electronic record" FOIA issues. Nearly six years ago, the results of a government-wide survey conducted by the Justice Department's Office of Information and Privacy indicated that conflict, uncertainty and reluctance on the part of many federal agencies in applying the FOIA to electronic records warranted the development and application of uniform administrative policies and practices in this area on a government-wide basis. Yet, since that time, neither the Justice Department nor the Office of Management and Budget has responded to this need.

Of course, the federal courts have established that the FOIA generally applies to agency records in electronic form. But the judiciary's efforts to resolve specific related issues regarding requests for records in particular formats, the treatment of computer software, and programming for search and processing purposes have proceeded slowly and unevenly on a case-by-case basis through awkward attempts to infer Congressional intent in the absence of express statutory language and legislative history.

Despite their considerable flexibility, the current provisions of the FOIA do not provide an adequate foundation for agencies or courts to establish clear, practical rules regarding these key electronic FOIA issues. Congress need not micromanage the agencies' handling of these matters, but it can and should provide sufficient guidance to limit the agencies' discretion to use the form or format of agency records as a basis for limiting or denying public access to such records. This is the purpose of S.1090 as reported by the Senate Judiciary Committee.

In 1994, when the Senate passed an earlier version of what is now S.1090, the House took no action with respect to the legislation and an important opportunity to provide much-needed direction to federal agencies on electronic FOIA issues was missed. In the present Congress, unsuccessful efforts to engage the Clinton Administration in consideration of S.1090 substantially delayed action on the bill in the Senate Judiciary Committee. Only after the bill was reported by the Committee and pending for consideration by the Senate did the Office of Management and Budget begin to urge revisions in a number of the bill's provisions. These post-Committee negotiations with OMB have resulted in substantial revisions to S.1090 as reported by the Committee. I understand that Senator Leahy submitted the revised version to this Subcommittee yesterday attached to his prepared statement. Senator Leahy, as you heard yesterday, is optimistic about the prospects for Senate passage of the revised S.1090 with the Administration's support.

* Congressional passage of S.1090 should not be deterred by "omnibusitis," the swift pace of related technological change, anticipated bureaucratic resistance, or fear of litigation. Critics of S.1090 may argue that the bill as reported by the Senate Judiciary Committee is not worthy of support because it would not address all, most or even many of the contested issues that arise in applying the FOIA to agency records in electronic form. They also argue that the bill's approach to the issues that *are* addressed will prove ineffectual in the face of bureaucratic resistance, challenging litigation, and the likelihood of being overtaken by the continuing evolution of related information technologies and their myriad applications.

In my view, Congress should not allow the pending electronic FOIA legislation to fall prey to what I call "omnibusitis." This infectious legislative virus, which causes a narrowly-cast bill to swell up into a "comprehensive" treatment of the original bill's general subject matter, typically leads to the bloated bill's death by means of its own weight. Tragic experiences with health care and regulatory reform legislation (to name but two recent victims) should persuade Congress that selective, incremental change is often the most sensible and pragmatic approach to public policy reform. This would seem to be especially true in areas where the swift pace of technological change makes attempts to lock-in present concepts or predict future scenarios as unreasonable as taking no action at all. In this regard, S.1090's pursuit of an admittedly narrow agenda of clarification and reform of the FOIA with respect to electronic records is not a shortcoming; rather, it is a deliberately-measured approach which rejects the popular appeal of "omnibusitis" and acknowledges the problems inherent in trying to fashion a detailed, comprehensive statutory mandate for evolving technology.

Those who criticize S.1090 on the grounds of anticipated bureaucratic resistance and a fear that years of litigation will delay settled interpretation and implementation of the proposed revisions probably overstate both concerns. Although some personnel at federal agencies have demonstrated a pronounced reluctance to fully apply the FOIA's public access mandate to agency records in electronic form, it is unfair to simply assume that all, most or even many of the agency personnel would deliberately resist implementation of reasonable measures seeking to harness the efficiency of computers to achieve the basic objectives of the

FOIA. My views on this are grounded not only in conversations with agency personnel that have bolstered my general presumption of regularity in the performance of their FOIA responsibilities, but also in the self-interest which I believe many (if not most) agency personnel will regard as being served by new operational efficiencies that will be realized once computer and telecommunications technologies are routinely utilized in the FOIA processing of agency records in electronic form.

* Concerns that agencies will be frustrated by new administrative burdens and the lack of adequate resources for compliance can be addressed by giving agencies an appropriate degree of flexibility for compliance with standards of reasonableness and technical feasibility. During a time of budgetary constraints, it is clear that Congress should avoid imposing extensive new mandates and administrative burdens on federal agencies without the necessary resources for compliance. S 1090 as it was reported in the Senate, and even more so after the discussions with OMB, carefully takes these concerns into account.

For example, since Senate passage of an earlier version in 1994, provisions in the pending electronic FOIA bill that would require agencies to make certain materials and indices available to the public through computer telecommunications and other electronic means have been revised to ensure that agencies have reasonable transition periods for compliance. Similarly, provisions requiring agencies to honor requester format choices and identify redactions in computer-based records have been revised to ensure that compliance efforts will be reasonable and feasible.

I would note that much of the concern regarding administrative burdens and lack of resources seems to flow from provisions in the proposed legislation which do not directly address electronic FOIA issues but were intended to address the problem of delays in agency FOIA responses. The bill would take advantage of efficiencies in agency record keeping and FOIA processing that are expected to result from the greater use of technology in handling FOIA requests. Certain somewhat controversial provisions, such as the fee-related provisions which were included in previous versions of the bill, have been dropped from S.1090. Others, including the various provisions addressing time limits for agency responses to FOIA requests, have been greatly modified in an effort to ensure that the agencies would not be unduly burdened by the new requirements.

Subcommittee members might ask why legislation ostensibly intended to focus on electronic FOIA issues also contains a number of significant provisions that would revise the time limits for agency responses to FOIA requests. The question is fair and the answer is straight-forward:

The current time limit provisions in the statute have proven to be generally unrealistic and have been an endless source of frustration to agencies and requesters alike since they were enacted by Congress in 1974. Although there is no magic reformulation that will ensure reasonable expectations of compliance at both ends of the FOIA requesting process, some efficiencies affecting the speed of agency responses can reasonably be expected to result from the agencies' transition to routine uses of computer and telecommunications technologies in

agency record keeping and agency procedures for responding to FOIA requests; in this regard, the latter development would be advanced by S.1090, while the former are already embodied in agency mandates under the Paperwork Reduction Act of 1995 and OMB's revised Circular A-130.

Provisions in S.1090 that would revise current FOIA law regarding basic time limits for agency responses on initial determinations and administrative appeals; the treatment of agency backlogs in applying the statute's "exceptional circumstances" standard under the Open America doctrine; multi track/"first in, first out" processing policies; and expedited access procedures are intended in combination to establish a more workable set of time limit requirements that would provide a better balancing of agency and requester interests. These provisions have also undergone substantial revisions to ensure that they will not unduly burden agencies and may be achieved without the need for additional resources.

* It should be recognized that the pending electronic FOIA legislation has not been crafted in a policy vacuum but with careful consideration for existing legal mandates and ongoing agency activities regarding the integration of computer and telecommunications capabilities into agency operations for information collection, dissemination and maintenance. This Subcommittee, which played such an important role in the enactment of last year's Paperwork Reduction Act and oversees agency implementation of a variety of federal information resource and management responsibilities, should understand that S.1090 would not force agencies to purchase or invest in these technologies solely for the purpose of

implementing the FOIA; rather, the legislation seeks to nudge the agencies into a standard implementation of certain aspects of the FOIA's application to electronic records that will incorporate the use of the new technologies, in which they are already investing substantial resources, for the additional purpose of improving public access to agency records and information.

In its present revised form, S.1090 may not answer all of the questions regarding electronic FOIA matters; however, it represents a substantial amount of thoughtful work on some complex issues. It should now be incumbent upon the House to take up the challenge of producing a final version of the legislation for enactment this year.

I would be happy to answer any questions you might have.

Mr. HORN. We thank you very much.

Our last witness on this panel is Mr. James Lucier, director of Economics Research at the Americans for Tax Reform.

Mr. LUCIER. Well, Mr. Chairman, I would like to preface my remarks with the observation that America today is probably the best-educated, the most dynamic, the most innovative society on earth, with the most innovative technology-driven economy.

We hear all the time about the development of the information economy, the race of technology, the new ways we have of dealing with technology that seem to surface every day.

We are facing a fundamental problem here, and that is that people have increasingly high standards and increasingly high expectations for the service they expect from the Government.

The Federal Government simply will not be able to keep up with the pace of change in the coming decades, indeed in the coming years, if not the coming months, unless it starts making some very basic, very simple reforms now.

I am here to suggest this afternoon that enactment of the Electronic Freedom of Information Improvement Act as quickly as possible is one of the simplest and easiest things we can do to start on the road toward fundamental and much-needed reforms.

As you mentioned, my name is James Lucier. I am the director of economics research at Americans for Tax Reform. As you can imagine, we spend a lot of time thinking about what an ideal tax and regulatory system would be like for the United States, especially in the 21st century economy.

Our general view is that taxes should be visible, lower, less burdensome, more rational, and we think all of that will come in time with EFOIA and with other proposals. Grover Norquist, our chairman, has just been named to the IRS Restructuring Commission, who will be looking at lots of information requests, FOIA requests from the IRS, in the coming months in connection with that Commission.

Let me, first, make a basic point about how our society has changed absolutely dramatically since the Freedom of Information Act was first enacted in 1966. That is, the number of people with college degrees has absolutely exploded. The number of people with professional management degrees has exploded.

The way people work in the economy, they tend to work in smaller consulting firms whose specialty is management expertise. We have heard a lot about how American corporations are flattening out, losing midlevel executives from their hierarchies who are going on to run smaller businesses with, you know, very high levels of management acumen.

The basic idea is that you have lots of optionarial people who are suddenly—you have lots of people that know how to run businesses and are used to taking charge. You also have lots of people who are used to information in real time.

Right now, about 1 million people, about a million people, are going to be watching you holding this hearing right now because about 1 million people watch C–SPAN at any given time of the day.

People with executive experience, people with education, people with degrees are seeing more and more about how the Government operates in real time. Because they are executives, because they

are business owners, they tend to think that they have management experience that is relevant, too. They really want to get their hands on the problem. They really want to participate.

The way whole corporations run, we are trying to use everyone's intellectual capital. We are trying to push information and decisionmaking all the way down onto the lowest levels in the production chain.

In other words, American society and American corporations are trying to get by in the 21st century by empowering everyone, by incorporating everyone into the decisionmaking process, by sharing information, and basically devolving power from the highest levels to the lowest levels. An important part of devolving power is sharing information.

On the political side, we see increasing demand for federalism. We see increasing demand for moving Federal Government functions down to the States, to local governments, even moving some previously Federal functions into the private sector through privatization and just devolving welfare functions into private, voluntary organizations.

The basic principle, though, is that there is a huge demographic out there that have very high expectations of how things should work: People that are used to ordering very sophisticated technological products overnight and paying for them over the telephone and having them the next day, people that are used to calling Federal Express, calling United Parcel Service and finding out what is the status of a package they sent earlier today.

These people are not stupid. People wonder why cannot their government do this as well? Why cannot government keep up with them? Why does it take so long? Why do they understand so little about the bureaucratic process? Why does it seem that government takes so long to address important problems or seem so totally unresponsive?

The simple fact of the matter is that when you have government processes and procedures that are still highly bureaucratic that have not quite undergone the management streamlining that the rest of corporate America has had to undergo, it just takes time for government to adapt this.

The government that still seems to be based on paper and totally antiquated information management strategies is simply not going to be able to maintain public confidence when people demand much better service from their pizza delivery company, let alone, you know, the Federal agencies that are supposed to be serving them.

What can we do to change this? I mean, how can we get the Government on a track toward being more responsive, more flexible, and so forth? The Electronic Freedom of Information Act points out a very obvious reality; and that is, we just do not do things on paper anymore. We do not use paper that much.

We have got to work on information dissemination strategies that are simply much less reliant on the paradigm of getting pieces of paper out the door. We need to make very fundamental changes as to making it routine that access is provided electronically.

We need to start planning in advance for agencies as they develop, so that electronic FOIA is part of their long-term management plans, and so that we can build on the very basic premise

right now of doing some of the things which this bill does to make agency documents available online when possible, to make sure that FOIA applies to electronic agencies, and so forth.

If we do not start doing this right now, and if we do not start moving the Federal Government into a new paradigm, which the concept is rational management of information, rational strategies for getting information out to everyone, you are going to have a Government that is decades, decades behind the current best practices in the corporate world. What we need to do is make one basic step today and continue progress on that path in years to come.

[The prepared statement of Mr. Lucier follows:]

Testimony of James P. Lucier, Jr.
Director of Economic Research
Americans for Tax Reform

Before the House Government Reform and Oversight Committee
Subcommittee on Government Management, Information, and Technology

Hearing on

The Electronic Freedom of Information Improvement Act, S.1090

June 14, 1996

Mr. Chairman, America is the best educated, most dynamic, most innovative society on earth with the most knowledge-intensive, flexible, adaptable economy. We also have extremely high and exacting standards for the quality of service we expect from our government. I am here to suggest this afternoon that unless the Electronic Freedom of Information Improvement Act (EFOIA) is enacted quickly, our government will not be able to meet the very demanding requirements we will make of it in the coming years.

My name is James Lucier, and I am Director of Economic Research at Americans for Tax Reform. As the name suggests, we spend quite a lot of time thinking about what an ideal tax and regulatory system would look like – particularly as we enter the 21st Century. Our preference is that taxes and the regulatory burden be low, highly visible, economically rational, and on a track to decrease rather than increase over time. (It is, incidentally, our belief that EFOIA will contribute greatly to these goals.).

Grover G. Norquist, President of Americans for Tax Reform, is among the nation's best-known taxpayer advocates and has just been appointed by Speaker Gingrich to the National Commission on Restructuring the Internal Revenue System. I direct ATR's project on Taxes and Taxpayer Privacy in 21st Century Digital Economy.

The Information Society

The first point I want to make is that information technology has already dramatically changed the attitudes and expectations of Americans toward their government. And it is not simply the progress of technology that is at work but also the type of economy and society that both contribute to technological and derive from it.

As the 104th Congress began, Speaker Gingrich recommended to all Members that they read Peter Drucker's 1955 management classic, *The Effective Executive*. In this book, Drucker made the seemingly extravagant claim that American society of *that time* was rapidly becoming a society of knowledge workers and decision makers – in effect allowing almost anyone to become an "executive" in the sense of the word he used.

If we look at what has happened since 1955, or even 1966, the year the Freedom of Information Act was first signed into law, we notice that the number of people with college degrees has dramatically increased.

- Perhaps even more significantly, the number of people with graduate degrees, professional degrees, and high level management experience has exploded. One look at the business books in any airport bookstore, or indeed, almost any mass market book counter shows that since some very sophisticated concepts of management science have achieved a very wide distribution in our society. It is almost second nature to a lot of people.

- Another important development is the degree to which small firms or even individual consultants have become specialists in a particular field. I have actually addressed taxpayer groups in which, say, a husband and wife working out of their home or with a few employees were advising major U.S. companies, including Fortune 500, on such topics as marketing strategy or quality management. People moving out of mid-level management in major companies are also starting small businesses of their own at an accelerating rate.

- The quality and quantity of information that is available to people in real time is simply amazing. I am not just talking about computer networks but also cyberspace or the new media as broadly conceived to include talk radio, CNN, C-SPAN, email, fax news services, fax networks, and the like.

- The quality of regional newspapers and even small town newspapers has improved dramatically. It used to be that newspapers told you what was happening after the fact, and that outside of the big cities most local newspapers worked with fairly limited resources beyond the national wires. Now newspapers rely much more on analysis and in-depth coverage of the sort where they can still maintain a competitive advantage against the broadcast or mass-market electronic media.

- Decentralization is the new management paradigm, not just in terms of federalism at the national level but also the devolution of decision-making power and reliance on informed judgment at all levels of the production chain The basic concept is that we are rapidly moving to a more participatory management style in wide areas – though certainly not yet all – areas of U.S. industry. In other words, at all levels of society and industry, we are increasingly demanding an *intellectual* contribution from everyone with a role to play.

- Further, to maximize productivity and quality of output, companies in leading industries are actually seeking to maximize the specifically intellectual contribution of all workers. One sees this reflected in participatory management philosophies, the flattening out of corporate hierarchies, and the like. Thus, in the 1990's, we run our business and associations in a fundamentally different way than we ran them in the 1960's. The great renaissance of U.S. economic competitiveness is one result.

- In politics, the demand for federalism and the devolution of many federal government functions to the states and localities, or even to private voluntary organizations is simply the public-sector to corollary to what has been going on in the business world for quite some time. In the name of leaner, more effective, more democratic, and *smaller* government, these trends should be encouraged.

To sum up, I would like say that the level of literacy many U.S. citizens enjoy concerning government operations and the workings of the economy at large are nothing short of phenomenal. Any time a hearing like this is on C-SPAN, over a million people will probably be watching – and I know a lot people who watch C-SPAN up to four hours a day. These tend to be very well educated people with a lot of business experience, often people who own and run businesses themselves. And these are your voters.

There is a big demographic out there comprised of people who are used to having virtually any type of information on demand. They are used to the idea of calling Federal Express and UPS to find out what happened to a package they mailed earlier in the day. They used to ordering all kinds of sophisticated products for next day delivery. They are hands-on managers who are used to taking on responsibility for getting things done. They are very literate in the types of management decisions Congress is making today and wonder why Congress doesn't do better.

Today's electorate is no longer in the position of voters a generation ago who simply had to content themselves with someone else's account of what you had done in the past few days: they know what you are doing now – and if it seems too complicated or counter-intuitive to them, they have definite ideas as to what to change. American politics is already greatly different than it was a generation ago.

The Case for Amending FOIA

It is important to realize just how basic the Freedom of Information Act is. Essentially what the 1966 Act as amended did was require that federal agencies publish such fundamental information as their addresses, their general organization, and their policies and practices for responding to information requests from the public.

The 1966 Act does not confer on citizens a right to receive all information, but it does recognize the right to make a request and receive a specific justification in the case of a denial. The types of information that must be made available include final opinions made in the adjudication of cases, administrative staff manuals that affect the public, and other types of information not subject to very clearly defined confidentiality protections. Agencies must also provide a reading room for basic FOIA materials and frequently-requested FOIA documents. In retrospect, it is hardly a radical or earthshaking proposal.

The Electronic Freedom of Information Improvement Act which passed the Senate on a voice vote last year is really about the minimum step one can make to update FOIA in light of a single fact: we really don't do much on paper anymore.

In one funny sense, government officials are really a lot like computers: legally, they can only do what software – i.e., the U.S. Code – tells them they can do. EFOIA gives agencies explicit authorization to start moving things off paper and into electronic form.

- Ensures that core agency documents are available electronically and where possible online.
- It requires that frequently requested documents also be made more readily available, especially online.
- Agencies would be required to develop an on-line index of materials that are the subject of repeated requests.
- It clarifies that FOIA applies to *electronic* agency records.
- It directs agencies to make reasonable efforts to accommodate a requester's electronic format request.

None of these items are particularly astonishing. They strike me as little more fundamental than requiring agencies to publish their telephone numbers now that telephones have been invented. It should not be surprising that S. 1090 passed the Senate on a voice vote last year, and that the proposed Leahy-Brown-Kerry substitute to last year's bill is not particularly controversial. We are at the stage where, as in the Nike ad, the time has come to "Just Do It."

The few issues that remain – should we have multi-track access or not? Of course we should—are basically nitpicking. There is really no sensible way to debate that we do not need EFOIA now. However, I think the debate has been mission one important component: the cost of <u>not</u> adopting EFOIA immediately. Anyone who makes the improbable case that EFOIA will be too costly or too difficult for the agencies to implement misses the basic point that every day we go without this necessary update to

the original 1966 legislation, we let federal agencies moulder in a management environment that is *decades* behind best practices in the private sector.

It costs the taxpayer and the economy at large huge amounts of money to maintain a bureaucracy that is ineffective and overly complex due to antiquated information practices. It also costs the government greatly in public confidence and perceived unresponsiveness, if not outright irrelevance, to the basic problems that trouble many Americans.

Let me leave you today with this thought. A quality revolution in government is not too much to ask for. We won't necessarily get something so sweeping with this bill, but at least it is a first step, and at least we can begin thinking about the future in bolder terms.

Perhaps what we need is ultimately a new conception of FOIA itself. In the old days, FOIA was supposed to be a citizen's defensive tool to keep all-powerful, bureaucratic, unaccountable government from doing things wrong. We should think of it more as a citizens' enabling tool In the information age, EFOIA will be one tiny step allow a limited, effective, responsive, participatory government do what's right.

Mr. HORN. Does the ranking member have questions she would like to ask the panel?

Mrs. MALONEY. Thank you, Mr. Chairman.

I would just like to ask, Mr. Adler, what do you think is the most important contribution in the Leahy bill?

Mr. ADLER. I think what it is going to do is try to focus some of the existing activities that are already taking place in agencies with respect to telecommunications and use of computer technology in a way that helps them to deal with the problems that they have under the Freedom of Information Act.

This legislation doesn't appear in a vacuum. As this subcommittee well knows, the Paperwork Reduction Act of 1995 and the "OMB Circular A–130" and a variety of other pieces of legislation have driven the agencies forward, based upon their own needs to be able to use these technologies for greater efficiencies and to have more productivity in their work.

There has not been a great deal of focus of how the use of those technologies, with respect to recordkeeping practices, can enable them to also be able to perform better under the Freedom of Information Act with respect to their public access responsibilities. I think that Senator Leahy's legislation attempts to focus them to think about that without creating a great deal of micromanaging type of direction to tell them exactly how to do it.

Mrs. MALONEY. There has been some criticism of the bill, which I am sure was not the intention of Senator Leahy that the definition of records was limiting. I would like each of you to comment on it if you would like, or if you would like to think about it and submit a definition that you think would be more appropriate or your comments on the current definition for the record, I think that would be useful to the chairman and myself.

Mr. GELLMAN. I think one of the principal problems with the definition comes from an old FOIA case from 1976, *SDC* v. *Matthews*. That case relied on the definition of "record" not in the FOIA, because there is not one, but in the Records Disposal Act in title 44, and used it to decide that a computer data base was not a record under the law and was exempt from disclosure.

It is a terrible case, one of the worst cases ever decided. Senator Leahy's bill included language that looks like it would codify that decision. I don't think that was the intent, but it would reenact that language out of the Records Disposal Act in the FOIA. That is a small problem that can be dealt with in the legislative process, but it is a very significant one.

Mr. ADLER. The definition of "record" has been criticized from both ends, Congresswoman, as being overly inclusive or too limited. There are people who are concerned with the fact that it tries to clarify the issue of the status of computer software, for example, as an agency record subject to the Freedom of Information Act.

One of the issues that it does not specifically address is the question of whether or not computer data bases that are used by Government agencies and acquired through license, for example, the jurist data base, is something that would always in every instance be considered an agency record subject to disclosure under the Freedom of Information Act. That issue is now the subject of litigation.

There has been a recent case decision where the court decided that, in fact, because computer data bases that are subject to licenses restricting their distribution and reproduction are not really agency records because the disposition of those materials is not fully within the control of the agency that possesses them.

That is the type of an issue that requires a great deal of thinking as to how you would place in law a statutory approach that is going to bind all agencies in dealing with many different kinds of computer data bases. But what the definition does do is to make it clear that as a general proposition computer data bases can be considered records subject to the Freedom of Information Act.

Mrs. MALONEY. Would you like to comment?

Mr. LUCIER. Yes. The key point is the definition of "record" should have nothing to do with the medium in which the record is kept. You can quibble at what point in the deliberative process a record becomes a completed document or becomes, you know, a final product or it becomes something that is subject to disclosure, but that is a definition of process. The medium should have nothing to do with it. Electronic information, computer data bases, magnetic records—all of those should be automatically considered as eligible under FOIA.

Mrs. MALONEY. One of the provisions that was in an earlier version of the Leahy bill allowed agencies to keep a portion of the FOIA fees in the agency to help with FOIA processing, which the chairman and I learned yesterday is a problem in most agencies of sometimes 4 years late and longer delays before you even get the information.

We included a similar solution in a debt collection bill that we passed earlier this year. I would like to hear your comments on whether you think that would be an appropriate or helpful provision to put back into the bill.

Mr. GELLMAN. I have a lot of problems with the provision as it is written. First of all, it provides that only agencies that are in substantial compliance with the time limits are able to keep the fees. That excludes a lot of the agencies that have big backlogs.

Second of all, it requires an audit by the General Accounting Office in order to determine whether they are in substantial compliance. That would impose potentially 100 audits a year on the General Accounting Office. If an agency asked, they would have to come in.

That would cost a lot of money and take a lot of resources from GAO that they would otherwise use for a lot of things. I am not sure it is a good use of GAO's time. Then I question whether the money would actually improve the process.

I think in a lot of cases it is not all that predictable how the revenues would be used. I suspect that agencies would use this money as a slush fund. Rather than hiring other people to process FOIA requests, agencies would probably use it to take trips to conferences and go see how other countries are processing FOIA requests. I am not convinced that this will really solve the problem.

Mr. ADLER. Again, this is a provision that was criticized from a number of different perspectives. In addition to the concerns that Bob has just raised about whether, in fact, it would make a substantial contribution of additional resources, there is also the con-

cern that has been raised that it might create incentives for agencies to charge higher fees than they should ordinarily charge in individual cases, once they have a stake in being able to hold on to that money, rather than turning it over to the Treasury.

Mrs. MALONEY. OK. Thank you. Last, would each of you comment, briefly, on a proposal to require agencies to include in their annual reports statistics on the number of requests completed, the median time to complete requests, the total number of pending requests, and the median time those requests have been pending?

In the testimony that we have heard from various agencies and others on this bill and people who are trying to gain the information is the tremendous backlog on FOIA requests. As Senator Leahy said, delays in answering requests are the same as denying the information, because sometimes it becomes such a long time it is no longer even relevant.

Do you think such a provision of oversight would be helpful in getting this information more quickly to the people who are asking for it, to the public, to the reporters?

Mr. GELLMAN. I think that is a very good idea. The FOIA does have an annual reporting requirement. Many of the requirements of what is in that report were determined in a letter that was sent out jointly by Bella Abzug and Ted Kennedy way back when.

Mrs. MALONEY. Really? That is interesting.

Mr. GELLMAN. It has never been changed in probably 20 years. It does not provide the information that people need. It provides more information in some areas than is really necessary, makes it more burdensome.

I think the annual reporting requirement needs to be reviewed, it needs to be updated, and you need to tell the agencies to collect information that would be useful. I think that is a very good idea.

Mr. ADLER. I think such requirements could not only be useful, but would particularly help in respect to the subject matter of this bill, if the agencies could focus on the ways in which they are able to use their time and resources more efficiently when they are able to employ computer and telecommunications technology in processing and responding to Freedom of Information Act requests.

Mr. LUCIER. That kind of a requirement would be very helpful. As long as it is still kept on paper, it is going to be very hard for the vast bulk of the public to get to. I mean, it is a palliative that would certainly help the intrepid reporter calculating these statistics, but there are lots of independent academic studies of how long FOIA requests take already.

We know that there is a problem. While having an ongoing report on the patient's condition would help the doctors in charge, it is really necessary to go full-bore now and enact FOIA, the electronic FOIA.

Mrs. MALONEY. Well, thank you very much.

Mr. HORN. Thank you.

Mr. Gellman, last year, as you know, Congress passed the Paperwork Reduction Reauthorization Act and addressed many of the Government dissemination issues. You worked on that legislation. How do you see that law interacting with the Freedom of Information Act in improving citizen access to Government information?

Mr. GELLMAN. Well, I think the two laws do work together, but they sort of focus in different directions a little bit. They are very complimentary.

The Paperwork Reduction Act focuses more on getting agencies to actively disseminate things, rather than wait for a request. Of course, with the Internet, agencies now have the capability of putting information up, making it much more readily available to a lot of people. There are other ways of making data available as well. I think that is the direction that the Paperwork Reduction Act has gone in. It sort of looks at active dissemination.

The FOIA is a passive process. You wait for a request to come in. Things that have not been disclosed, that somebody wants, that is what the FOIA is for. You can call it two sides of the same coin—there are different methods of getting information out.

I think that the Paperwork Reduction Act was very helpful and had a lot of very useful language, especially in the sphere of electronic records. I do not dispute at all that the FOIA may, in fact, need some correction and some emphasis on electronic dissemination.

I am not trying to suggest that nothing needs to be done at all. I think that the law could be updated. I think that a lot of our information laws are out of date. The FOIA, the Privacy Act, the archives laws—all of them fail to recognize that information is now maintained electronically, and they are all very paper based. That has created problems for all of them.

Mr. HORN. Any comment any of the rest of you would like to make?

Mr. ADLER. Yes; I would say, Mr. Chairman, during the first 30 years of its existence, the Freedom of Information Act was something that was viewed by agency employees as being a responsibility that simply was imposed on top of their other responsibilities with respect to records management.

What the Paperwork Reduction Act has done, and indeed the OMB circular that I mentioned has also done, is to get agencies to focus more on the lifecycle of information that it collects, maintains, and disseminates.

The Freedom of Information Act responsibilities now, I believe, have a much better chance of being integrated into the way the agency employees view their recordkeeping responsibilities. This should allow them to be more efficient and make better use of their resources and be more responsive to the public.

Mr. LUCIER. The life cycle value of the information is extremely important. The Federal Government is virtually an information depository, and there is a tremendous opportunity for the public and for the private sector people to do their own studies, to do their own value-added reports on what the Government is up to. This could help the public at large greatly understand what the Government is doing. Anything whatsoever you can do to get the information moving more freely would help. But again, the basic paradigm is different.

Once upon a time, we thought of FOIA as the citizens defensive tool. It was defined out of bureaucrats behind some unresponsive, monolithic bureaucracy, we are not doing the right thing or we are doing bad things. It was to allow public scrutiny.

What we need to do now is move toward a newer paradigm in which the electronic FOIA becomes the empowering tool which lets citizens do more, have a bigger role, and see what is happening as it happens.

Mr. HORN. That is very helpful. Let me ask you a question about Senator Leahy's bill. Is the multitrack processing system a good idea? I am just curious if any members disagree with that system, and why?

Mr. GELLMAN. No; I think it is a great idea, and some agencies are already doing it. They don't need legislative authority to do it. The legality of that kind of processing has been upheld by the courts. If you put it in the law, and you put in that there is a requirement in there that resources have to be adequately balanced between the two tracks, that is going to generate more litigation.

This is an example of a problem that agencies can solve on their own without legislative language. If you put it in the law, you are going to have to pay the price in litigation. The question is, Is it worth it?

Mr. HORN. The Leahy bill proposes an expedited access system. Mr. Gellman, as I understand it, you criticize putting this in the law while Mr. Adler supported that; is that correct?

Mr. GELLMAN. Yes. I think——

Mr. HORN. Is there any way to reconcile you two?

Mr. ADLER. I hope so. [Laughter.]

I think that part of Bob's criticism, again, he is concerned about the fact that the language is going to be litigated, is nothing new in the area of the Freedom of Information Act.

I think that Bob would also agree that the courts have been integral in interpreting the act and ensuring the congressional intent for public access rights has been fulfilled the way Congress intended it, rather than the way some of the agencies might have wanted to do it.

Let me point out that the expedited access provisions also are not created in a vacuum under this legislation. They have taken the gist of their approach from existing guidelines of the Department of Justice, which have been used for some time now, at least since the early days of the Clinton administration, to provide expedited access to certain agencies.

What the legislation does in trying to codify this is to make sure that, hopefully, the beneficial results of expedited access provided by these enlightened administrators will not go away when there are new leaders in these agencies that have provided expedited access in the past.

Similarly, they have tried to impose some form of standardization without limiting the agencies from developing their own additions to the policy, so that FOI requestors can receive and expect to receive similar treatment from multiple agencies.

Mr. GELLMAN. If I could respond?

Mr. HORN. Sure.

Mr. GELLMAN. I think Alan's point about the court being an integral part of the FOI process is right, but they have not been very favorable in cases involving time limits. They are not very happy when people come to court and say agencies are not complying with time limits. It is very hard to get relief in court.

I think the real problem, my real objection to the expedited access provision—is it is just another administrative burden. There will be a lot of requests for expedited access from prisoners, from reporters, from businessmen, from others, and it will simply burden the process.

If you are going to do it, I would suggest basically that you dump most of the language in the bill and put in a one line provision that says agencies can do it if they want, and let it go at that. That will minimize quibbling over what the statutory standards mean.

You are still going to burden the administrative process if agencies go too far. I think letting the agencies control it and set the terms of when they are going to allow expedited access may make sense.

Mr. ADLER. If I could just briefly comment on that, I don't think that those fears are really likely to occur in reality because the agencies are given discretion, informed by the statutory standard imposed in this legislation, so that they will be able to deny most of the frivolous requests that come in for expedited access.

Beyond that, there is a concern that, in fact, this is simply part of the multitrack approach that the legislation allows agencies to engage in. Again, the reason that they are doing that is because although many agencies do it now, some agencies have testified before Congress and in response to the Justice Department's survey 6 years ago, that they didn't believe they had the authority to treat requests under different tracks and timeframes. Congress is responding to that concern.

Mr. LUCIER. I would just like to say the principle of expedited access and multiple track should be an absolute no-brainer as long as you can get reasonable standards for it. Then there is the basic question, whose interests and convenience is at stake here, the bureaucrats' or the citizens'? It should come down in the citizens' favor.

Mr. HORN. Should we set up any type of special appeal process in this area, or should we just leave it that if you don't like what the agency has done, you have got an appeal within the agency of some sort and eventually you go into the Federal court? What is your feeling on that? Should there be a specialized arbitration-type body, or does everything escalate to the Federal district court?

Mr. GELLMAN. We looked at that issue actually some years ago, probably in the mid-1980's about whether we need some other kind of administrative process. Many other countries have FOIA laws. You can look at Canada and find they have an administrative office that handles appeals and essentially tries to either arbitrate or mediate or ultimately make decisions short of going to court. Americans, of course, love to go to court, and that is a standard remedy.

Mr. HORN. Until they have to pay the lawyer?

Mr. GELLMAN. Of course. Actually, I would like to make a point about that.

Mr. HORN. You mean now that you have left the staff, you have to worry about things like that?

Mr. GELLMAN. No. You will see where I am headed in a minute.

I think that that is an issue that might be reopened and re-examined. I don't know. There was not any consensus on it years ago,

and there may not be now. People found the courts were very important in the process, and no one wanted to get away from that.

Since you raised the issue of attorneys' fees, let me sort of bring in an issue from left field that ought to be thought about. When agencies deny documents and get sued, the Justice Department defends them. The agencies do not have to pay a lawyer's bill. They have unlimited free legal services from the Justice Department.

If agencies had to pay to defend their denials, they would look at this differently. They would say, "You know, it is not worth spending $50,000 to defend this internal memorandum. It would be cheaper and easier for us if we could just disclose it." Now, that is a very nice, simple idea.

Mr. HORN. You will be happy to know we discussed this thing yesterday. I agree with you completely, that the only way an agency and a bureaucracy get the message—or at least the chief operating officer gets the message—is when he looks at his or her budget; and that is, when they have got to pay the damages out of their own funds, and Congress is not going to appropriate it. It is coming out of your agency budget somewhere.

After a while, if somebody is in a pattern or practice of being very restrictive on access, they will decide as you suggest that that cost is not worth it.

Mr. GELLMAN. Well, I am not surprised that you are way ahead of me. I think it is a very interesting idea, but I have thought about this quite a bit, and there are a lot of problems in trying to do it across the board.

For example, if an agency says, "Well, we are not going to pay money out of our budget to protect some classified document or some private document or some corporate document," you really begin to get into problems.

You have to try to find a way to focus that to documents that are agency documents and that might be withheld under Exemption 5 or maybe a few other exemptions.

Mr. HORN. Let me bring up another issue, and then I will not keep you. We are exploiting you as it is. One of the things that worries me is when we see some of the filings at the Food and Drug Administration. Now, as you know, the Food and Drug Administration is not exactly Congress' most fond agency, shall we say, to be charitable.

Some firms—some fly-by-night, some fairly large—may simply be using the FOIA, one way or the other, to gain commercial intelligence that they might not be able to gain any other way.

That creates a lot of problems, I would think. When the public interest is protected, that is one thing. However, if it has to do with somebody just using FOIA to gain an advantage, to find a process that is being revealed by another, and then to argue about it in court, I am worried. If you have got more lawyer money you might win it, even though you are wrong.

That worries me. Does it worry you?

Mr. GELLMAN. Well, let me give you three responses to that. First of all, we looked at that quite a bit in the mid-1980's, and we really found very little evidence that confidential, commercial information was being disclosed.

There was a very occasional horror story. If anything, the agencies are more protective of business information, and they err on the side of withholding information, rather than disclosing it. I think that is still the pattern. I am not sure there is a problem.

Second, if an agency has a document, whatever it is and wherever it came from, that is not exempt, that would be valuable to somebody, I would prefer not to second-guess why somebody wants it. Anybody who wants a document that is not exempt should be able to get it, regardless of their motive.

The reason that that is important is the third reason. Once you start investigating motives, the bureaucracy will go crazy. Who are you? Why do you want it? Are you sure you are not making this request on behalf of somebody else? Have you really told me the truth about what your motive is?

They will spend inordinate resources cross-examining requesters, rather than just spending time deciding whether documents are exempt. That is the question. If the document is not exempt, disclose it. If it is exempt, withhold it. Who the requester is, should not make a difference.

Mr. HORN. Would you like to comment, Mr. Adler?

Mr. ADLER. Yes. I agree with what Bob has said, but I would also add I disagree with your premise, Mr. Chairman. I think there is a public interest in having these types of requests made. After all, an agency like FDA, which is designed in large part to sit at the control switch over whether or not certain products become marketable to consumers directly is a consumer agency.

I think that most consumers are convinced that they don't hear enough either from the FDA or Congress about what the FDA is doing. In some respects, I think that it is the requests that come from the business community, purely motivated by their own self-interest perhaps, which nevertheless bring out a great deal of information about what the FDA does and whether or not it is serving its purpose.

Mr. HORN. Well, of course, these requests are being made by people in the business community, I mean, to do it on the cheap in a sense. In other words, someone else has done the research, someone else has been deeply involved.

Here, it is like the blackmail game played in the securities industry by a number of law firms. They file these suits that are absolutely frivolous and blackmail a company into submission and live off of them like a leech living off the main body.

Mr. ADLER. I think this is a little bit different than that, though. In many instances, these requesters, blind requesters if you will, are hired by the companies because the company does not want necessarily the agency or other requesters who get to look at who has made Freedom of Information Act requests to know particularly what subject matter they are interested in. I do not think that that, as a general matter, is a harm to the public. It may be a drain on the agency's resources, but I do not think it is harmful to the public.

Mr. HORN. Well, the agency might well release it despite the presence of an exemption. The question remains that people have invested in some process and they simply have to defend their creative activity. Is this a stealing of intellectual property?

Mr. ADLER. Oh, no, that it is not, Mr. Chairman. The Freedom of Information Act does contain an exemption which allows confidential business information and proprietary data to be withheld by an agency. Although people can sue to try to force the agency to disclose such data, the act has also been construed to allow the people whose proprietary interests are at stake to go into court to block such disclosure.

Mr. HORN. Well, that leads me to one more question. Since that is a very complicated question to answer as to when that truly is in conformity with the exception in the statute, do we not then have a lot of professional time soaked up in attempting to make that decision? The average "administrative personnel" that is trying to be responsive to the pile of mail in the in-box with requests is not going to know the answer to that.

Mr. ADLER. Well, many of them will, in fact. One thing that has occurred over the last, oh, decade or decade and a half or so, is that the people who have the job in the agencies of responding to Freedom of Information Act requests have become much more of a professional class.

These are not just clerks; these are not just administrative people. These are folks that take pride in what they do, and they have developed the need and the desire and the demand for training so that they can, in fact, become expert in these types of questions.

Now, the fact that most of these do raise some times subtle legal issues which ultimately involve the lawyers and the courts does not mean that they all cannot be resolved promptly or satisfactorily by the staff. I think that increasingly the agencies have improved their sophistication in knowing what types of data raise these issues and what types of records do not.

Mr. HORN. Mr. Lucier, do you have any comment on this?

Mr. LUCIER. Well, just one comment. In the eighties we had a long debate about industrial policy and what Government agencies should do to increase the competitiveness of an economy nationwide.

One of the fields I worked in then was Japanese patent law, like many European countries, in fact like most countries in the world, have an open patent publishing system which they use as a means of disseminating technical information throughout the economy. People applying to Government agencies to find out what other people are up to is not necessarily a bad thing.

In fact, a lot of very successful countries and very successful economies have a policy of actually disseminating this information at some level to move everyone ahead, and to increase the Nation as a whole.

Mr. HORN. Well, that is a very helpful comment. I thank you gentlemen for sharing these ideas with us. If you have any other thoughts, please feel free to write us. We would welcome your input as we pull the pieces together.

Mr. GELLMAN. Thank you.

Mr. ADLER. Thank you.

Mr. LUCIER. Thank you.

Mr. HORN. Thank you very much.

We now turn to our final panel, where we will be discussing the proposed Health Information Privacy Protection Act. This proposed

legislation will place Federal protections on individual medical records. We have four very well-respected witnesses providing testimony today, and there is a very widespread interest in this topic. We look forward to your testimony.

We will have the clerk inform Mr. Condit and others on this Health Protection Privacy Act that the ranking minority member will also be on it as a co-sponsor. Now among our four are Ms. Janlori Goldman, the deputy director, Center for Democracy and Technology. Let me first swear you all in and then we will start with you, Ms. Goldman. If you don't mind standing?

[Witnesses sworn.]

Mr. HORN. All four witnesses affirmed. Ms. Goldman, you are first at bat.

STATEMENTS OF JANLORI GOLDMAN, DEPUTY DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY; KATHLEEN A. FRAWLEY, DIRECTOR, WASHINGTON OFFICE, AMERICAN HEALTH INFORMATION MANAGEMENT ASSOCIATION; GERRY BAY, VICE-PRESIDENT OF PHARMACY OPERATIONS, EAST DIVISION, AMERICAN DRUG STORES, NATIONAL ASSOCIATION OF CHAIN DRUGSTORES; AND STEVEN K. HOGE, AMERICAN PSYCHIATRIC ASSOCIATION

Ms. GOLDMAN. I very much appreciate the subcommittee, Mr. Chairman, holding this hearing this afternoon. Your commitment is especially evident, given the day and the hour which you have held this, and I very much appreciate it. This subcommittee and the full committee and the Congress, in fact, as you may know, has considered the issue of protecting people's medical information for about 20 years.

While we have come back year after year, not myself for 20 years, but myself for half that time, to urge the Congress to enact comprehensive strong legislation in this area, we have gotten close, sometimes not so close, but we are still here urging the Congress to act in this area.

What has changed is that the health information industry has continued to grow, continued to become more sophisticated, and the players are more numerous. The violations and the harms are more egregious. The problems have absolutely gotten worse.

As we move to the development of health information networks which can communicate with each other not only nationally but globally, we have more people sitting at the table, if you will, saying how the bill should affect them or not affect them. I think it has become more complicated, but I don't think that should deter us in our effort to pass some strong legislation, if possible, this Congress.

Last Congress, there had been hearings held on a number of proposals. One could say a fair consensus was reached that included the American Medical Association, the American Civil Liberties Union, IBM, a number of other organizations.

One bill, in fact, was approved by the full committee here, two full committees in the Senate. It was part of the larger health care reform effort. But again, the starting point was that we had to protect people's medical records before we moved forward and talked about omnibus health care reform.

Now, I would say that had we enacted any form of health care legislation last Congress, it would have included a fair, detailed privacy section. In fact, that was the starting point at the beginning of this Congress. Now that we have decided to take an incremental approach since an omnibus approach has been unsuccessful. This Congress asked, Where are some starting points? Where did we have some fundamental agreement last Congress?

Senator Bennett on the Senate side recognized that in the area of protecting people's medical records there was fundamental agreement. That has been a starting point for health care reform efforts in the Senate.

The Senate bill has received a fair amount of work and attention. There was a hearing held last fall on a bill introduced by Senators Bennett and Leahy, S. 1360. There has been a markup scheduled, unscheduled, rescheduled, and unscheduled throughout the spring and the summer.

But again, there is a fair consensus, and I think everyone at this table will say, we need Federal legislation. Everyone's statement says we need legislation. When it comes down to actually talking about how the various groups will be regulated, action is stalled.

One issue that I think is critical is that in the House-passed version of the portability bill, which is hopefully going to be conferenced soon by the Congress. There is a provision known as administrative simplification which mandates that personal health information be handled in standard format, uniform format. It delegates to the secretary rulemaking authority in the area of privacy and confidentiality.

Now, a privacy advocate such as myself would say that is good news. The concern that we have is that it is essentially an open-ended authority to the secretary with no parameters, no standards, no indication of what should be in such a set of regulations.

I would urge that that provision not be allowed to stay in the bill unless a more fleshed out version of confidentiality is included, either as a statutory provision or as a more detailed recommendation to the secretary as to what to include in such regulations.

It can be a version of the draft bill that you have before you today. It can be provisions in H.R. 435 that was introduced by Gary Condit last January, or again provisions in the Bennett-Leahy bill in the Senate.

I think it is critical that that provision not be allowed to stand without a better signal to the executive branch as to what needs to be in the regulations. Our testimony over the years has included a series of horror stories. It seems that a critical component of any legislative process is knowing what the problem is.

We again have documented some of the new problems that have cropped up since last year. A social service agency in Boston was requested by the Federal Government to turn over names and Social Security numbers of people they had treated for HIV and AIDS as part of funding that they received under the Ryan White Care Act. They complied and then it turned out that the information was improperly used and disclosed by Federal agencies.

Now, again, there is not ill-intent necessarily behind the demand for that information. It is all done with the eye toward auditing and cost reduction and oversight of Federal funds. However, when

privacy is not built into the activities of agencies, then it is not considered at the front end. That is where the problem is.

Again, as we are moving toward a network environment, privacy safeguards have to be technically and legally built in at the front end. The risk, and again this risk is well-documented, if people do not believe their personal health information will be protected, they will not seek care, they will lie about their medical condition, or they will pay out of pocket for services for which they otherwise have coverage.

The trust and confidence of patients is at stake here. The very foundation of the doctor-patient relationship is at stake. It is already being eroded by the lack of privacy protections.

The good news which I can share with you today, which you are probably already aware of, is the Supreme Court yesterday came down with a decision in a case called *Jaffe* v. *Redmond,* where they said that the confidentiality privilege between therapists and patients will be upheld, and that therapists cannot be compelled to disclose information from those confidential sessions in court.

It is a fabulous decision. The underpinnings of the decision, which was a 7-to-2 opinion, recognized that people will not seek care if their information is not protected. Again, it is a narrow holding in that it only applies to compelled disclosures in court, but I think it certainly sets the right tone. It is one that I would hope that Congress would also pursue with some urgency. I will close very quickly. The principles which we think must be in any——

Mr. HORN. Excuse me. I usually do not do this, but the ranking minority member would like to ask you a question at this point, if you do not mind.

Ms. GOLDMAN. Absolutely.

Mrs. MALONEY. On just that point, that is an important and interesting decision. Did it speak in any way about disclosing information between the therapist and the patient? Because there is, as you know, a dispute where some patients want their records and therapists feel they should not be given to the patient. Did it go into that aspect or not?

Ms. GOLDMAN. It did not that I am aware of. I think that is a critical issue which I hope that the panel will get into to some extent, since we have a representative from the APA here.

Our position, as a fundamental matter, is that people should have a right to their medical records, whether it is mental health treatment notes or other records. We should not treat mental health records differently from the way we treat other kinds of medical information.

If we can show in any area that the disclosure of this information to the patient would result in possible harm to that individual and if we can show that, then we have a case. But I don't think we should treat mental health records separately. I don't think the court addressed that issue, either.

Mrs. MALONEY. Thank you.

Ms. GOLDMAN. I will close very quickly and just say that in the discussion draft that this subcommittee has put together and in the Condit bill which is before the House, and the Bennett-Leahy bill which is being considered by the Senate, all of them currently include—principles which I think should be included in any bill. Peo-

ple should have a right to see their own records, which we have just discussed. Only half the States currently provide that.

People should have control over the information about themselves that they divulge to their doctors, that they divulge to their health plans. Particularly in treatment and payment contexts, they should have control over that information.

That information should not be divulged without their permission. There should be an incentive to create nonidentifiable data. In many, many circumstances—in research, for public health purposes, for all other kinds of purposes—nonidentifiable data is sufficient.

We should give an incentive to those requesters to turn the information into nonidentifiable to the extent we can. I believe that law enforcement should be required to present a warrant before getting access to personal health information. Right now, they only present a warrant when they are turned away.

If a clerk or anybody else says, "I am not going to give it to you," then maybe they will go and get a warrant. We have a warrant requirement for access to video rental lists and cable subscriber lists, and not for medical records.

There should be remedies that have real teeth. A private right of action, a civil and a criminal penalty, the discussion draft before you has a debarment provision for real heinous and flagrant violations of the law where you then cannot participate in Medicare and Medicaid. We think that is good.

I want to just quickly address the thorny issue of pre-emption. It has been very, very contentious in the discussion of any comprehensive medical privacy bill. I think that, ideally, we should allow the States to continue to be laboratories and to enact legislation which is stronger.

I think pre-emption tends to lock States out of very creative and oftentimes important areas. In order to get a fair consensus on this bill, however, most of the provisions have included pre-emption of State law.

What has given us some solace in that area is that the way that most of the proposals have been drafted is to create protections that are at a higher level than anything currently at the State level. I am not aware of a State law that would be pre-empted under either the discussion draft under consideration by this committee or the Condit bill or the Bennett-Leahy bill.

Just as a final word, I think that there are very powerful interests who will come forward to this subcommittee and come forward to other Members and say, "We want a bill. We want Federal legislation. We want pre-emptive legislation. We support it. We think it is important." But when it comes down to the details, they will essentially walk away. I would urge a very strong message from the subcommittee that we need to do something now.

[The prepared statement of Ms. Goldman follows:]

Chairman Horn and Members of the Subcommittee:

I. OVERVIEW

My name is Janlori Goldman and I am the Deputy Director of the Center for Democracy and Technology (CDT). CDT is a non-profit, public interest organization dedicated to preserving free speech, privacy and other democratic values on the Internet and other interactive communications media. I appreciate the opportunity to testify before you today on behalf of CDT in support of the need for strong, comprehensive federal legislation to protect the confidentiality of medical records.

One of CDT's primary goals is the passage of federal legislation that establishes strong, enforceable privacy protection for personally identifiable health information. We believe that comprehensive legislation that protects the privacy of health information is critical. The public will not have trust and confidence in the emerging health information infrastructure if their sensitive health data is vulnerable to abuse and misuse. We commend the efforts of Chairman Horn and Representative Gary A. Condit for their leadership towards enacting legislation to protect the privacy of health information.

Presently, there is no comprehensive federal law that protects peoples' health records. However, a Louis Harris survey found that most people in this country *mistakenly* believe their personal health information *is* currently protected by law. And most people mistakenly believe they have a right to access their own medical information. In fact, only 28 states allow patients access to their own medical records and only 34 states have confidentiality laws. Federal privacy policy is urgently needed to address the increasing demands for health information by those outside the traditional doctor-patient relationship. Information demands of insurance companies, managed health care companies, researchers, employers and law enforcement are eroding the doctor-patient confidentiality that is central to

health care. CDT believes Congress must act to protect the privacy of personally identifiable health information so that our laws will finally conform, to some extent, with the American public's perception and expectation that their sensitive medical records are confidential.

Technological innovations that allow medical records, data and images to be transferred easily over great distances, impacts our country in significant ways. The development of a national information infrastructure and information superhighway are changing the ways that we deal with each other. Traditional barriers of distance, time and location are disappearing as information and transactions become computerized -- few relationships in the health care field will remain unaffected by these changes. In the absence of any Congressional action, the collection and use of personally identifiable health information will continue to occur within electronic, networked environments without privacy protections.

But while this information revolution may hold great promise for enhancing our nation's health, CDT and others believe that personal health information, in both paper and electronic form, must be protected by strong, enforceable privacy rules. Even useful technologies pose potential risks to privacy, where an individual's need to keep information confidential is forced to take a back seat in the drive to lower costs, increase efficiency and facilitate health research through automation.

Last Congress, this Subcommittee held hearings on the Fair Health Information Practices Act, sponsored by Representative Condit, and co-sponsored by Chairman Horn, Representative Craig Thomas, and others. The bill, H.R. 435, was approved by the full Government Operations Committee as part of its ongoing consideration of health care reform.[1] Testifying in support of H.R. 435 last Congress

[1] Last Congress, both the Senate Labor and Human Resources Committee and the Senate Finance Committee approved health privacy bills similar to H.R. 435. The Senate Labor Committee held a hearing on S. 1360, the Medical Records Confidentiality Act, introduced by Senator Robert Bennett (R-

were industry representatives, privacy and consumer advocates and health policy specialists, including: Rep. Nydia Velazquez (D-NY); Nan Hunter, Department of Health and Human Services; Dr. Alan Westin, Columbia University; John Baker, Equifax, Inc.; Dr. Donald Lewers, American Medical Association; Fredric Entin, American Hospital Association; Joel E. Gimpel, Blue Cross and Blue Shield Association, representing the Workgroup on Electronic Data Interchange; Kathleen Frawley, American Health Information Management Association; Dr. Richard Barker, IBM Corporation; Dr. Martin Sepulveda, IBM Corporation; Robert S. Bolan, Medic Alert Foundation International; and Professor Paul Schwartz, University of Arkansas Law School. In January, 1995, Representative Condit reintroduced H.R. 435. Representative Jim McDermott (D-WA) recently introduced H.R. 3482, also aimed at protecting personal health information. Our testimony today outlines the need and demand for federal privacy protection, and key principles that should be embodied in any comprehensive legislation protecting health privacy

II. THE NEED AND DEMAND FOR FEDERAL PRIVACY PROTECTION

A. Consensus Exists

A consensus exists that federal legislation is needed to protect the privacy of personal health care records. In 1993, a conference in Washington, D.C. was co-sponsored by the U.S. Office of Consumer Affairs, the American Health Information Management Association, and Equifax. Panelists from the American Medical Association, CIGNA Health Care, the U.S. Public Interest Research Group,

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UT) and Patrick Leahy (D-VT), and co-sponsored by then-Senator Dole, Senator Kassebaum, Senator Kennedy, Senator Frist, Senator Simon, Senator Hatch, Senator Gregg, Senator Stevens, Senator Jeffords, Senator Kohl, Senator Daschle, and Senator Feingold. The Labor Committee plans to mark-up S. 1360 in the coming months.

Computer Professionals for Social Responsibility and IBM urged policymakers to address the issue of health information privacy.

At the conference, Louis Harris and Associations released their Health Information Privacy Survey, prepared with the assistance of Dr. Alan Westin, a privacy expert at Columbia University. The survey found that the majority of the public (56%) favored the enactment of strong comprehensive federal legislation governing the privacy of health care information. In fact, eighty-five percent (85%) said that protecting the confidentiality of medical records was absolutely essential or very important to them. Most people wanted penalties imposed for unauthorized disclosure of medical records (96%), guaranteed access to their own health records (96%) and rules regulating third-party access.

Buttressing these findings, another 1992 Harris survey revealed that nearly ninety percent (90%) of the public believed computers make it easier for someone to improperly obtain confidential personal information. Twenty-five percent (25%) of the public believed they had been a victim of an improper disclosure of personal medical information.

A number of studies have determined that a federal law is needed to protect peoples' medical records. Georgetown University Law Professor Larry Gostin concluded that a federal preemptive statute based on fair information practices was necessary to protect personal privacy as networked health information databases continued to grow.[2] In 1994, the Office of Technology Assessment (OTA) issued a report entitled *Protecting Privacy in Computerized Medical Information*, which addressed the consequences of computerizing medical records on individual privacy. In recommending comprehensive federal legislation, OTA found that:

> [t]he expanded use of medical records for non-treatment purposes exacerbates the shortcomings of existing legal schemes to protect

[2] 80 Cornell Law Review 451 (1995).

> privacy in patient information. The law must address the increase in the flow of data outward from the medical care relationship by both addressing the questions of appropriate access to data and providing redress to those who have been wronged by privacy violations. Lack of such guidelines, and failure to make them enforceable, could affect the quality and integrity of the medical record itself.[3]

The Institute of Medicine (IOM) of the National Academy of Science released a study that focused on the risks and opportunities associated with protecting the privacy and confidentiality of personally identifiably health data. The IOM report recommended that Congress enact legislation to preempt state laws to establish a uniform requirement for the confidentiality and protection of privacy rights for personally identifiable health data. It also suggested that Congress create a Code of Fair Health Information Practices to ensure the proper balance between required disclosures, use of data, and patient privacy.

Currently, the National Research Council (NRC) is preparing a report on health care organizational applications of privacy and security by analyzing the distribution and flow of health care information among patients, providers, and third-party institutions. The NRC plans to issue its report on organizational practices that support the security and confidentiality of electronic health care information by the end of 1996.

B. Misuse of Personal Health Information

The unauthorized disclosure of personal health information can have disastrous consequences (see attached news stories and editorials). New York Congresswoman Nydia Velazquez won her House seat only after overcoming the results of an unauthorized disclosure. Her confidential medical records -- including details of a bout with depression and a suicide attempt -- were faxed to a New York

[3] OTA Report, p. 44.

newspaper and television stations during her campaign. In another instance, a journalist disguised himself as a doctor, obtained the medical record of an actress, and published that she had been treated for a sexually transmitted disease.

More common, and in some ways more troubling than the well-publicized privacy invasions of public figures, are the consequences suffered by ordinary individuals whose privacy has been compromised by the disclosure of medical information. For instance, federal auditors demanded the names of patients seeking confidential AIDS treatment at a Boston clinic. Once the auditors obtained the names, they disclosed the information to other agencies.[4] The Harvard Community Health Plan, a Boston H.M.O., admitted to routinely entering detailed notes of psychotherapy sessions into its computer records, which were then accessible by all clinical employees.[5] In Maryland, eight Medicaid clerks were prosecuted for selling computerized record printouts of recipients' financial resources and dependents to sales representatives of managed care companies.[6] Even more common are the practices of some H.M.Os of sending letters to employers detailing the health problems of their employees. Surprised individuals have also discovered that personal problems they discussed with employee assistance program counselors became common knowledge among their co-workers.[7] There are a number of other well-documented instances of breaches of health privacy.[8] Undoubtedly, there are millions of similar breaches that occur

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[4] Matthew Brelis, *AIDS Alliance says US Violated Privacy*, BOSTON GLOBE, April 3, 1996, at A1, A12; Tamar Lewin, *Lawsuit Seeks to Bar U.S. From Access to AIDS Files*, N.Y. TIMES, April 3, 1996, at A13.

[5] Tamar Lewin, *Questions of Privacy Roil Arena of Psychotherapy*, N.Y. TIMES, May 22, 1996, at A1, D20.

[6] John Riley, *Open Secrets*, NEWSDAY, March 31, 1996, at A5 - A33.

[7] Tamar Lewin, *Questions of Privacy Roil Arena of Psychotherapy*, N.Y. TIMES, May 22, 1996, at A1, D20.

[8] Other instances of unauthorized disclosure of protected heath information include: a physician at a large New York City medical school logged onto a computer system, discovered that a nurse was pregnant, and publicized that information. A Colorado medical student sold medical records to attorneys practicing malpractice law. In Jacksonville, Florida, a 13-year old daughter of a hospital clerk went to work with her mother. Left unattended, she accessed the names of patients from her

either without the knowledge of the individuals harmed or outside of the media's spotlight.

The need for comprehensive federal legislation becomes more imperative as the U.S. Court of Appeals for the Third Circuit recently ruled that an employer's right to access their employee's health records outweighed the employee's right to privacy in their health information. In *Doe v. Southeastern Pennsylvania Transportation Authority*,[9] the court overturned a $125,000 jury's award to an employee who was taking the antiviral drug AZT and whose infection with HIV became known to co-workers due to a breach in confidentiality of the employer's prescription drug benefits plan. While the Court agreed that employees have a constitutional privacy right in their prescription drug plan records, it found the right was limited by their employer's interest in monitoring such plans to determine fraud, drug abuse and excessive costs. The majority's decision rested on the fact that this employee suffered no adverse employment action, such as harassment or demotion, as a result of the unauthorized disclosure. Dissenting in the decision, Judge Lewis stated, "I hope I am wrong, but I predict that the court's decision in this case will make it easier in the future for employers to disclose their employees' private medical information, obtained during an audit of the company's health benefit plan, and to escape constitutional liability for harassment or other harms suffered by their employees as a result of that disclosure."[10]

Errors found in medical records have also been difficult to correct and control. For instance, Mary Rose Taylor of Springfield, Massachusetts was denied health insurance for over a year because of a computer error at the Medical Information Bureau (MIB), a database of medical information used by insurance companies. MIB

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mother's computer and as a prank, called seven patients and told them they had tested positive for AIDS.

[9] *Doe v. Southeastern Pennsylvania Transportation Authority*, No. 95-1559, (3d. Cir. filed December 28, 1995).

[10] *Id.*

reported that Ms. Taylor had an abnormal urinalysis, even though she had only taken a blood test. Ms. Taylor was forced to go to the insurance commissioner of her state to correct the error -- and it was only then that she finally received health insurance.

C. Consequences of Not Protecting Personal Health Information

Despite the public and private horror stories about breaches of privacy, many Americans trust that the information they share with their doctor is kept confidential. Indeed, the traditional doctor-patient relationship is intended to foster trust and to encourage full disclosure. However, once a patient's information is submitted to a third-party payor, or to any other entity, the ethical -- and sometimes legal -- relationship between doctor and patient evaporates, putting patient privacy at risk. In fact, in a Harris survey, 93% of those termed "leaders", including hospital CEOs, health insurance CEOs, physicians, nurses and state regulators, believe that third party payors need to be governed by detailed confidentiality and privacy policies.

Within our current health care system, many individuals engage in tactics to avoid potential threats to their privacy. Some people routinely ask doctors to record a false diagnosis because they fear their employer may see their health records. Some people withhold information from doctors, for fear of losing control over sensitive information. In psychiatric practices, it is common for patients to ask doctors not to take notes during sessions, fearing the danger that such records, if in the wrong hands, could ruin a job opportunity, harm their reputation, or prevent them from changing insurance companies. Numerous people take the simple -- if costly -- step of paying for medical services out-of-pocket to avoid the creation of insurance records, even though they are entitled to, and have paid for, insurance coverage.

A few insurers have been candid enough to concede that their primary business relationship is with the employer and not the employee/patient. These insurers may be reluctant to disclose individually-identifiable health information if requested by an employer, but they will comply if pressed. Most patients, of course, believe the fiduciary relationship is between themselves and their doctors, and don't realize that a third party with no direct relationship to their medical treatment actually controls the information. It is intolerable to support a system in which an employer's payment of a portion of employees' health care premiums, amounts to employers' unfettered access to employee's health records.

Advances in technology exacerbate the lack of uniform, federal privacy protection for identifiable health information. For example, at the state and local levels, employers, insurers, and health care providers are forming coalitions to develop automated and linked health care systems containing lifetime health histories on millions of Americans. The primary goals of these projects are cost reduction and improved quality of care. State coalitions are attempting to address the privacy, confidentiality, and security of health data by crafting internal guidelines, regulations, and contracts. In addition, in those states where the automation of health care information is seen as a key component of a state's health care reform package, state legislatures and public agencies are attempting to enact legislation that establishes a right of privacy in protected health information. These states are also attempting to design effective enforcement penalties and oversight mechanisms to monitor the information practices of these newly created health data systems.

While some attempts are being made to address privacy concerns, the lack of a comprehensive policy protecting individual's privacy across all health care settings will leave individual privacy vulnerable. The outcome of this piecemeal, state-by-state approach to protecting the privacy and security of health care

information will lead to conflict among the states and ultimately set back the overall goal of privacy protection. Relegating the protection of health care information to the states' different guidelines, policies and laws leaves individuals subject to differing degrees of privacy depending on where they receive their health care. In some instances, this means that individuals traveling across county or state lines to receive necessary medical treatment may lose their ability to control how their personal medical information is used. Moreover, states and local governments with different rules governing the use of health care information may be prevented from sharing health care information contained in their systems with neighboring states that insufficiently protect privacy.

Health care records, in both paper and electronic form, deserve privacy protection. But the vulnerability of information to unauthorized access and use grows exponentially as the computer makes possible the instant sharing of information. As a 1992 study by the Workgroup for Electronic Data Interchange (WEDI) pointed out: "The paper medium is cumbersome and expensive...Ironically, it is the negative impact of the paper medium...that has minimized the risk of breaches of confidentiality. Although a breach could occur, if someone gave access to health records or insurance claim forms, the magnitude of the breach was limited by the sheer difficulty of unobtrusively reviewing large numbers of records or claim forms."

Nevertheless, technology itself is not the evil. Information systems can actually be designed to promote the confidentiality and security of personal information. For instance, a well-designed computerized system can more closely guard individual privacy, than paper filing systems. The key is to recognize technology's potential to enhance privacy, not simply to focus on the risks technology poses to undermine privacy. There is widespread agreement among privacy and security experts that protections must be build in on the front-end; it is

too difficult and risky to enact them only after a major privacy breach. Privacy and security must regain their own place as cornerstones of the medical relationship. Only then can we achieve the potential for enhancing privacy and security.

III. PRINCIPLES FOR A HEALTH PRIVACY POLICY

CDT believes that the following principles for protecting personal health information must be incorporated in any health privacy bill:

- Individuals must have the right to see, copy, and amend their own medical records;
- Individuals must control the disclosure and use of their personal health information -- rules must be established requiring doctors, insurance companies, and other "health information trustees" to obtain individual consent prior to the use and disclosure of personal health information;
- Safeguards must be developed for the use and disclosure of personal health information;
- All those who are given access to personal health information must be bound by comprehensive rules that ensure the protection of such information;
- A warrant requirement for law enforcement access to peoples' health records must be created; and
- Strict civil penalties and criminal sanctions must be imposed for violations of the legislation, and individuals must be given a private right of action against those who mishandle their personal medical information.

Without comprehensive protections such as these, the widespread electronic transmission of records in a framework of piecemeal and incomplete protections,

will produce the worst of both worlds -- confusion and red tape for legitimate data users, and debilitating fear and mistrust for people seeking medical care.

IV. CONCLUSION

CDT believes that the protection of personally identifiable health information is critical to ensuring public trust and confidence in the emerging health information infrastructure. Health care reform cannot move forward without assuring the American public that the highly sensitive personal information contained in their medical records will be protected from abuse and misuse. As the Harris surveys indicate, people are highly suspicious of large scale computerization and believe that their health records are in dire need of privacy protection. If people are expected to embrace and participate in this rapidly changing health environment, the price of their participation must not be the loss of control of sensitive personal information.

Any system that fails to win the public's trust will fail to win the public's support. We risk having individuals withdraw from the full and honest participation in their own health care because they fear losing their privacy. Congress should not allow people to fall through the cracks of the health care system because the privacy of their health information is unprotected. We urge you to move forward with legislation that adequately protects health information privacy.

Mr. HORN. Well, let me speak for a minute on that point. I have heard enough evidence in the last Congress to make me angry enough and I don't really need much evidence to keep me motivated. I was outraged by what I heard.

I think the sloppiness with which some medical records are kept, and the easy access to who knows who is wandering through that file room really disturbed me. I have had a number of cases that I am familiar with where that has happened.

I think there has got to be a lot of tightening up because privacy is not very well protected right now, as far as I am concerned, in a whole lot of places. They might be some very distinguished places, but they aren't protecting the privacy that people can sort of look around and know about.

As you know, we had one witness, a colleague in politics, whose records were stolen and revealed in a political campaign. That is outrageous. We appreciate the example. We appreciate your very thorough brief.

Ms. Frawley, we are delighted to have you here. You are the director of the Washington Office of American Health Information Management Association, proceed.

Ms. FRAWLEY. Thank you, Mr. Chairman and Representative Maloney.

The American Health Information Management Association appreciates the opportunity to appear before the subcommittee this afternoon really to present our views on the need for Federal preemptive legislation and to discuss the importance of the proposed Health Information Privacy Protection Act.

On behalf of AHIMA's 35,000 members, we are pleased to announce our strong support for this committee's efforts and are pleased to have this opportunity to be here. Our association is the professional organization which represents the credential specialists who on a daily basis collect, manage, and protect the health information that is an increasingly important component of our health care delivery system.

Our members work in hospitals, physicians' offices, and health care facilities throughout the United States, and ensure that an individual's right to privacy is protected. Health information management professionals handle requests for health information from third-party payers; employers; researchers; attorneys; other health care providers; and local, State, and Federal agencies.

Our members ensure that information is disclosed pursuant to valid authorizations from the patient or their legal representative or pursuant to statute, regulation, or court order.

This responsibility is not taken lightly and is complicated by the lack of uniform national guidelines or legislation. In fact, for the past 68 years, our association has assumed the responsibility for protecting the confidentiality of health information and working very hard to educate consumers on their rights and to understand how information is handled.

Obviously, our efforts have been hampered by the lack of Federal pre-emptive legislation. We believe that the language that is before the subcommittee is the solution to this dilemma, as the language establishes a code of fair information practices and certainly a uni-

form national standard for the use and disclosure of individually identifiable health information.

Now, we know that the primary goal of confidentiality is to allow patients to communicate with their physicians, we believe this is very important, and to share sensitive information regarding their health status.

Trust is an essential element in the relationship between a patient and a physician. Certainly, individuals should not be afraid of seeking health care and worrying about who has access to their information.

At the Federal level right now, we have the Federal Privacy Act, which addresses health information maintained by Federal agencies such as the Veterans Administration, the Department of Defense, and the Indian Health Service.

We certainly have the Federal alcohol and drug abuse regulations which have done a very fine job of protecting information of those individuals who are treated for substance abuse.

But again, as we are aware, we are left with the province of State law to address this important issue. Currently, only 28 States allow a patient to access their health information, and even then these statutes are not uniform in their approaches.

A review of the statutes will reveal that in some States patients can only have access to their hospital records; in other States, they can have access to their hospital records and records maintained by their physician.

There is little uniformity among the State statutes and regulations that we have right now. Thirty-four States do have statutes and regulations on confidentiality. But again, the protections vary according to who the holder of the information is.

Typically, the burden is placed on the hospital or on the physician or on the health care provider to protect the confidentiality, but it does not address what restrictions can be placed on insurance companies, employers, and others who have access to information.

As Ms. Goldman pointed out, the health care delivery system is going through some very radical changes. We have entities that we never contemplated who are now handling very sensitive health information and are not covered under any of the statutes and regulations that are out there at this time.

Often, these States' statutes lack any type of penalties for misuse or misappropriation of health information. As Mr. Horn pointed out, the stories that we know of that people who have had situations compromised because of misuse or misappropriation is very egregious.

As Ms. Goldman pointed out, we certainly know that there has been a consensus. We have had a long history of working with this Congress on this important issue. We are very pleased that the provisions in the Health Information Privacy Act contain a lot of the provisions AHIMA has supported over the years: certainly the patient's right to access, certainly to know what information is collected about them.

Many Americans have never seen their medical records, have absolutely no idea what is contained in their medical records, and are

very surprised to find out that there is no Federal legislation protecting the confidentiality of their records.

We are pleased to see that the proposed language allows individuals the right to access their personal health information, not just the information that is maintained by providers, but other individuals who receive this information. They would have the right to know what people are doing with their health information. We note some concerns on it, and I think it is an important concern to bring before this subcommittee this afternoon.

Under the proposed language, sections 101 and 102 would require all health information trustees to permit individuals to inspect and copy health information maintained by the trustee, and also requires the trustees correct medical records upon request or take certain actions if they refuse to make requested corrections.

Since the medical record is the legal record of the hospital or the health care facility or the physician and is very important to the continuous treatment of the patient, we urge that a provision be added to exempt from sections 101 and 102 those health information trustees who do not provide care.

We feel it is very important that if there is erroneous information contained in the medical record that the provider or the health care facility be responsible for reviewing those records and making any corrections or amendments. We do not think it is appropriate for individuals who have received information to make that correction.

AHIMA strongly believes that individuals have the right to know who maintains their information. As we have talked about, health care information is extremely personal and sensitive information that if improperly used or released may cause significant harm to an individual's ability to obtain employment, education, insurance, credit, or other necessities.

We truly believe that it is very important that any proposal have restrictions on use and disclosure of information. We are pleased to note that your language is clear on the distinction between "internal access to use of health information by health information trustee" and "external disclosure of health information." We are talking about some very different issues here.

It is important that information can flow within integrated health care delivery systems and that no barriers are placed on providers who are trying to provide quality care to patients.

There are many appropriate uses that health information within a health care entity, and it is important to allow persons not involved in direct patient care to have access to carry out responsibilities. We believe it is critical for Federal pre-emptive legislation to be enacted.

We would like to thank the subcommittee for holding this important hearing. Certainly, we would also like to recognize the efforts of Representative Gary Condit for his efforts over the last several years in this important area.

Thank you.

[The prepared statement of Ms. Frawley follows:]

Mr. Chairman and Members of the Committee:

My name is Kathleen A. Frawley, and I am Director of the Washington, DC Office of the American Health Information Management Association (AHIMA). AHIMA appreciates the opportunity to appear before the Subcommittee on Government Management, Information and Technology and to announce our strong support for the "Health Information Privacy Protection Act".

The American Health Information Management Association is the professional association which represents over 35,000 credentialed specialists who, on a daily basis, manage and protect the health information that is an increasingly important component of our nation's health care delivery system.

AHIMA members work in hospitals and health care facilities throughout the United States and ensure that an individual's right to privacy is protected. Health information management professionals handle requests for health information from third party payers, employers, researchers, attorneys, other health care providers and local, state and federal agencies. Our members ensure that information is disclosed pursuant to valid authorizations from the patient or their legal representative, or pursuant to statute, regulation or court order. This responsibility is not taken lightly and is complicated by the lack of uniform national guidelines or legislation.

For the past 68 years, AHIMA and its members have assumed the responsibility for protecting the confidentiality of health information. Our efforts have been complicated by the lack of federal preemptive legislation. AHIMA believes that the "Health Information Privacy Protection Act" is a solution to this dilemma as the bill establishes a code of fair information practices and a uniform national standard for the use and disclosure of individually identifiable health information.

The primary goal of confidentiality is to allow patients to communicate with their physician and to share information regarding their health status. Trust is an essential element in the relationship between a patient and a physician. One of the most important aspects of the relationship between a patient and a health care provider is the provider's duty to maintain the confidentiality of health information. The historical origin of a physician's obligation is found in the Oath of Hippocrates, written between the sixth century B. C. and the first century A. D. The Oath states "what I may see or hear in the course of treatment in regard to the life of men, which on no account must spread abroad, I will keep to myself.....". Ethical codes promulgated by professional associations have consistently recognized the importance of confidentiality. However, these codes do not address current issues regarding use and disclosure of health information.

While communications between patients and physicians are privileged in most states, the protection of these laws is very narrow. The privilege only applies when a

physician is testifying in court or in related proceedings. Many of these laws include significant restrictions that further limit the availability of the privilege. The physician-patient privilege offers no real protection to patients regarding the confidentiality of their health information.

Increasing demands for data pose an increasing threat to the patient's right to privacy. The federal Privacy Act of 1974 was designed to provide private citizens some control over the information collected about them by the federal government. Health care facilities operated by the federal government, such as the Indian Health Service, Veterans Administration and Department of Defense, are bound by the Privacy Act's requirements regarding access, use and disclosure of health information. However, the provisions of this law do not apply to health information maintained in the private sector.

The federal alcohol and drug abuse regulations only apply to federal or federally funded facilities that offer treatment for alcohol or drug abuse. While these regulations offer strong protection, they are limited in applicability. Currently, there is no uniform national standard protecting the confidentiality of health information. The protection of health information is left to state law.

Currently, only 28 states allow a patient to access their health information. However, these statutes are not uniform in their approaches. A review of these statutes

reveals that in some states patients may only access hospital records while in other states they may access both hospital and physician records. There is little uniformity among state statutes and regulations regarding confidentiality of health information. Protections vary according to the holder of the information and vary for different types of information. Most statutes do not address redisclosure of health information and lack penalties for misuse or misappropriation.

It has been recognized that there is a need for more uniformity among the 50 states. In recent years, the National Conference of Commissioners on Uniform State Laws developed the Uniform Health Care Information Act in an attempt to stimulate uniformity among states on health care information management issues. Presently, only two states, Montana and Washington, have enacted this model legislation. Vermont is presently attempting to enact comprehensive legislation. Clearly, efforts must be directed toward developing national standards on privacy and confidentiality.

THE NEED FOR FEDERAL LEGISLATION

Over the past several years, a consensus has emerged within Congress and among the general public regarding the need for federal legislation to address this important issue. The Office of Technology Assessment (OTA) report, Protecting Privacy in Computerized Medical Information, found that current laws, in general, do not provide consistent, comprehensive protection of health information confidentiality. Focusing on

the impact of computer technology, the report concluded that computerization reduces some concerns about privacy of health information while increasing others. The OTA report highlights the need for enactment of a comprehensive federal privacy law.

The public's concern about the confidentiality of health information was reflected in a poll conducted by Louis A. Harris and Associates for Equifax, Inc. The results of the Health Information Privacy Survey 1993 found that fifty-six percent (56%) of the survey participants indicated strong support for comprehensive federal legislation to protect the privacy of medical records as a part of health care reform.

The survey also indicated a strong agreement on what should be included in national privacy legislation. Ninety-six percent (96%) believe federal legislation should designate all personal medical information as sensitive and impose severe penalties for unauthorized disclosure. Ninety-five percent (95%) favor legislation that addresses individuals' rights to access their medical records and creates procedures for updating and correcting those records.

In 1994, the Institute of Medicine released a report, Health Data in the Information Age: Use, Disclosure and Privacy, which recommends that federal preemptive legislation be enacted to establish uniform requirements for the preservation of confidentiality and protection of privacy rights for health data about individuals.

The 1994 Equifax-Harris Consumer Privacy Survey focused on how the American public feels about having their medical records used for medical research and how safeguards would affect their opinions about such systems and uses. Among a list of 13 groups and organizations, doctors and nurses rank first in terms of the percentage of Americans who are "very" confident (43%) that this group properly handles personal and confidential information. After hearing a description about how medical records are used by researchers to study the causes of disease, 41% of those surveyed said that they would find it at least somewhat acceptable if their records were used for such research. If a federal law made it illegal for any medical researcher to disclose the identity or any identifiable details of a person whose health records had been used, 28% of those who were initially opposed to having their records used would change their position. This would increase the acceptance of this practice to over half of those surveyed (58%).

In the final Office of Technology Assessment (OTA) report, Bringing Health Care Online: The Role of Information Technologies, the issues of privacy and confidentiality were identified as particularly important areas in dealing with health information. The report noted that if there is little confidence that an electronic medical information system will protect them, then providers and patients will be unwilling to use it. The report recommends that Congress may wish to establish federal legislation and regulation with regard to privacy and confidentiality of medical information, as well as storage media for medical records and electronic data standards for storage and transmission of medical information.

The 1995 Equifax-Harris Mid-Decade Consumer Privacy Survey indicates that the American people say they are strongly concerned about threats to their personal privacy but believe business is doing a better job than government in handling personal information. A majority (58%) also now believes that privacy protection in the year 2000 will remain at least as strong as it is today if not improve. Americans appear more willing to take an active role in protecting their own privacy, with six out of 10 now reporting instances where they have refused to provide requested information. This is an increase from 42% since 1990.

The survey focused on the benefits of a computer-based patient record system. The majority of survey respondents see the trend towards a computer-based patient record system as either "very" beneficial (40%) or "somewhat" beneficial (45%). In terms of the personal benefits that a computer-based patient record system might provide, the greatest importance is attached to the benefit that enables key medical information to be sent to a doctor treating a person in an emergency situation away from home. 86% of survey respondents said that this would be "very" important to them. Nearly seven in ten people (69%) also said that a more effective presentation of past medical experiences, test results, and conditions would be "very" important to them. Finally, the elimination of a need to complete detailed forms as a result of the automatic printing of a patient's medical records and payment information would be "very" important to 55% of the public.

The survey also found that the ability of administrators to "identify sub-standard doctors and poorly run health facilities", to "improve the detection and reduction of fraudulent claims by patients, doctors and hospitals," and to "reduce the cost of health care by improving the identification of waste and inefficiency" would be very important to 79%, 76% and 74%, respectively, of the public. Seventy-four percent say the ability of medical researchers to "get better statistical data for studying the causes of diseases and testing new treatments" would be "very" important to them.

The importance of benefits provided by computer-based patient records notwithstanding, most people say they are either "very" concerned (33%) or "somewhat" concerned (41%) about the potential negative effects of such a system. With detailed privacy safeguards in place, most people (80%) say they would be willing to have their medical records in a computerized system. Respondents indicated that a detailed privacy code would inform patients how their records are used; set rules of confidentiality; make it possible for patients to see their medical records; keep those records separate from all other consumer databases, and ensure the records are not used for marketing products to consumers.

Virtually, all respondents (98%) believe that a "patient should be able to obtain a copy of the medical record maintained about him or her by a doctor or health facility." In response to a similar question asked in 1978, 91% of the public said that "people who

want to should have the legal right to see their medical records held by their personal doctor and by a clinic or hospital."

HEALTH CARE AND THE INFORMATION AGE

The development of the national information infrastructure (NII) is a key component of health care reform. Efforts to reform this country's health care delivery system will rely heavily on administrative simplification and computerization of health information to control costs, improve quality of care and increase efficiency. The Institute of Medicine (IOM) report, The Computer-Based Patient Record: An Essential Technology for Health Care, recommended the adoption of computer-based patient records by the year 2000 and the formation of a nationwide health information network. However, as that report noted, there are states which require that medical records be written and signed. In order to facilitate the development of a national health information infrastructure, it is imperative that health information can be created, authenticated and retained in electronic form.

To meet today's information requirements, the nation must move towards a health information infrastructure which will support computer-based patient record systems that capture clinical information, integrate it with clinical support and knowledge bases, and make it available for all legitimate users.

Because health information remains largely uncomputerized and unintegrated, patient information is often inaccessible at the time health care decisions are made. Highly trained health care professionals spend valuable time looking for records, contacting each other to obtain basic information, struggling to decipher handwritten entries or repeating tests because previous results could not be found or obtained quickly enough. National studies have estimated that health care providers spend on average approximately 40 percent of their time on paperwork. External users of health information, such as payers, researchers, governmental agencies and others must depend on a limited set of data that often is not transmitted electronically or sort through volumes of records for key information about an encounter.

There are a number of benefits which can be achieved through widespread use of computer-based patient record systems. Health care providers would have more complete information about the patient instantly and easily. Care would be improved through the ability to access knowledge databases and online expert systems. Information systems would reduce the enormous paperwork burden that providers currently experience. Aggregated data from these medical records will enable better research.

One of the major prerequisites to the appropriate implementation of the computer-based patient record is the need for federal preemptive legislation to protect the confidentiality of health information. In order to move health care delivery systems into

the 21st century, AHIMA believes that the nation cannot wait to enact federal preemptive confidentiality legislation. It is critical, and arguably, the most important aspect of any health care reform effort.

AHIMA'S POSITION

In February 1993, in order to address the need for federal legislation, AHIMA drafted model legislative language that outlined a code of fair information practices. This language was published in the OTA report as a model code and was used in the drafting of the "Fair Health Information Practices Act" (HR 435) and the "Medical Records Confidentiality Act" (S.1360) which are presently pending consideration in this Congress.

There are a number of key provisions in AHIMA's model language which we believe must be essential elements of any legislation to govern the collection, use and disclosure of health care records. These include:

- **Disclosure** -- No person other than the patient or the patient's representative may disclose health care information to any other person without the patient's authorization, except as authorized.

  No person may disclose health care information except in accordance with the terms of the patient's authorization.

The provisions apply both to disclosures of health care information and to redisclosures of health care information by a person to whom health care information is disclosed.

- **Record of Disclosure** -- Each person maintaining health care information shall maintain a record of all external disclosures of health care information made by such person concerning each patient, and such record shall become part of the health care information concerning each patient. The record of each disclosure shall include the name, address and institutional affiliation, if any, of the person to whom the health care information is disclosed, the date and purpose of the disclosure and, to the extent practicable, a description of the information disclosed.

- **Patient's Authorization; Requirements for Validity** -- To be valid, a patient's authorization must --

  1) Identify the patient;
  2) Generally describe the health care information to be disclosed;
  3) Identify the person to whom the health care information is to be disclosed;
  4) Describe the purpose of this disclosure;
  5) Limit the length of time the patient's authorization will remain valid;
  6) Be given by one of the following means --

a) In writing, dated and signed by the patient or the patient's representative; or

b) In electronic form, dated and authenticated by the patient or the patient's representative using a unique identifier.

The AHIMA model also includes the following principles of fair information practices:

- **Patient's right to know** -- The patient or the patient's representative has the right to know that health care information concerning the patient is maintained by any person and to know for what purpose the health care information is used.

- **Restrictions on collection** -- Health care information concerning a patient must be collected only to the extent necessary to carry out the legitimate purpose for which the information is collected.

- **Collection and use only for lawful purpose** -- Health care information must be collected and used only for a necessary and lawful purpose.

- **Notification to patient** -- Each person maintaining health care information must prepare a formal, written statement of the fair information practices

observed by such person. Each patient who provides health care information directly to a person maintaining health care information should receive a copy of the statement of a person's fair information practices and should receive an explanation of such fair information practices upon request.

- **Restriction on use for other purposes** -- Health care information may not be used for any purpose beyond the purpose for which the health care information is collected, except as otherwise provided.

- **Right to access** -- The patient or the patient's representative may have access to health care information concerning the patient, has the right to have a copy of such health care information made after payment of a reasonable charge, and, further, has the right to have a notation made with or in such health care information of any amendment or correction of such health care information requested by the patient or patient representative.

Required safeguards -- Any person maintaining, using or disseminating health care information shall implement reasonable safeguards for the security of the health care information and its storage, processing and transmission, whether in electronic or other form.

- **Additional protections** -- Methods to ensure the accuracy, reliability, relevance, completeness and timeliness of the health care information should be instituted. If advisable, additional safeguards for highly sensitive health care information should be provided. The AHIMA model language also contains provisions for civil and criminal penalties to protect against unauthorized use or disclosure.

AHIMA is pleased that the "Health Information Privacy Protection Act" contains nany of the provisions based on a code of fair information practices that were contained n the AHIMA model language and in HR 435 and S. 1360. We strongly support the concept that individuals have the right to know who maintains health information and for what purpose the information is used. Many Americans have never seen their personal health records and are unaware of the information contained in their records.

Section 101, Inspection and Copying of Protected Health Information, and Section 102, Correction or Amendment of Protected Health Information, will provide all individuals with the right to access their personal health information. These provisions also provide for the right of individuals to access their health information to amend errors if they do exist.

We note, however, some concerns about sections 101 and 102 regarding inspection, copying and correction of information. These sections require all health information trustees to permit individuals to inspect and copy health information maintained by the trustee. These sections also require that trustees correct medical records upon request or take certain actions if they refuse to make requested corrections. Since the medical record is the legal record of the physician or health care facility and is important to continuous treatment of the patient, we urge that a provision be added to exempt from sections 101 and 102 those health information trustees who do not provide care to individuals and are not responsible for the creation and maintenance of health information.

AHIMA strongly believes that individuals have the right to know who maintains their health information and for what purpose the information is used. Health care information is extremely personal and sensitive information, that if improperly used or released, may cause significant harm to an individual's ability to obtain employment, education, insurance, credit, and other necessities. Health information concerning an individual must be collected only to the extent necessary to carry out the legitimate purpose for which the information is collected. There must be limitations on the use and disclosure of individually identifiable health information. The bill addresses these issues in Title II, Restrictions on Use and Disclosure. Health information is used for a variety of legitimate purposes, including patient care, quality assurance, education, research, public

health, and legal and financial interests. Regardless of the use or users, individuals must be assured that the information they share with health care professionals will remain confidential.

We are pleased to note that the language is clear on the distinction between internal access to and use of health information by a health information trustee and external disclosure of health information. It is important that information can flow within integrated health delivery systems and that no barriers are placed on providers who are trying to provide quality care to patients. There are many appropriate uses of health information within an organization and it is important to allow persons not involved in direct patient care to have access to carry out their responsibilities.

AHIMA strongly supports the need for mechanisms that will allow individuals to enforce their rights. We are pleased to note that Title III, Sanctions, addresses civil and criminal sanctions.

SUMMARY

The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks and networks, and the emergence of multi-state providers and payors creates a compelling need for federal law governing the use and disclosure of health care information.

AHIMA believes that it is critical for federal preemptive legislation to be enacted. AHIMA extends its thanks to the Subcommittee for holding this important hearing. We hope that this testimony will prove helpful to the Subcommittee. In addition to the points we have made here, we have additional technical comments which we would be pleased to offer as you continue work on the provisions of the "Health Information Privacy Protection Act".

Thank you for the opportunity to present our views. AHIMA looks forward to working with this Subcommittee and the Congress to enact legislation to protect an individual's right to privacy and to ensure the confidentiality of individually identifiable health information.

Mr. HORN. We thank you.

Mr. Gerry Bay is the vice president for pharmacy operations, east division, American Drugstores, and you are representing the National Association of Chain Drugstores. I take it American Drug Stores, looking at the letterhead, includes Savon and OSCO Drugs?

Mr. BAY. Correct. That's correct.

Mr. HORN. Just out of curiosity, where does OSCO come from? Was that a founder or what?

Mr. BAY. That was a buying organization. It was an acronym of which I have long forgotten.

Mr. HORN. Well, we have Government acronyms every day like that, and some of them should be forgotten.

Mr. BAY. Thank you, Mr. Chairman and Representative Maloney. In addition, I would like to add that I am a registered and licensed pharmacist in the State of California and have been since 1966.

American Drug Stores operates Savon Drug Express and Savon Pharmacy in the Long Beach area and OSCO Drugstores in the Chicago area. I appreciate the opportunity to provide comments on the Health Information Privacy Protection Act. I would request that I could submit my complete written statement for the record.

Today, the community pharmacy infrastructure extends beyond the 66,000 retail pharmacies. Chain retail pharmacy provides over 60 percent of the $2 billion outpatient prescriptions dispensed annually, $1 billion of which is provided through third-party payers.

Given the vast number of claims processed by community pharmacy, we have been on the cutting edge of incorporating online, electronic processing of health care claims into its day-to-day patient-care operations.

American Drug Stores is a multistate corporation that operates 946 pharmacies in over 21 States. Over the past several years, American Drug Stores has invested over $50 million in a computer-based, recordkeeping system for our pharmacy operations.

This system has significantly helped improve the efficiency of our operations and management of approximately 8.1 million patients. Electronic transmission simplifies the billing process, it improves the communication with other health care professionals, and allows cost-effective delivery of care.

To improve efficiency, today's health care system is increasingly relying on the electronic transmission of patient identifiable information. As a result, access to confidential information is more readily available. Therefore, we believe that Congress should move forward to ensure the confidentiality of patient information at the Federal level.

To be effective, Federal confidentiality legislation should include the following elements: appropriate tracking of protected health information, but with minimal interference in a health care professional's provision of care; comprehensive scope so that State laws are unnecessary; and strong criminal and civil fines and penalties for those who knowingly and illegally disclose protected information.

If Federal legislation includes these specific provisions it would reduce a retail pharmacy's cost of complying with the various State confidentiality laws, increase overall efficiency and recordkeeping,

and provide reasonable protections for maintaining confidential patient records.

Unfortunately, we cannot support the current draft of the Health Information Privacy Protection Act, because the legislation does not contain these elements. We believe that this bill as written will tie the hands of the day-to-day operations of the pharmacy, and could result in a technological step backward for community pharmacy.

This legislation would needlessly interfere with communications between pharmacists and their patients. Under this bill, we believe that each of our patients would have to personally authorize any disclosure of patient identifiable information when a prescription is obtained at our pharmacies.

We would have to develop two separate 10-point authorization forms, one to provide the prescription or related professional services, and one to receive payment for these services.

Because our systems are automated, these forms would have to be computerized. In addition, it is unclear if these authorization forms would be required in each pharmacy that a patient uses or if they are required for each prescription each physician prescribes.

We believe that it is unnecessary to obtain an authorization form for a pharmacist to practice his or her profession. When a patient or the patient's physician gives the prescription or prescription coverage card to the pharmacist, a pharmacist should be authorized to disclose protected information to treat the patient and receive payment for the prescription, as well as other services provided such as counseling, disease management, and other pharmaceutical care.

This legislation does not pre-empt all Federal and State confidentiality laws. Federal preemption of State and Federal confidentiality laws must be complete to provide consistency to our systemwide operation. Hundreds of health care providers operate in multiple States.

We would find it most efficient and far less costly if one Federal standard existed to ensure the confidentiality of patient information. Many States currently have laws that address confidentiality, but often these laws are inconsistent and obsolete.

This legislation would only exacerbate our current operations costs involved with complying with multiple State and Federal confidentiality. We recommend that this bill provide comprehensive Federal pre-emption of State and Federal confidentiality laws.

Without total pre-emption, we will find it impossible to integrate the necessary patient information and authorizations in our computer software. Electronic transmissions will become ineffective; implementing the extensive requirements of this bill would be prohibitively expensive.

Under this bill, many community pharmacies would have to purchase, develop, and implement software that would allow for the input of additional patient information. We recommend that additional hearings are held on this legislation to assess the implementation costs of complying with these new requirements and to determine the bill's specific impact on health care providers and other affected industries.

We also strongly recommend that regulations required under this act are finalized 12 months after the enactment date and the effec-

tive date extended to at least 24 months after regulations are finalized.

This legislation includes new, steep fines up to $250,000 and penalties, a possible exclusion from participating in Medicare and Medicaid for inadvertent disclosures of confidential patient information.

Given the billions of claims retail pharmacies process and transmit, human error could occur and protected health information could be disclosed. We recommend that the committee include a knowing standard in the civil penalty section, so that the standard for civil and criminal sanctions is consistent. Pharmacists should not be penalized for unintentional disclosure.

We also recommend that the Secretary adopt existing standards for electronic transmission developed by standard-setting organizations such as the National Council for Prescription Drug Programs. If these standards do not exist upon this legislation's enactment, standing/sitting organizations should have the time to develop them.

American Drug Stores fully supports the overall goals of this legislation, but would like to see it revised to address our concerns. We ask this committee to conduct additional hearings to examine the implementation cost of this legislation and the impact it would have on communications between health care providers and between health care providers and their patients.

We look forward to working with this committee and Congress as you move forward on this bill.

[The prepared statement of Mr. Bay follows:]

Good afternoon, Chairman Horn and Members of the Committee. I am Gerry Bay, Vice President of Pharmacy Operations, East Division, for American Drug Stores. We operate Sav-On Drug Sav-On Express, and Sav-On Pharmacy in the Long Beach area and Osco Drug Stores in the Chicago area. I appreciate the opportunity to provide comments on the "Health Information Privacy Protection Act."

Today, the community pharmacy infrastructure extends beyond 66,000 retail pharmacies. Chain retail pharmacy provides over 60% of the *two billion* outpatient prescriptions dispensed annually -- one billion of which are provided through third-party payors. Given the vast number of claims processed by community pharmacy, we have been on the cutting edge of incorporating on-line, electronic processing of health care claims into its day-to-day patient care operations.

American Drug Stores is a multi-state corporation that operates 946 pharmacies in 21 states. Over the past several years, American Drug Stores has invested over $50 million into a computer-based, record-keeping system for our pharmacy operations. This system has significantly helped us improve the efficiency of our operations and the management of approximately 8.1 million patients.

Electronic transmission simplifies the billing process, improves communication with other health care professionals involved in a patient's care, and allows cost-effective delivery of care.

Federal Initiatives on Protections for Patient Information

To improve efficiency, today's health care system is increasingly relying on the electronic transmission of patient-identifiable information. As a result, access to confidential information is more readily available. Therefore, we believe that Congress should move forward to ensure the confidentiality of patient information at the federal level.

To be effective, Federal confidentiality legislation should include the following elements:

- Appropriate tracking of protected health information, but with minimal interference in a health care professional's provision of care.
- A comprehensive scope, so that state laws are unnecessary; and
- Strong criminal and civil fines and penalties for those who knowingly and illegally disclose protected information;

If federal legislation includes these specific provisions, it will reduce retail pharmacy's cost of complying with the various state confidentiality laws, increase overall efficiency in recordkeeping, and provide reasonable protections for maintaining confidential patient records.

Recommendations to the Health Information Privacy Protection Act

Unfortunately, we cannot support the current draft of "The Health Information Privacy Protection Act," because the legislation does not contain these elements. We believe that this bill, as written, will tie the hands of the day-to-day operations of a pharmacy and could result in a technological step backward for community pharmacy.

Needless Interference with Communications between Health Care Providers

This legislation would needlessly interfere with communications between pharmacists and their patients. Under this bill, we believe that each of our patients would have to personally authorize any disclosure of patient-identifiable information when a prescription is obtained at our pharmacies. We would have to develop two separate 10-point authorization forms, one to provide the prescription and related professional services, and one to receive payment for these services. Because our systems are already automated, these forms would have to be computer-based.

We estimate that for day-to-day operations, these authorization forms would be required for the following transactions that occur in our pharmacies:

- Billing a health plan for a prescription;
- Discussing a patient's prescription with the prescribing physician;
- Conveying information about how to take the medication correctly to the caregiver.
- Monitoring any drug interactions, adverse drug reactions, and patient compliance through a pharmacy benefit management company;
- Transmission of an electronic refill request to the treating physician;

In addition, it is unclear if these authorization forms would be required in each pharmacy that a patient uses, or if they are required for each prescription each physician prescribes.

Recommendation: We believe that it is unnecessary to obtain an authorization form for a pharmacist to practice his or her profession. When a patient or the patient's physician gives the prescription or prescription coverage card to the pharmacist, a pharmacist should be authorized to disclose protected information to treat the patient and receive payment for the prescription as well as other services provided, such as counseling, disease management, and other pharmaceutical care. *We recommend that health care providers be authorized to disclose patient-identifiable information for the purposes and activities defined and recognized under the state health care professional practice acts.*

Pre-emption of State Law

This legislation does not preempt all federal and state confidentiality laws. Federal preemption of state and federal confidentiality laws must be complete to provide consistency to our system-wide operations.

Hundreds of health care providers operate in multiple states. A multi-state corporation, American Drug Stores operates 946 pharmacies in 21 states. We would find it most efficient and far less costly if one Federal standard existed to ensure the confidentiality of patient information. Many states currently have laws that address patient confidentiality, but often these laws are inconsistent and obsolete. They were often written for a paper claims processing system in mind. Community retail pharmacy is fully automated and nearly all of our records are electronic. Because of the inconsistencies among federal and state laws, we are forced to purchase, develop, and operate separate, state-by-state systems. The more variable federal and state laws are, the higher the costs and the more impractical electronic transmission becomes.

Recommendation: This legislation would only exacerbate our current operations costs involved in complying with multiple state and federal confidentiality. *We recommend that this bill provide comprehensive federal preemption of state and federal confidentiality laws.* Without total preemption, we will find it impossible to integrate the necessary patient information and authorizations in our computer software. Electronic transmission will become ineffective. Furthermore, a comprehensive federal law should provide maximum protection for the confidentiality of medical records so that other state or federal laws would be unnecessary.

Unknown Costs of Technology

Implementing the extensive requirements of this bill could be prohibitively expensive. Under this bill, many community pharmacies would have to purchase, develop, and implement software that would allow for the input of additional patient information. In addition, pharmacists will have to spend additional time after patient visits to input the data from the disclosure form into a patient's record.

Recommendation: *We recommend that additional hearings are held on this legislation to assess the implementation costs of complying with these new requirements and to determine the bill's specific impact on health care providers and other affected industries.*

Extension of Effective Date

Given our overall concern about the time needed to implement the requirements of this legislation, we believe that the effective date should be extended. Adequate time must be allowed for software manufacturers to develop their products, to test and distribute the product, and to train pharmacists on product use. The ability of all health care providers to implement this legislation in a timely manner will be critical to successful implementation.

Recommendation: *We strongly recommend that regulations required under this act are finalized 12 months after the enactment date and the effective date extended to at least 24 months after regulations are finalized.*

Imposition of Fines and Penalties should be Intent-based

This legislation includes new, steep fines of up to $250,000 and penalties of possible exclusion from participating in Medicare and Medicaid for inadvertent disclosures of confidential patient information. Given the billions of claims retail pharmacies process and transmit, human error could occur and protected health information could be disclosed unknowingly without patient-authorization.

Recommendation: *We recommend that the Committee include a "knowing" standard in the civil penalty section so that the standard for civil and criminal sanctions is consistent. Pharmacists should not be penalized for unintentional disclosures of confidential information.*

Standards for Electronic Transmission of Patient Information

This bill would require the Secretary to promulgate regulations on computer system security and electronic transmission of patient information and electronic disclosures. These provisions are inconsistent with the federal government's current participation in standard setting organizations that are developing electronic data standards by consensus with the private sector and state governments. Standard setting organizations are composed of hundreds of active participants representing a broad base of health care industries.

Recommendation: *We recommend that the Secretary adopt existing standards for electronic transmission developed by standard setting organizations, such as the National Council for Prescription Drug Programs.* If these standards do not exist upon this legislation's enactment, standard setting organizations should the time to develop them.

Conclusion

American Drug Stores fully supports the overall goals of this legislation, but would like to see it revised to address our concerns. We ask this committee to conduct additional hearings to examine the implementation costs of this legislation and the impact it would have on communications between health care providers and between health care providers and their patients. We look forward to working with this Committee and Congress as you move forward on this bill.

Mr. HORN. We thank you very much for that statement.

Our last witness on this panel is Dr. Steven Kenny Hoge, representing the American Psychiatric Association.

Dr. Hoge.

Dr. HOGE. Thank you, Mr. Chairman.

As you noted, my name is Steven Hoge, and I am testifying today on behalf of the American Psychiatric Association, which is a medical subspecialty organization representing more than 40,000 psychiatric physicians nationwide. I am the chairman on the Council of Psychiatry and Law for the American Psychiatric Association.

Before presenting my oral statement, I would like to take a moment to thank you, Mr. Chairman, as well as Ranking Member Carolyn Maloney, for your personal support for parity in coverage for insurance for the treatment of mental illness. Both our members and, more important, their patients and families are grateful for your efforts on behalf of basic fairness in this area. Thank you.

Mr. HORN. I must say, if I might, maybe you have some wisdom on it, the other day on that proposal where they were going to create a commission, and if the expenses exceeded what the base cost was there, they would be phasing out the mental health.

There were a lot of us worried about that. I happened to vote against that proposal, because I thought there ought to be parity. I don't know if there was a position taken by APA. I would be curious to hear it if there was.

Dr. HOGE. Well, certainly the American Psychiatric Association continues to push to the fullest extent for parity.

Mr. HORN. Right.

Dr. HOGE. Certainly, as you know and probably are better aware and are better informed about than I am, there continues to be a great deal of political struggle over that issue.

Mr. HORN. Well, there was confusion, may I say.

Dr. HOGE. Yes.

Mr. HORN. That's the only word I know to describe it. Because people who were for parity were not sure if that was the route or not. I did not mean to detract you.

Dr. HOGE. Yes. I think that is true.

Mr. HORN. But as long as I have an expert here, I want to tap their brain.

Dr. HOGE. Well, there are always differences in tactics on the path to righteousness, I suppose.

My written statement offers specific comments about the draft Health Information Privacy Protection Act. I thought today what I would do with my time was to express APA's general concerns and to respond to any specific questions that you have and that the rest of the subcommittee might have for me.

The APA believes as our most basic principle that we must preserve medical record confidentiality and protect the privacy and security of sensitive personal information. We understand that the advent of new and evolving information technology, which everyone has acknowledged, provides opportunities to facilitate patient care.

At the same time, while we exploit our advances in technology, we must also uphold and protect a fundamental tenet of medical practice, that we must protect the confidentiality of patient medical information.

We are pleased that your draft bill has incorporated some of the comments and suggestions that the APA has made about other confidentiality bills over the last few years. We welcome the opportunity to work constructively with you to further protect the doctor-patient relationship.

In past years and in simpler times, it was possible to protect patients' privacy solely by concentrating on the ethics and standards of practice of physicians. However, in modern times, as we have heard again today, with complicated third-party private and governmental reimbursement systems, large integrated health networks and systems, computerized data storage banks, systems that may involve literally tens of thousands of physicians and millions of patients in one system, the challenge is to develop a more comprehensive regulatory framework concerning privacy.

Physicians have a centuries old tradition of protecting confidentiality. We have sought in modern times appropriate legal safeguards to prohibit inappropriate access by those seeking such information.

The question today is how to regulate data banks, insurers, information clearinghouses, and the myriad of other entities that collect, handle, transmit, control, or use health information which heretofore has been almost exclusively within the control of physicians.

Essentially, technology and the increasing complexity of the health care system has outstripped the scope of current legal protections. I think that is a problem we face today.

One approach, and the one pursued in this bill, is to place these new entities termed in the bill, "health information trustees," on par with traditional handlers of information such as physicians and hospitals.

In our view, this does not work very well, this conferring upon the new entities the same authority and scope of action with respect to information as physicians. I hope to explain that to you, briefly.

It is crucial to understand that physicians operate under an exacting standard of professional conduct as their patients' fiduciaries, as legal fiduciary. It is a standard of conduct under which these new trustees do not operate.

The crux of the problem is that legislation which is written to be permissive, and necessarily so, to allow physicians the appropriate flexibility to disclose information to accommodate widely varying clinical circumstances, that flexibility also gives inappropriately broad latitude to nonfiduciary entities to breach confidentiality in circumstances that are not in the best interest of the patients.

This problem is compounded when legislation is coupled or includes immunization from liability for inappropriate or unauthorized disclosures. The problem with a one-size-fits-all approach is that it fails to recognize that the needs and the appropriate scope of action of specific entities may, in fact, be very different.

A truly modern approach to patient privacy in the new information age would require regulation of each of these different entities based on their individual needs and purposes.

Let me give you just one example. I think Mr. Bay gave you another example of how this does not fit his circumstances particu-

larly well. Let me give you a broader example. Title II, section 201 contemplates that trustees will use contractors or agents to carry out the responsibilities.

Clearly, among these agents will be entities that collect and maintain large data banks of both identifiable and nonidentifiable health care information. It is my own view that these entities should be our "Fort Knox" of health information, since they are obviously a potential source of information, a potential locus for severe breach of confidentiality.

I think we should articulate as clear a principle as possible that Fort Knox is closed, absent a specific authorization for release of information from those most directly affected, the patients and direct health care providers. Clearly, these entities should not have the same discretion as physicians to disclose confidential health care information.

Unfortunately, the bill that you have here fails to articulate any policy with respect to the liability or obligations of these agents or contractors or to provide any heightened scrutiny of their actions in disclosing information.

Nowhere is the need for privacy more clearly seen than in the psychiatrist-patient relationship, for the assurance of privacy is the foundation on which therapeutic relationships are formed.

It is extremely important that any confidentiality legislation not undermine this relationship. Earlier, it was brought to your attention, and I want to repeat it, yesterday's Supreme Court vote, 7 to 2, to protect confidentiality of psychotherapy case notes, the *Jaffe* v. *Redmond* case. Justice Stevens, writing for the majority, says it better, I think, than I can say it, and I am quoting:

"Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationships necessary for successful treatment."

Going on, saying with respect to the lower courts ruling that confidentiality could be breached, if the evidentiary needs outweighed the patient's privacy interest, Justice Stevens rejected that by saying: "The balancing component implemented by the court of appeals is rejected, for it would eviscerate the effectiveness of the patient-therapist privilege by making it impossible for participants to predict whether their confidential conversations will be protected."

I think that this ruling underscores the importance of securing mental health records. I think that I would like to stop there and thank you for allowing me to testify. I will be happy to answer any and all questions.

[The prepared statement of Dr. Hoge follows:]

Mr. Chairman, I am Steven Kenny Hoge, M.D., testifying on behalf of the American Psychiatric Association (APA), a medical specialty society representing more than 40,000 psychiatric physicians nationwide. I am the Chair of the APA's Council on Psychiatry and Law.

I am grateful to have the opportunity to present our recommendations to strengthen and improve the protection of the privacy of psychiatric treatment records as provided for in the Health Information Privacy Protection Act. For the record, the copy of your bill to which my comments are addressed is the Discussion Draft dated May 2, 1996, referenced as "Horn 056" from the House Legislative Counsel.

In addition to my testimony on behalf of the APA, I have appended to my written statement a "white paper" articulating important technical issues in confidentiality legislation developed by the American Medical Association for the Senate Committee on Labor and Human Resources. The AMA's white paper is a very useful resource for legislators, and I commend it to your attention.

I am pleased to have this opportunity to appear before you, Chairman Horn, as well as Ranking Member Maloney, and the other members of this Subcommittee. At the outset, Mr. Chairman and Representative Maloney, I would like to note the appreciation of the members of the APA and their patients for your efforts on behalf of mental illness parity coverage as part of health care reform. We very much appreciate your support.

As you know, numerous bills addressing issues of medical records confidentiality have been introduced in the 104th Congress, including the pending introduction of Chairman Horn's own bill, similar legislation by Senator Bennett, and H.R. 3482 by Representative Jim McDermott, the only psychiatrist serving in Congress.

As our most basic principle, the American Psychiatric Association has consistently advocated that Federal legislation should not permit the disclosure of confidential information that identifies an individual without the individual's consent except in narrowly-defined emergency circumstances and situations. We believe that providers, patients, and other participants in the health care system should not be required to transmit information electronically. Congress, however, has determined that in certain circumstances, public policy interests dictate that medical record information should be accessible without the patient's consent, and/or without the provider's knowledge. We are pleased that your draft legislation has incorporated some of the comments and suggestions the APA has made about other confidentiality bills, and we welcome the opportunity to work constructively with you to further protect the doctor/patient relationship.

When the Medicare program was enacted thirty years ago, Congress made a promise to the American people that Medicare was designed to protect the physician/patient relationship. The Medicare enabling legislation stated that:

> Nothing in this title shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided... 1

Since that time, however, volumes of Medicare law have in fact directly "controlled" the practice of medicine. We are therefore concerned that any legislation drafted to anticipate each and every potential medical record disclosure, beyond authorized releases, will become a prescription for release rather than a protection of the medical record.

The APA strongly supports preserving medical record confidentiality and protecting the privacy and security of sensitive personal information. We understand that the advent of new and evolving information technology provides opportunities to use such technology to facilitate patient care. At the same time, while we exploit our advances in technology, we must also uphold and protect a fundamental tenet of medicine: protecting the confidentiality of patient medical information critical to the patient's treatment.

Mental illnesses and substance abuse disorders do not discriminate by race, age, income, gender or ability. Today, some 50 million adults in the United States suffer from mental disorders or alcohol or other substance abuse on an annual basis.2 These Americans deserve to be treated with dignity and respect; they are also entitled to have their individual medical records kept confidential.

During the extensive debate on reforming America's health care delivery system that took place in the 103rd Congress, proponents of a Federal medical record confidentiality law repeatedly referred to a public opinion poll conducted by Louis Harris and Associates for Equifax, Inc. (Harris survey). "The poll found an overwhelming majority (eighty five percent) of the public believe that protecting the confidentiality of health records is absolutely essential or very important in national health care reform."3 The Harris survey provides other insights that deserve attention as Congress continues to debate confidentiality legislation.

The Harris survey indicated that users of mental health services, "score higher than non-users in their general privacy concerns and in favoring strong legal protections of medical privacy."4 The survey reported that these patients and family members, as a group, are more concerned than others regarding several issue areas, including:

- saying they did not seek medical treatment to avoid jeopardizing opportunities;
- paying bills out-of-pocket to avoid submitting medical claims;
- worrying about changing health insurance if they change jobs.5

According to the Harris survey, "Users of mental health services -- almost one in four members of the public plus additional members of their families who may have used such services -- clearly constitute one of the most high-concern segments of the public on issues involving the handling of sensitive medical information."6 Moreover, 11% of those surveyed responded affirmatively when asked if they or an immediate family member had ever paid out-of-pocket for a medical test, treatment, or counseling rather than submit a bill or claim under a health plan or program. It is likely that the most probable reason was the concern attached to the confidentiality of the mental health record.

Why do individuals who suffer from mental illnesses place such a high premium on protecting their medical records? To answer that question honestly, one has only to ask: why, when announcing that he would not run for President of the United States in 1996, did General Colin Powell have to answer a question regarding his wife Alma's depression? Why was Vincent Foster apparently afraid to seek professional help for his condition? Why does the American public, sadly, find humor and entertainment value in psychiatric disorders and treatment? The answer is stigma. Because of the stigma of mental illness, rooted in fear and ignorance, psychiatric patients have legitimate reasons to seek assurances from their elected officials that the confidentiality of their medical records will be preserved.

The draft Health Information Privacy Protection Act would give patients a Federal right to inspect, copy and "correct" their medical record; it prescribes a method by which patients can authorize the release of medical record information for treatment, payment, and other purposes; and it outlines the "balancing test" situations where medical record information can be released without the patient's consent or the treating physician's knowledge.

While the draft bill restricts the release of "protected health information" within a heath information trustee to, "use[s] or disclosure[s] compatible with and directly related to" the purposes for which the information was obtained, the draft outlines a variety of entities that may receive medical record information from "Health Information Trustees" (defined to included providers, plans, oversight agencies, and public health authorities) without first obtaining patient consent. Those entities (and purposes) entitled to receive information are: Health Information Services (defined in the bill); Next of Kin; Directory purposes; Emergency Circumstances; Oversight purposes; Public Health; Health Research; Judicial and Administrative purposes; Accreditation purposes; Law Enforcement; and Non-Law Enforcement Subpoenas.

The draft bill also imposes criminal and civil penalties for violations of the Act. Imposing responsibility not to disclose by virtue of the "trusteeship" to entities that have access to medical record information is positive. We are concerned, however, that the trusteeship grants health plans and government entities the same authority as physicians in releasing the medical record. Where the physician owes the patient a fiduciary duty to act in that patient's best interest, with or without a Federal statute, other entities will have financial and other concerns, and will not put the patient's interests first.

As noted, the APA recognizes the need to strike a balance between society's need for and access to information, and the patients right to doctor/patient confidentiality. We underscore, however, that any legislation passed by Congress must not jeopardize the doctor/patient relationship. Patients come to physicians with the expectation that the information that is generated within the physician/patient relationship will be used to further their medical interests and will be kept private. Privacy is important not only for its intrinsic value but also, with respect to treatment for mental illness, the assurances of confidentiality are a critical element of the trusting physician/patient relationship.

Because the bill addresses issues of computerization and electronic disclosure through the promotion of efficiency and the transfer and exchange of health care information, and because many in Congress support computerization efforts not only to promote quality of care but also to combat health care fraud and abuse and reduce paperwork, it is appropriate to consider a risk\benefit analysis of the computerization of the patient medical record. The Harris survey indicated that seventy-one percent of respondents agreed either strongly or somewhat that, "If privacy is to be preserved, the use of computers must be sharply restricted in the future."7 The following excerpt from a recent episode of the CBS Television program "60 Minutes" illustrates some of the problems associated with any information contained in a computerized system:

Mike Wallace, co-host: If you're going to cruise the information superhighway, like 30 million Americans are doing right now, you'd better be aware that cruising alongside you are intruders, hackers who can break into your computer and ferret out your credit records, your medical records, just about everything private that you wouldn't want to share with a stranger. Alan Brill heads up the worldwide high-tech security endeavors of Kroll Associates in New York.

Mr. Alan Brill (Kroll Associates): Everybody is telling you how great it is to get your company on the information superhighway.

Wallace: Right.

Mr. Brill: But they don't tell you that on this superhighway, there's carjackings, there's drive-by shootings and some of the rest stops are pretty dangerous places to hang around. Until companies understand that, they're putting themselves at risk...

Wallace: How do the hackers break into a computer on the Internet? One of the easiest ways is by getting hold of the passwords that companies use, ostensibly to protect their computer files. But to demonstrate just how easy it is to uncover a password and break in, Alan Brill writes a brief message of his own.

'This is a corporate secret.'

Mr. Brill: And I don't want anybody to see that message.

Wallace: Right.

Mr. Brill: Now if I tried to get that document, and if I don't know your password, the file is locked-not very good.

Wallace: Right.

Mr. Brill: There are programs that were developed for law enforcement. . .

Wallace: Mm-hmm.

Mr. Brill: . . .that, unfortunately, have kind of gotten out there. Guess where? On the Internet.

Wallace: That program can pick out secret passwords because, when analyzed electronically, they stand out from the rest of the words in a file. Alan Brill was able to find my secret password within just seconds.

Mr. Brill: The machine believes that your password was Zina.

Wallace: There it is.

Mr. Brill: With that password, I can get in and I can be you.

Wallace: Which means he'd have access to all the files in my computer.8

Mr. Chairman, protecting the confidentiality of medical record disclosures is especially imperative for those who need and obtain psychiatric treatment. Accordingly, the APA submits the following specific recommendations to strengthen your draft Health Information Privacy Protection Act and urges the Subcommittee to support the changes outlined below.

While we appreciate that, in fact, there are currently organizations that store and transmit medical record information in a computerized fashion, and that it is the intention of the legislation to impose the duties of trustees (and penalties for violations) outlined in the bill, the APA strongly believes that the potential creation of a health information network threatens the doctor /patient relationship by jeopardizing, in a global fashion, the confidentiality of that relationship. No law passed can absolutely guarantee the protection of any item of value. The reality, however, of the World Wide Web and other technological advances we have achieved have raised the stakes tremendously.

- Federal legislation should not interfere with the medically necessary and medically appropriate treatment of patients:

Title I, Section 101 of the draft provides for the inspection and copying of protected health information by the subjects of the records. The Subcommittee will be interested to know that in the Harris survey cited earlier in this statement, seventy-six percent of the individuals surveyed never asked to see their medical record. Of the twenty-four percent that did request to see their record, ninety two percent were either given their complete record or shown a complete copy; ninety seven percent of those respondents thought they understood the information or had it explained to them in a satisfactory way.9 The fact of the matter is that very often, physicians, including psychiatrists, educate patients on what is in their records, particularly since patients are concerned about issues such as reimbursement and capitation of visits.

Inspection and copying of mental health treatment notes (as distinguished from what is commonly thought of as the "medical record," i.e.: diagnosis, charts, test results) by psychiatric patients may in fact endanger the course of treatment and thus not be in the best interest of the patient's welfare.

One of the arts of psychotherapy is timing, and to impose a requirement on the psychiatrist to share with the patient understandings, interpretations, and thoughts of the practitioner, when the patient is not ready to receive this information may not reach the "endangerment to life or safety" exception standard outlined in the bill, and could very well endanger the therapy. A patient exposed to these notes at the wrong time might be emotionally harmed, elect to discontinue treatment, and thus jeopardize their recovery.

Section 101(b)(1) permits a trustee to decline to allow a record to be inspected or copied if the trustee "determines that the disclosure of the information could reasonbly be expected to endanger the life or physical safety of the individual." We note that this the only reference which specicically includes physical safety but does not include some comparable acknowledgment of the validity of an exception for mental well-being. *We therefore recommend that Title I Section 101(b) be amended to also include an exception for mental well-being.*

- Federal legislation should not permit the disclosure of confidential information that identifies an individual without the individual's consent except in narrowly-defined emergency circumstances:

Title II, Section 201 lays out the general responsibilities regarding the use and disclosure of protected health information. This Section is troublesome in several respects. First, it contemplates -- as is reasonable -- that trustees will use contractors or agents to carry out their responsibilities. The draft, however, fails to define "agent" or "contractor". Second, the draft fails to articulate any policy with respect to the liability or obligations of such agents or contractors separate and distinct from the trustees.

These oversights are critically important because these entities will need to maintain large data banks of identifiable and non-identifiable health information which by the nature of the work involved will have to be routinely updated. This is obviously a potential source for a severe breach of confidentiality. *We strongly recommend that Title II, Section 201, be amended to specifically define "agent", "contractor" and other relevant terms, and to specifically articulate stringent confidentiality standards. Further, it is our view that it would be appropriate and desirable to make such standards even more stringent than those applied to trustees as defined by the bill.*

Title II, Sections 202 and 203 provide for the written authorization of disclosure of medical record information. Several problems present themselves under the bill as drafted. If a patient orally requests that a physician convey protected health information as defined in the bill, and the physician does so, is he or she in violation of Federal law?

For example, if a patient is out on a lake fishing with his friend who is also his doctor, and another person, and the patient turns to the doctor and states, "tell my friend about that kidney problem I had last year," would compliance with this request violate the proposed law? The information is protected health information, thus, the patient could only release it with a written consent.

Section 203 of this draft allows providers to request that patients authorize the release of medical record information on a day on which the provider renders health care to the individual. This is an improvement on legislation being considered in the Senate that would have prohibited such requests. Under the Senate bill as introduced, for example, for outpatients, facilities and providers would have been unable to request previous treatment records unless the patient made a special visit, on a day in which no health care was rendered, in order to provide such authorization. Similarly, inpatients would have been rendered ineligible to provide such authorization throughout their entire hospitalization.

The underlying rationale for the initially proposed Senate prohibition, a concern that patients could be coerced into signing authorization forms when such forms are offered to them concurrent with the receipt of medical care, is adequately addressed in your draft. As noted, Section 203 of this draft allows providers to request that patients authorize the release of medical record information on a day on which the provider renders health care to the individual. This is an important change, and we commend you for making it in your draft.

Both Sections 202 and 203 require that an authorized release of health information "contains an acknowledgment that the individual who is executing the authorization has received a statement of any disclosures of the protected health information that the recipient intends to make on a form that is separate from the authorization for disclosure." It is not clear whether the intention is that the health information trustee must acquire information from the third party recipient regarding intended disclosures, nor is it clear what, if any liability, falls on the physician should the downstream recipient of protected information inappropriately use or disclose the information, or even appropriately use or disclose information where such use or disclosure is beyond the specified scope of the statement.

There is never specific notice to the patient that in fact third parties may access their medical record under various provisions of Title II without their express consent. While it would be difficult to inform a patient that their records "may" be accessed, for example, by the Federal Government, the possibility of such an "unauthorized" release is troublesome. How, for example, will the citizen/patient ever know that his or her records have been accessed without their express consent?

- Federal legislation should presume that information is confidential unless the patient affirmatively elects otherwise.

Section 204 permits the disclosure of protected health information to next-of-kin and for directory information. While the bill provides the patient with notice and an opportunity to object, there is an apparently reflexive presumption that the information *may* be disclosed *unless* the patient objects; thus, the burden is on the patient to object. *We believe that the legislation should instead affirm the reverse, that information should not be released unless the patient consents. Thus, Title II, Section 204 should be improved to reflect that the trustee shall* ***not****, unless consistent with legal and ethical medical practice, disclose protected health information* ***unless*** *the individual who is the subject of the information has been notified and concurs.*

We support your efforts in Section 204 to recognize established medical standards by including a provision that disclosures to next-of-kin must be consistent with good medical or other professional practice. This will allow psychiatrists to respond appropriately to the specific context of each case. In many instances it is contrary to the practice of psychiatry to release information to the next-of-kin without express authorization. For example, an abused spouse or child must know that they can trust their psychiatrist to maintain strict confidentiality in order to facilitate treatment. On the other hand, for example, some patients may be so incapacitated by their mental disorder as to be unable to consent, even where the release is appropriate and necessary.

We recommend that the same language be added for the release under Directory Information. While the exceptions outlined on page 29 of your draft would include "specific information about the physical or mental conditions" of the patient, the mere fact that a patient is in a psychiatric hospital in and of itself may reveal more than a patient wants others to know. While the patient will be notified and have a right to object here, we are confident there will be many notices a patient will receive upon checking into a hospital and are concerned that this important issue not "get lost in the shuffle" of admission. This merely gives a patient further protection.

- Federal legislation should not create a new entitlement to protected health information by law enforcement authorities.

Title II, Section 211, would permit health information trustees to disclose "protected health information to a law enforcement agency, other than a health oversight agency" for specified purposes. Federal legislation however, should maintain current law and not allow law enforcement agencies to access confidential, personally identifiable medical information ***without a court order****. Thus, we believe that Title II, Section 211 should be deleted.*

- Physicians should be constructively involved in the development and review of all regulations promulgated pursuant to medical records confidentiality legislation.

Section 504 would establish an Advisory Group to review all proposed rules and regulations and submit recommendations to the Secretary. The Secretary may also promulgate regulations in consultation with privacy, industry, and consumer groups. It is imperative that those concerned about mental illness, both physicians and patient communities, be included explicitly in these capacities. *"Physicians" should be added to Title V, Section 504(b)(2).*

- Physicians should not be left "out of the loop" in decisions to disclose medical information.

Physicians should, in effect, be the guardians of the medical record, and be in a position to notify their patients of third parties' attempts to obtain private medical records. Physicians as knowledgeable participants in the health care system are the most qualified persons to inform their patients of potential consequences of disclosure. Even the Institute of Medicine report, Health Data in the Information Age: Use, Disclosure and Privacy, cited by proponents of computerization of medical records refers to the Workgroup on Electronic Data Interchange (WADI) recommendation that, federal legislation include provisions that, "establish appropriate protections for highly sensitive data, such as data concerning mental health."10

While the APA supports Title V's preemption exception for state mental health laws in Section 506(f)(3), we believe that it is appropriate for federal legislation to impose greater protections on psychiatric records. *We believe that the draft bill should be amended to reflect that any records, including psychiatric records, pertaining to mental health treatment, may only be released by the health care professional in possession of the records or his/her designee.*

- Federal legislation should not change the standard of care in the practice of medicine.

In our rapidly changing health information technology system, it is inevitable that there will be many entities other than traditional handlers of health care information (such as physicians and hospitals) that are in need of regulation to protect patient privacy. There is a major philosophical and public policy issue at the heart of all current confidentiality legislation regarding the status of such non-traditional entities. Including such new entities as health information trustees, on par with physicians and hospitals, confers upon them the same authority and scope of action as physicians. As previously noted, however, physicians operate under an exacting standard of professional care as fiduciaries. Legislation which is written to be permissive, and therefore allow physicians the appropriate flexibility to disclose information to accommodate widely varying clinical circumstances will give inappropriately broad latitude to non-fiduciary entities to breach confidentiality in circumstances which are not in the best interests of patients. This problem is compounded when permissive legislation is coupled with immunization from inappropriate or unauthorized disclosures, such as that laid out in Title V Section 507. Section 507, while intended to protect those parties who comply with the law in good faith, actually lowers the standard of privacy protection in the health care system. *We believe that Section 507 should be deleted.*

Mr. Chairman, in conclusion we note that sensitive, private material should not be treated as a commodity -- to be indiscriminately bought and sold -- particularly by those motivated by corporate and marketplace profit incentives. The creation of a health information network and network services that store protected health information will be of interest to both those with a legitimate concern for patient welfare and those whose interests are strictly pecuniary or potentially abusive or destructive.

As noted earlier throughout this statement, the APA strongly supports a fundamental rationale for protecting medical records. Federal legislation should protect personally identifiable information by ensuring that the following principles are contained in any legislation passed by Congress:

- Federal legislation should not undermine the traditional doctor/patient confidential relationship by taking the physician out of the information-disclosure process and, therefore, preventing the physician from notifying the patient of attempts to obtain private, personal medical information or to inform the patient of potential consequences of disclosure.

- Federal legislation should not permit the disclosure of confidential information that identifies an individual without the individual's consent except in narrowly-defined emergency circumstances and situations. Providers, patients, and other participants in the health care system should not be required to transmit information electronically.

- Federal legislation should not preempt, supersede or modify state confidentiality, privacy, privilege or medical record disclosure statutes or federal or state common law findings that protect patient medical record information. Federal legislation should provide a "floor" of uniform protection for all personally identifiable medical record information; states should be allowed to provide stronger privacy protection for their citizens if needed.

Any interference with the maintenance of the confidentiality of psychiatrist/patient communications erodes the fundamental privacy of patients and also impairs the ability of a psychiatrist to help his or her patient. To the extent that such communications are disclosed without the patient's consent, the reliability of the physician/ patient relationship is eroded, and the ability of a physician to help his or her patient is impaired. The APA urges the committee to accept what court after court has recognized as a legitimate zone of privacy--the psychiatrist/patient relationship--and protect the confidentiality of an individual's psychiatric medical records. Thank you for this opportunity to present our views on the draft Health Information Privacy Protection Act.

Notes:

1. Sec. 102(a) of the Social Security Act Amendments of 1965 (P.L. 89-97).

2. Health Care Reform for Americans with Severe Mental Illnesses: Report of the National Advisory Mental Health Council, produced in response to a request by the Senate Committee on Appropriations, *Am J Psychiatry 150:10*, October 1993 ("mental disorders" refers to conditions that impair life's major functions, not brief periods of anxiety, panic or low spirits that people commonly experience).

3. House Comm. on Government Operations, H.R. Rep. No. 103-601 Part 5, 103rd Cong., 2nd Sess. (1994) (report to accompany H.R.3600).

4. Harris-Equifax *Health Information Privacy Survey 1993*, Louis Harris and Associates, New York, New York, p.12.

5. Id.

6. Id.

7. Id. at Appendix B card 1 p. 1

8. 60 Minutes CBS News, Feb. 26, 1995, Volume XXVII, Num. 25, Burrelle's Information Services, Livingston, New Jersey.

9. Harris at Appendix B card 1 p. 3.

10. *Health Data in the Information Age: Use, Disclosure, and Privacy*, Institute of Medicine, 1994, p. 181.

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February 27, 1996

The Honorable Nancy Landon Kassebaum
United States Senate
302 Russell Senate Office Building
Washington, DC 20510

Dear Madam Chairman:

The American Medical Association (AMA) welcomes the opportunity to share with the Committee our views on the confidentiality of patient medical records, an issue brought to the fore by S. 1360, "The Medical Records Confidentiality Act of 1995." After the bill was referred to the Committee, the AMA, in conjunction with some twenty other national physician organizations, wrote the Committee requesting an opportunity to assist in refining the language of S.1360. While we noted our express support for the mission of the legislation, our concern was and remains that the language of S. 1360 must be significantly modified to adequately protect the privacy of patients' medical information. The Committee has signaled a willingness to examine the details of the bill and to seek improvement from a variety of parties. We appreciate being included in this reevaluation of the legislation.

The AMA has extensive policy concerning the ethical responsibility of physicians to protect the privacy of our patients' medical records and information in order to assure that those patients are willing to communicate sensitive and personal information to their physicians without fear of subsequent disclosure. Our Board of Trustees has reviewed AMA policy and considerable additional information in its evaluation of S. 1360, and its conclusions are reflected in the attached report.

We look forward to continuing the dialogue on S. 1360 with the Committee and urge you to bring your questions and concerns to us. The AMA supports federal legislation protecting the confidentiality of patient records; however, we regret that we cannot support, in its current form, S. 1360. Thank you for taking our views into consideration as you explore this complex and important issue.

Sincerely,

James S. Todd, MD

James S. Todd, MD
enc.

cc: The Honorable Robert Bennett
The Honorable Thomas A. Daschle
The Honorable Robert Dole
The Honorable Russ Feingold
The Honorable Orrin G. Hatch
The Honorable Herbert H. Kohl
The Honorable Patrick J. Leahy
The Honorable Alan K. Simpson
The Honorable Ted Stevens

REVIEW OF S. 1360
"THE MEDICAL RECORDS CONFIDENTIALITY ACT OF 1995"

The American Medical Association (AMA) commends the sponsors of S. 1360, "The Medical Records Confidentiality Act of 1995," for focusing attention on the important issue of confidentiality of private medical records. The bill as introduced, however, does not assure adequate confidentiality protections for personally identifiable medical information, and the AMA would discourage the Senate Labor and Human Resources Committee from reporting such legislation without significant reexamination and modification.

The AMA believes that the patient-physician relationship is based first on trust and that the confidentiality of communications within this relationship is the cornerstone of good medical care. It cannot be too strongly stated that in order for physicians to provide the best and most appropriate medical care, patients must feel that they can disclose to their physicians personal facts and information that they would not want others to know. Without such assurances, patients may not provide the information necessary to properly diagnose and treat. The evolution of electronic medical records, typified by interstate electronic transmissions and the aggregation of information into large databases that are used for non-treatment purposes, has intensified existing concerns about patients' confidentiality. While the AMA supports federal legislation to protect patients' privacy in an environment of heightened availability and access through computerized networks, we are concerned that S. 1360, without substantial modification, fails to adequately address numerous concerns about medical information privacy.

The AMA's analysis of the issue is based on a threefold premise:

- that there exists a basic right of patients to privacy of their medical information and records, and that this right should be explicitly acknowledged;
- that patients' privacy should be honored unless waived in a meaningful way (i.e., informed, noncoercive) or in rare instances of strongly countervailing public interest; and
- that the information disclosed should be limited to that information or portion of the medical record necessary to fulfill the immediate and specific purpose (i.e., no fishing expeditions).

Within the context of these three overriding principles, the AMA makes the following recommendations by which any medical information or record confidentiality legislation should be assessed:

1. **The primary purpose of the medical record is to provide a reliable tool to provide clinical treatment of patients.** The medical record is the property of the physician or responsible health care provider or entity, who has legal and ethical obligations to maintain a true and accurate record. While patients should have access to the information from the medical record (with rare exceptions to protect the mental or physical safety of the patient), the physical record is the property of the physician or provider. When a provider entity controls the medical records or information, a physician advisory body to the provider (or a medical staff if one exists) should superintend the manner in which the physical record is released. This conceptual frame of reference should be set out explicitly in some sort of legislative preamble and should be recognized in statutory language.

   The model contained in S. 1360 for disclosure and correction of patient records, based on the procedures for reporting consumer credit information, is not translatable to the medical information arena and should not be adopted. Subsequent holders of medical information (such as information data banks or other types of "trustees") should not be allowed to change medical information or conclusions. It follows that the treating physician or health care practitioner that generated the medical information should be the only "trustee" through whom patients may "amend" or "correct" their medical information or records.

2. Often, an entity will seek an individual's authorization for disclosure of his other protected health information, subsequently using the information for purposes beyond the scope for which the consent was obtained. For example, an insurer with both health and life insurance lines has a legitimate interest in medical information regarding a policy holder for administering health benefits. Without specific authorization from the individual, however, that information should not be available to the insurer for purposes of its life insurance line.

   "Firewalls" should be constructed so as to preclude a patient's first consent from applying to all subsequent disclosures (unless the patient specifically and freely waives defined rights). The specificity of the patient's consent creates the "firewall." Requests for information should be specific as to:

   - the portion of the records or information needed (the specific treatment or matter at issue);
   - the time period of the records needed (e.g., "from 1990 through the present"); and
   - the purpose for which the information is requested.

The specificity of consent is the key to imposing effective "firewalls," to preclude the lateral drift of information once an initial consent is agreed to by the patient. Patients and physicians will feel more protected if a signed consent is required for each disclosure of records, rather than continue to allow for blanket waivers by patients. Blanket authorizations are acceptable for most treatment and payment purposes and "scrubbed" charts; however redisclosure should be prohibited without subsequent authorization. In instances where personally identifiable medical information is part of a requested record that is not easily "de-identified" (for example, when a utilization review company wants to review 25 patient charts), specific permission from the patients should be required. The responsibility for obtaining consent for disclosure should rest with the entity requesting the data.

3. **Exceptions to the requirement for patient consent to disclosure should be minimal and narrowly drawn.** The burden should be on the requesting entity to demonstrate why its need should override the patient's confidentiality. This burden should be equally applicable for research (both scientific and market-based/economic), law enforcement and any other legitimate purpose.

   In the particular instance of exceptions for purposes of law enforcement, the AMA believes the bill should set high standards for non-consented-to disclosures. The AMA recognizes the needs of legitimate law enforcement; however, these needs must be balanced with an individual's expectation of privacy for his or her personally identifiable medical information. The requesting entity should be required to show "probable cause" in establishing why medical records should be divulged without the patient's consent, and the particular information required to meet the immediate law enforcement purpose should be specified. Records thus disclosed for legitimate law enforcement purposes should then be held in camera by the court.

4. **Whenever possible, medical information used for research purposes should have all identifying information removed, unless the patient specifically consents to the use of his or her personally identifiable information.** The entity requesting protected medical records or information should be required to pay for "de-identifying" the record. The AMA believes that the protections contained in S. 1360 relating to release of identifiable information without authorization when an IRB determines that the need for that information outweighs the individual's right to privacy are adequate without further showing of problems that might currently exist.

5. **Regarding the issue of federal preemption of state law, any federal law should provide a "floor," rather than a "ceiling" when applied to patient confidentiality protections.** It is understood that there are many who believe that there should be a uniform federal standard to facilitate electronic data interchange (including the Work Group on Electronic Data Interchange (WEDI)). The AMA is concerned, however, that heightened state standards will be lost to federal legislation. If the bar is placed high enough to secure protection of patient information in the federal language, the AMA would revisit the preemption issue.

6. S. 1360 has major penalties for unauthorized disclosure of protected medical information. The AMA believes that **penalties and sanctions for unintentional disclosures of identifiable patient information, where the disclosure does not result in demonstrable harm to the subject of the disclosure, should be reduced or eliminated. Penalties and sanctions related to improper disclosure for commercial purposes, profit, malicious purposes or where there is significant patient harm should be commensurate with the violation.** In addition to monetary sanctions, legislation could include the loss by a database company, for example, of its privilege to hold or transmit protected medical information, thus reducing the potential for companies to accept the monetary penalties for improper, intentional disclosures as a "cost of doing business."

The AMA does not believe that S. 1360, as it currently stands, meets the principles elaborated above and therefore we do not support the bill in its present form. We do support, however, the need for federal legislation in this area so that patients will be adequately protected as medical information becomes available in new forms and with greater ease of transmission. The AMA appreciates the Committee's active efforts to seek input regarding improvements to the bill. The AMA's fundamental concern on this issue has been and continues to be the protection of the patient-physician relationship and the confidentiality that is so basic to the trust inherent in that relationship.

Mr. HORN. Thank you very much. This is most helpful, and especially timely in light of that court decision. I now yield 10 minutes for questioning to the ranking minority member, Mrs. Maloney of New York.

Mrs. MALONEY. I would like to ask, Dr. Hoge, if this bill passed tomorrow, what effect would it have on your practice?

Dr. HOGE. Well, I think that is an interesting question. I think on my direct practice it would probably have very little effect. A great deal has been made of the patient access provisions. I think the numbers quoted, I am sure, are accurate, probably.

Certainly, not all the States have had patient access provisions. I have practiced in States that have them and States that do not. It has never made any difference to my practice. There is certainly no law that prohibits doctors from allowing patients to have access to records. In my experience, doctors routinely do so when it is appropriate.

In the direct forms—again, the bill as it relates to physicians—I think that the problems that I would foresee would be long-term. Because I think the implications of my testimony, both oral and written, is that the bill threatens to lower the standard protection for patients because it is written in a permissive way and then immunizes for liability.

Physicians who begin to lower the standard of care would be immunized, as long as they followed the relatively broad latitude granted in the bill. If, for example, they followed the letter of the law but not the spirit, the letter but not take into consideration clinical circumstances, they would still be free from liability. It is a challenge.

I will tell you it is a challenge that the APA takes up every year to educate young psychiatrists, and sometimes not so young psychiatrists, in the importance of protecting confidentiality.

I think that I would fear over time this would erode those efforts because psychiatrists would find that lowering the standard of care had no consequences in law. My concerns about the bill have more to do with the protections that it extends or, I guess in my view, fails to extend to nonphysician entities.

Mrs. MALONEY. Well, to followup on the problem that you brought up. This bill does surrender to the Secretary of Health and Human Services the power to set standards for computerized medical records. What is the effect of that section of the bill? I would like you to comment, or Ms. Goldman or anyone who would like to comment on that particular aspect of it?

Dr. HOGE. The section that allows the HHS to issue regulations with respect to computerized information?

Mrs. MALONEY. Yes.

Dr. HOGE. Yes. Well, I think that, obviously, a great deal hinges upon what those regulations would be like, so it is a little hard to know how to respond in advance. I guess, again, our concerns can be summarized, I think, briefly. One is that the bill as it is written, I do not see how any regulation could reduce the scope of potential disclosures that is outlined in the bill.

The fact that other health information trustees, other than health care providers who have direct knowledge of the patients circumstances, direct knowledge of the patients wants and desires,

their preferences regarding the protection of the records, to allow these other entities—again, many of whom will not have any direct knowledge and may not even know how to recognize the patient—to allow them to release information when they do not have the same professional standards, the same professional motivations, the same historic devotion, dedication to the protection of confidentiality, I simply do not see how either a bureaucrat in a Government agency or an employee in a data bank or a clearinghouse will have the same motivation or concern for the patient to limit disclosures to the greatest extent possible. That is my concern.

Mrs. MALONEY. Would anyone else like to comment?

Ms. GOLDMAN. I will take a moment at it. My understanding is that the establishment of the safeguard section, which is not only in this discussion draft but is in the Senate and Condit bill as well, is not aimed necessarily at the substantive provisions that Dr. Hoge mentions, but directs the Secretary to say how these provisions should be implemented.

You may have some small providers, those that don't necessarily have large network health information systems, but will give them some guidance as to appropriate technical and security measures that could be put into place that will effectuate these provisions.

It gives them some framework, in a technical sense, as to how to lock up the information, how to create the "fire walls," how to limit access, how to create passwords or audit trails, things that are fairly technical and that we would not want to legislate with great detail. But which allows the Secretary to spend some time and to issue some guidance in this area. So that it will then be used by those who say, "Of course, we want to comply, but we do not necessarily have the resources to develop the expertise in this area." I do not think it is intended to be a substitute for legislation or the legislative restrictions.

Mrs. MALONEY. Finally, I would like anyone who would like to, to comment. What are the basic principles that should be the foundation of any legislation on medical privacy and the privacy of medical records? Do you think that this legislation achieves that?

Ms. FRAWLEY. I would like to answer that. Thank you. Certainly, I think that this bill takes a very good approach because as it says, the patient has the right to know what information is being collected about them. It lays out very nicely the framework for authorizations for disclosure information. It talks about that it should be limited to the necessary and legitimate purposes.

Certainly, the thing that I think could be stronger is the fact that there has to be significant prohibitions against redisclosure of information. If the patient authorizes release of information for reimbursement of a health care claim, they do not contemplate that that information is going to be released to unauthorized third parties or to be used for commercial purposes.

I think that is a very important point. Unfortunately, we know that consumers are just not familiar with the flow of information and when they sign an authorization what the impact could be.

We certainly think that the civil and criminal penalties are very important. People should have standing to bring an action against misuse or misappropriation of their health information. I think that the bill does a very fine job of laying out on these principles.

I do want to just indicate that there is no stronger legislation out there right now, other than the Federal alcohol and drug abuse regulations, which only covers a minor subset of records in the United States. This bill would not lower the standard at all. If anything, it is going to raise the standard.

I think that is very, very important. Because, unfortunately, many individuals have in looking at this draft language or other bills that are pending in this Congress sometimes have not portrayed the protections that are out there right now.

Mr. BAY. If I might?

In the practice of pharmacy in the community setting, really the practice is defined by the State's standard of practice and the practice acts, and it is extremely critical that the communication really be free-flowing between the patient and the patient's physician and the pharmacist so that we can, No. 1, improve compliance, assist in disease management, and other pharmaceutical managements. If this is interrupted it really, I think, minimizes the outcome because of time delays unnecessarily, and also ultimately raise costs.

In speaking to the earlier question, I would say it is extremely important that we do have a standard of communicating and that standard-setting organization does get involved.

Mrs. MALONEY. Thank you.

Would anyone else like to comment on the principles?

Dr. HOGE. Yes; I would like to just take note of a couple of principles that the APA and the AMA have joined the APA in articulating. First, the physician should continue to be the guardian of the medical record, or health care providers should continue to be the guardian of the medical record. As I noted earlier, this principle is violated by the draft bill under consideration.

Mrs. MALONEY. Do you think psychiatric records should be treated differently than other medical records?

Dr. HOGE. I have two answers to that. First, I think again as noted as recently as yesterday by the Supreme Court is indicated by the lack of parity, the great vilification, the great fear, the misunderstandings of mental illness, the deep and very difficult diagnosis to reduce levels of stigmatization of mental disorders, that it is clear that there is a class of disorders, mental disorders, I think in a special category. That heightened protection of mental health records, I think indeed there is a great deal to be said for that.

On the other hand, I think I agree to some extent, I agree largely with what some other members of the panel have said today. I have testified to this prior, previously, or lobbied to this effect previously.

I think that protections—that privacy is a very personal and individual thing. It may not matter to some patients that other people know that they have depression; it may matter a great deal to other patients that people know that. There may be individuals who have a great deal of concern with disclosure of the fact that they have a relative common medical disorder.

I think that privacy cuts across diagnostic boundaries. As a physician rather than as a psychiatrist I would like to see the protections in any legislation be as strong as possible and be based on the patient's need for privacy, rather than diagnostic.

Ms. FRAWLEY. I would like to just make a comment. I have worked in health care institutions in States where there have been exemptions created for mental health records or for HIV or for substance abuse records. The problem that you have there is that you have a different standard for how those records are handled.

By inference you have breached someone's confidentiality—I cannot tell you how many times I have had district attorneys serve subpoenas looking for information, and having to deny the subpoena and ask for a specific court order, and immediately had the DA say, "Oh, that means the person must be HIV-positive or they are a junky or they are under treatment for mental health."

I think we need to be sensitive to the fact that any legislation should not perpetuate stigmas. I mean, people should feel very comfortable entering the health care delivery system if they are HIV-positive or they are a substance abuser or they are seeking treatment for mental health.

When we start carving out exceptions, the problem there is that we create dual standards. Our association feels very uncomfortable obviously if that approach is taken. I think we are lowering the standard. We are not raising the standard. We really need to work on ensuring protection for all information. Certainly, an issue that we have not even explored this afternoon is genetic health information, and the potential there with human genetic project and some of the consequences there.

Mrs. MALONEY. Thank you very much.

Mr. HORN. Thank you. I have a series of questions to put in the record. Some are easily answered, however, I am going to start with the one that is not easily answered.

I have heard that some professionals in the psychiatric community are opposed to allowing patients to see their psychiatric records. It is my understanding that you have been quite vocal about the fact that psychiatrists should be exempted from the provisions of this and similar acts.

Dr. Hoge, how do you feel about allowing patient access to medical records, in general, and psychiatric records in particular?

Dr. HOGE. I think that is a good question. I think it is fair to say, before I give you my response, that there is some degree of disagreement about this particular point. I believe, as I finished my response earlier, that access to records is, as with any other question we have addressed today, more based on the individual needs, concerns, vulnerabilities of the individual, rather than diagnosis.

Again, it is a little difficult to answer that question in part for the same reason I said earlier. As a class of disorders, certainly there is more concern about many people who are mentally disordered just on a probablistic basis.

I mean, if you consider the more serious mental disorders where people are confused, may not be competent, may not be competent to understand the information, may be emotionally vulnerable to information that may be disclosed. I can see a great deal of merit in having special rules.

On the other hand, I think that all physicians should be sensitive to the very same psychological psychiatric mental health needs of their patients, and should take that into consideration when disclosing information to them.

What we suggested in our written testimony that I did not mention is that we would like—we are happy with what you have in your current bill. We would like a slight expansion so that the physician could take into consideration the mental well-being of patients when disclosing information to them. We are not asking today for a special mental health treatment record exception.

Mr. HORN. I love that specific reference to the bill. I would welcome from you or any other witnesses specific language or suggestions, because your profession knows certain terms of art that the lawyers that draft these bills might not know. I think we ought to deal with the professional language there and at least help get us to a point.

Now, Ms. Frawley and Ms. Goldman, what are your opinions of the issue of allowing patient access to psychiatric records?

Ms. FRAWLEY. Well, I have had to, as chief of medical records in hospitals where psychiatric patients were treated, handle requests for information. First, in the Federal facility under the Privacy Act. In that situation, there was an exemption if the psychiatrist felt that there would be harm in disclosing and providing access to the patient.

There was what was known as a "third-party designee," where the individual would designate an individual who could receive that information. That person—whether it was another physician, a clergy member, or a family member—could make the decision whether or not there should be a disclosure.

I have also worked in States where the health department had an appeal mechanism so that a provider could decide that there could be harm caused by the disclosure and have an outside party review the medical record and make a decision whether or not access should be granted.

The problem that we have got is we have a lot of approaches at the Federal and State level. Often, what I have found, because I have been in situations where I have had to sit with physicians and patients reviewing their medical records, a lot of times people are concerned that the physician has not given them all the information they need. In some situations, people just want to be reassured about their health treatment.

As Dr. Hoge pointed out, we have a lot of States that don't have patient access statutes, and yet providers will sit down and review medical records with patients. I think that, you know, we should never usurp the provider's judgment. I think that is always important, that relationship between a physician and a patient.

Ms. GOLDMAN. I would take a slightly different approach on that issue. I think we should start from the premise that people have a right to their own records. They have a right to see them, and they have a right to review them. If there is information which they believe is inaccurate or outdated, they can supplement that information.

If a provider can show that serious harm would occur, that the person is suicidal or there is some other issue and serious harm would occur if the information was released, there should be a process by which that is reviewed by a third party.

We are moving away from, and I think that there are some strains in both the mental health community and the provider com-

munity at large, that are moving away from what I would consider to be an outdated, paternalistic notion of how health care is delivered.

People can handle the information if they are given information about what is actually in their medical record. If, as we have heard from so many providers, people should have control over their own information and that they own their own medical record, we have heard this from a number of providers, then they should not only apply that when it comes to disclosure of that information to others, but they should apply that same theory when it comes to giving people access to their very own records.

Mr. HORN. Mr. Bay, any other thoughts, from the pharmacist's standpoint?

Mr. BAY. No. I think that——

Mr. HORN. The way doctors send prescriptions in, nobody will be able to read their records anyhow. [Laughter.]

Mr. BAY. Well, we are used to their idiosyncracies. No, I think that the concern, certainly, that we have is certainly the confidentiality of the patient information and health information.

Certainly, we feel that the process should really be to expedite care through good, consistent communication certainly adhering to the standards of the Pharmacy Practice Act in the States. Through that working with the physicians and the patient, I think that we can really expedite and give the fast medical care that our patients deserve, and also I think ultimately lower health care costs.

Ms. GOLDMAN. Mr. Chairman, if I can just add?

Mr. HORN. Sure.

Ms. GOLDMAN. To understand why we are pushing so hard for people to be able to have access to their own records. It is a romantic notion that providers are still the guardians of patients' medical records. That is certainly outdated in this world. Many hundreds and even thousands of people are the guardians of people's medical records at this point.

If there is something that is wrong, if there is something that is damaging in that record, it is going to be all over the country in a variety of payers' hands and researchers' hands and, you know, information processors. It can be used to deny someone employment or insurance. It can get into the wrong hands.

I think it is just critical that people be able to know what is in their record, so that they can try to pull back some of that control, and at least make sure the information is accurate.

Dr. HOGE. Mr. Chairman, can I just respond to that?

Mr. HORN. Sure. Please.

Dr. HOGE. I think I agree in some settings that the relationships between doctors and patients is not as strong as it was a generation ago. I think I take great exception to the assertion that it is an outdated notion that the physician is the guardian of the record.

I can tell you as a fact that psychiatrists who, of course, have very strong, very deep relationships with the patients very much act as the guardians of the records. I know many primary care physicians who do the same. Probably, it is less, though, of specialty—surgeons, and so on.

I think it is important to note that while Ms. Goldman represents a strong consumerist, and I think a welcome consumerist,

viewpoint, that physicians are in a position to have a greater understanding of the health care system, that physicians are repeat players in disclosure processes that patients often come and disclose information sometimes for the first time in their lives to employers and other people.

Without physicians there to guide them and counsel them and tell them, "You know, maybe you should not give that information out to your employer. Maybe the fact that—you know, of course they want to know something about why you were in the psychiatric hospital before you can go back to teaching school. You do not have to tell them all of the details about your psychotic break. You can perhaps release more limited amounts of information."

I think it is simply unbelievable that individuals can be expected to acquire and have the same level of sophistication and understanding of the potential consequences, particularly the potential adverse consequences, of overly broad disclosures.

I think that is, again, particularly where the APA is concerned about this notion that information can be disclosed and accessed from multiple sources. We are very concerned about that. We continue to believe that physicians, psychiatrists, health care providers should be the point of access for anyone outside the health care system, whether it be patient or employer or whomever.

Mr. HORN. Well, we thank you for those views.

Dr. Bay, with all the telemedicine advances, pathologists and radiologists seem to be in the forefront in terms of providing medical treatment. Pharmacists seem to be in the technological forefront in terms of providing medical services, as they have the most paper-free office environment.

I would like to know how provisions of the proposed legislation impede the delivery of services in pharmacies such as Savon or any other one?

Mr. BAY. I think, you know, and I am probably repeating myself, I think that what we want to do is really take the patient, the physician, and the pharmacist, have a direct exchange of information, and through that consent really allow us to deliver and we are really looking in different areas today than we have in the past, getting more involved in cooperate disease management with the physicians, compliance programs that ultimately impact the better outcome of the hypertensive or the asthmatic.

I think to do that and to be encumbered with possible authorizations for every communication outside of American Drug Stores, as we look to deal with the patient and to help the patient, I think that that is going to result in less of an outcome than we are hoping for.

Mr. HORN. Well, that is helpful.

My next question is for the consumer advocates here. The Justice Department has apparently expressed concern that a provision in this legislation could impede the ability of law enforcement officials to effectively do their jobs in certain instances. Do you have any comments on this? What are the opinions of your organizations?

Ms. Goldman, do you want to start?

Ms. GOLDMAN. Well, I'm aware of the concerns that have been raised by the Justice Department about the law enforcement provisions. I would just hope that law enforcement officials would not

see a warrant requirement which is part of our constitutional protections as an impediment to their doing their job. If anything, I think it bolsters and supports their ability to do their job.

They have to gather sufficient information about suspects and criminal activities before they can get access to information. It is something which is not only built into our Constitution, but it is part of the statutory framework for all of our privacy laws currently on the books.

As I said earlier, from the Video Privacy Protection Act, passed in the wake of the disclosure of Judge Borke's video rental list, to the Right to Financial Privacy Act and the Cable Subscriber Act and a host of other privacy laws on the books.

When Congress takes action in this area, it has never neglected to include a fourth amendment warrant requirement. While I recognize that the Justice Department thinks it might be easier to avoid compliance with such a regulation, it is certainly not onerous, and one which they live with every day.

Mr. HORN. How about you, Ms. Frawley?

Ms. FRAWLEY. Absolutely, I would concur with Ms. Goldman's comments. I do not think this is onerous at all and certainly would not want to be in a situation where law enforcement could go on a fishing expedition and walk into a physician's office or walk into a health care facility and ask to see records that they may not be entitled. I think the way the language is crafted is very good.

Mr. HORN. Let me give you another softball question. [Laughter.]

Dr. HOGE. Do you mind?

Mr. HORN. Sure.

Dr. HOGE. Could I offer a response as well?

Mr. HORN. Please.

Dr. HOGE. I agree with the responses given earlier, but I am a little less clear that the provisions that are in here are as protective as maybe the other people here are. I think that there are, if I follow this right, and this is a very complicated section of the bill, it is almost 20 pages long, addressing law enforcement——

Mr. HORN. Well, let me just say we are not going to redraft it here.

Dr. HOGE. Yes, I understand.

Mr. HORN. Please do give me your thoughts and have your general counsel review it with doctors around him to make some sense out of what he has to say.

Dr. HOGE. I will. Can I just interject one more point?

I think it is important to recognize that the provisions related to health oversight agencies who are collecting information essentially for prosecution is another police agency.

When we talk about a warrant requirement, a judicial warrant requirement, I think I am in full agreement with what has been said earlier, but it should apply to oversight agencies, administrative warrants that do not require a showing of probable cause, in my view, are not constitutional and we need more protections, I believe. I will be happy to get you more information.

Mr. HORN. Well, let me give you softball three then, and this would apply to the same team here. There is a section in the proposed bill that addresses the individual's right to correct or amend

portions of their medical records. What is the importance of these provisions, in your judgment?

Ms. FRAWLEY. It is very critical. Oftentimes, individuals since they have not seen their medical records, oftentimes may not be aware of the information that is contained in them, until they find out later that they were denied insurance benefits or it might have had an adverse affect on their employment.

Certainly, it is important that people should be able to see their records; and if information is inaccurate, ask the provider, and that is an important point in our testimony this afternoon, it should be the provider who created and maintained that health information to amend the information.

Basically, the original documentation will always stand, but an amendment can be offered if the provider does not feel that the information is inaccurate, then certainly a supplemental entry can be placed into the record from the patient.

Mr. HORN. Why should the original stand if it is just dead wrong?

Ms. FRAWLEY. The problem that you have is that oftentimes when you are looking at how medical records are created and the number of individuals who have relied on that documentation to make treatment decisions, and since that medical record is the legal and business record of the provider, and certainly in terms of the determinations and the care that has been rendered, you cannot delete that information.

I mean, certainly what can happen is that truly if there is an error, and that does happen in recording, you can indicate that there is an error and what the correction is. Certainly, every day allied health professionals, nurses, physicians, you know, do that in terms of correcting entries.

Certainly, years later if the patient is concerned about what is in their record, you know, the point is that you cannot go back and remove something from a record, but certainly can supplement that information.

Mr. HORN. Well, I realize one could get down to even specifying how you keep a file and what kind of file, but we are trying to give a little freedom here. But for the doctor, say, that dictates what he did with a patient at a certain point in time.

What I am talking about is the clerk in the file operation might have taken the dictation and applied that in the wrong patient, two patients have relatively similar names. I have seen that happen in a number of cases. My point would be if it is just plain wrong and it belonged to another patient, should it not be removed from the file?

Ms. FRAWLEY. Absolutely. The point is that that record has not been entered into the medical record. One of the things is that when a physician dictates a report the report is reviewed by the physician and he then has to authenticate it, and then it is entered into the medical record.

It is the process of authentication which is reviewed by the practitioner and then their signing of the report. Then it becomes a part of that legal record. Certainly, every day radiologists, physicians, pathologists, you know, people are dictating reports.

Certainly, having worked as a transcriptionist, there are times that you cannot here, if someone is munching or yawning, what they are saying. So, certainly, I mean, in terms of that process. The legal record that has been created and those entries have been authenticated, you then cannot move that documentation; you can certainly supplement it.

Mr. HORN. OK. Any other comments along that line of that question?

Let me move here to the closing question—you will be glad to hear. I have heard tales of various individuals paying for their medical treatment out of pocket, even though their treatment would have been covered through their medical insurance.

I also know that individuals sometimes instruct their psychiatrist not to take notes on conversations and some even go so far as to lie about symptoms. These drastic measures arise from a fear that the confidentiality of their sensitive medical information may be jeopardized.

What needs to be done to address this concern, and does our proposed legislation deal adequately with this and address this concern, or is it an impossible thing to address?

Dr. HOGE. I assume that question is addressed to me?

Mr. HORN. It is directed to you and then to your fellow actors, over here, for the Academy Award, Ms. Goldman and Ms. Frawley who might well have a comment on what you have to say.

Dr. HOGE. Let me take a whack at it.

Mr. HORN. OK.

Dr. HOGE. I think that the bill probably does not address sufficiently the concerns about confidentiality. It is very, very common, the scenario that you described is very, very common for patients not to use their medical insurance because they are concerned that the information will go back through the insurer, sometimes to the employer or to other people or will be kept in a data file in a computerized data bank, which of course many of the insurance claims are kept in insurance data banks.

As we move to paperless offices, there will be more information kept in computerized data banks. Of course, even currently many of the insurance claims are being processed in-house by large corporations. The concerns about confidentiality, I can assure you, I can verify for you are great.

I think that there needs to be more protection, more written into the law about what was referred to earlier as secondary disclosures. Really, what I think we are talking about is regulation of the uses of information.

We currently have the information where an insurance company can learn about an illness in a child and use that information which they have acquired for billing to turn down the life insurance for the father of the child because they might have the same illness, because there is a genetic relationship.

Mr. HORN. Sure.

Dr. HOGE. You know, again, I am young to be so conservative, I suppose, but I harken back to the good old days of medicine when patients came to doctors and they disclosed information—and they continue to do this I believe—private information, because they expect the information to be used by the doctor to help them.

We now have a system where nonphysicians, other entities, get the information and they use it against the patient. They use it against the interest of the patient. This is the problem that has grown over the last 10 or 15 years, as a result of the evolution we have already talked about.

We need to have legislation that prohibits third parties from using the information in ways which they were not originally intended to be used. I do not think the bill does address that concern. That is really the gist of my oral testimony. More attention needs to be addressed in that area.

Mr. HORN. Well, that is an excellent suggestion. I sympathize very much with what you are talking about.

Ms. FRAWLEY. Mr. Chairman, I would like to also make a comment. Unfortunately, right now the only way you can have a reasonable expectation of privacy in our health care delivery system is to use a pseudonym and pay cash.

Mr. HORN. Right.

Ms. FRAWLEY. Unfortunately, we have just too many oversight functions. The problem we have is that while the bill does a very good job of addressing prohibitions against redisclosure and use of the information without notice to the patient and authorization, the problem we still have is that every day in this country insurance companies will receive a claim for health care services and will hold up payment of that claim to a provider, you know, whether it is physician, psychiatrist, hospital, nursing home until a photocopy of the medical record is received within their offices.

I mean, there is a whole new industry that is out there xeroxing medical records, so they can go off to insurers. We certainly have concerns about employers who are administering benefits programs in terms of the fact that they are not building a "Chinese wall" and protecting that information.

Unfortunately, we have so many issues in terms of financing of our health care delivery system, that while this bill is a good start, it does not address some of those issues.

Mr. HORN. How would you address some of them, and what are some of the subsections under that section?

Ms. FRAWLEY. I think the problem that we have is that we really have to go back to the fact that to pay a claim for health care services, we need minimal information. I mean, the physician's diagnosis and some limited information which is coded either in IC9CM or CPT code, should be sufficient.

The fact that people feel they have to go back to the provider and ask for much more detail and copies of medical records or the fact that insurance companies require a blanket authorization up front giving them total access to any medical records where I might only be asking for reimbursement for an ER visit and they want my medical records for the last 20 years. We really have to put limits on the use of information.

Unfortunately, we have the floodgates where more and more information is going out and patients are unaware of that, so the consumer education is critical, but also trying to partner with the insurance industry and with others to try to develop some sensible ground rules in terms of what information do they really need, and really start to build some protections for patients.

Mr. HORN. Any comments, Ms. Goldman?

Ms. GOLDMAN. Well, I think that what we have heard—and again while I welcome this hearing very much, it is certainly not the first hearing that Congress has held on this—and what we tend to hear from certain segments is that whichever bill is on the table, is too burdensome.

Mr. Bay raises some very good comments about how the bill as currently drafted, the discussion draft, could be too burdensome. The intention is not to burden those that are involved in the critical care and treatment of patients. In fact, it is to try not to put in duplicate 10-point authorization forms.

The intention of the discussion draft is to try to put in some protection at the payer and at the provider level that tells people how the information about them could be used, allow them to authorize disclosures clearly to pharmacists and for payment purposes. People, for the most part, will welcome that and will want to be part of that process. Then, to allow that authorization to stand, unless people change their mind.

That is the intention behind the way that the legislation has been drafted, and we can work on that. You then have on the other side people who say that the bill is too strong, too strong in terms of favoring access and disclosure and it needs to be bolstered and strengthened in certain key privacy ways.

I do not question the sincerity of either of those views. The reality that we have to face is there is no comprehensive Federal protection. We are not operating in an environment where there are rules that we are tinkering with.

There is nothing, except for a few States that have enacted legislation that attempts to be comprehensive; so, people are unprotected. There is an environment in which while providers want to see themselves as guardians of the medical record, yet they have to submit claims so that their patients get reimbursed. That is the reality, even if people pay out of pocket.

In Maryland, there was a law passed recently that requires providers to submit information about health care treatment, even where people have paid in cash. People cannot evade the disclosure of information even when they pay cash. I just think that it is reprehensible and inexcusable.

What I would just hope is that while everyone here says very positive things about the need for legislation, we need to tinker here and tinker there, let us sit down at the table and figure out how to craft a bill that we can live with that will give people some real protections today.

If we need to strengthen it, we will come back and strengthen it. If it is too burdensome, we will come back and we will work on it. It is just critical that we do something, and we have an opportunity to do that this Congress.

Mr. HORN. Let me ask you the final question, Mr. Bay. I have always been curious, because I have heard numerous stories where both nurses and pharmacists have saved the patient from great grief when certain prescriptions are made by doctors who may not have asked the question which doctors do increasingly ask, "What other pharmaceuticals are you taking?"

What does the pharmaceutical industry do to protect itself during the issuance of prescription—is there any protection under State laws, which mostly regulates the pharmacies? Are there any requirements now that questions like, "what else are you taking," be asked. A doctor may have, just, inadvertently forgotten to ask that question?

Mr. BAY. Yes; exactly. You spoke to technology. Certainly, everything we do with technology looks to support exactly that potential problem. OPRA certainly started the process, and States, too, have come through with the all-important regulations, that really dictate and mandate the interfacing of the pharmacist and the patient to ask specific questions.

We really need to get the patient history, drug allergies, OTC medications that are being taken, so the patient profile on our computer system is complete our system's and the technology of today's flag for, and supports the pharmacist in flagging for overlaps, interactions, any potential problem. Interactions or severity codes raise the flag for us to communicate with the physician to identify alternative medications.

All that technology and all the pharmacists education out there with the regulations that have been enacted certainly are supporting, I think, for the maximum outcome of the patient.

I think that the concern that I have, and certainly Ms. Goldman is exactly right, we do need some form of protection of confidentiality. No question. The concern that we have is that the legislation and the law that is put out there does not sidetrack us to get us to focus on things and technology to support processes that have really no benefit to the patient.

Some of the provisions, as we see it today, really would require us to look at our technology, looking for electronic signature and new software, that has nothing to do with improving patient outcome, but looking to support, really, administrative pertinence.

Mr. HORN. When someone is trying to track down medical records for one reason or another—it might be a lawsuit related to how that patient was treated and the patient is no longer around, the patient died, it might be a law enforcement matter, or whatever—it seems to me, in the days when people are moving between doctors and moving between pharmacists, sometimes based on price and sometimes on convenience and sometimes forgetful of who they went to the first time and lost their prescription, that you have got a tremendous number of pieces of medical record of that patient.

Now, should we just worry about the confidentiality of every record no matter where it is, or is there a need to try to work through? How do you maintain an accurate medical record that has all these helpful things that could be helpful to the patient if they don't know the total picture? The doctor often does not know the total picture. It is memory of the patient, they move 3,000 miles away, the pharmacist decided to go hunting and retire early or whatever.

What can we do about that? Is that just a record that maybe somebody could create a business and say, I will keep all of your medical records and they will only be accessible if you give me permission to release them to a particular doctor.

Mr. BAY. That is a troublesome gap that we are facing right now. As you say, for any number of reasons patients will not go to the same physician and really not make it public to two physicians, or they will very easily go to multiple pharmacies, whether for hours of operation, for convenience, "I just do not have the time to go to my regular pharmacy." That is a challenge that we have not overcome as yet. I am not sure what the answer is, but it is going to be an answer that is hard to come by, I think.

Mr. HORN. Yes.

Ms. FRAWLEY. Mr. Chairman, there is just one thing I want to point out is that there is no Federal record retention guidelines. This is another issue where we are back to, you know, States and also what approach they have taken.

Typically right now, most State statutes might require that a medical record be maintained for 7 years or 10 years. There is a requirement for pharmacy records. In some situations where we are dealing with a minor, we might be required to keep the records until the age of majority.

Just keep in mind, there are very few providers that have medical records going all the ways back. Many places will store their records on microfilm, microfiche, optical disk, CD–ROM. There are a lot of different media now being used to store records.

Conceivably, someone could enter the health care delivery system and a record from an account 15 or 20 years ago may not be available any longer. Again, there is no uniformity, and I just wanted to point that out.

Mr. HORN. Ms. Goldman.

Ms. GOLDMAN. There are some States and some regions that are moving toward what are called community health management information systems or community health information networks, where there has been an effort to essentially create a statewide or regional network of personal health information; that is, essentially a pool of information from providers and plans and pharmacies to be accessed by researchers; public health officials; and at times, employers.

Obviously, there are great public health benefits and other kinds of benefits to be gained by this. They are very, very controversial from a privacy standpoint in that, again, if the privacy and security issues are not dealt with up front, these can be magnets for abuse and for misuses.

There are efforts to achieve these good, laudable health reform goals that have been mentioned here. But again, I think one of the obstacles has been the lack of privacy protection.

Mr. HORN. Well, along that line, as I remember, there is a firm or firms that are selling your whole record that you submit the papers, too, and you can have it in something you carry with you so that it could be scanned immediately if you were in an emergency—in an accident.

Ms. GOLDMAN. In fact, I think a representative of one of those firms testified at the hearing last Congress. I think it was Medic Alert or Med Alert?

Mr. HORN. Right. It is very impressive.

Dr. HOGE. Yes. My comment is not about the private aspect of this, but I want to agree with Ms. Goldman and also to say that

there are other concerns. You mentioned, Mr. Chairman, sort of unavoidable ways in which the medical record might be fragmented. But of course, some patients will go to different providers with the intent of protecting their privacy. That is the intent.

Mr. HORN. Right.

Dr. HOGE. Sometimes people will see a psychiatrist in a different town or a different city because they do not want the hospital in their hometown, which is staffed by their friends and relatives, to know about what is going on. This is true not only of psychiatric records, but I think it is true of other records.

While I think there is a great deal to be said for centralizing records, I think we always need to provide an out for the individual patient who does not want their record to be computerized and to go into one of these large data pools, in spite of the fact that that might in some theoretical way result in the detriment of the quality of the medical care that they get.

Mr. HORN. Yes. I think you are absolutely right.

Well, let me in concluding this hearing say thank you to all of you, and the predecessor witnesses. We would welcome from any group that has concerns in this area in writing some of the thoughts they might have in terms of definitions. This is an open process. Which is why we have these hearings.

We will have a lot of people sitting around the table. We are not going to do this in a dark, back room, and so we would welcome your suggestions line by line. In the old tradition of the markup, that is the way we go, line by line, before we really even get it into our colleagues to look at it.

We want the best expert advice we can find. You all and your predecessors in these hearings and qualified for that, or you would not be here. I appreciate the differences of opinion, and I appreciate the comments and perspective you have brought to this legislation. Thank you very much for coming.

Dr. HOGE. Thank you.

Mr. HORN. With that, this hearing is adjourned. I want to first say, however, thanks to the staff, and J. Russell George, staff director and counsel is back in the room, back against the wall there; then Mark Uncapher, professional staff member, took the first part of the hearing to my left; Council Nedd, professional staff member, took the last part of this hearing; Andrew Richardson, clerk, over there, two from the wall; and Ian Davison, staff assistant, helping out on his internship this summer.

My friends on the Democratic side, Mark Stephenson and David McMillen. Oveda Hancock, our official reporter. Thank you, Oveda. I appreciate it.

With that, we are adjourned.

[Whereupon, at 5:10 p.m., the subcommittee was adjourned.]

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