B. SENATE DEBATE AND VOTES, MAY 30, 1974; PAGES S9310–S9343

Amendment of Freedom of Information Act

The Presiding Officer. Under the previous order, the Senate will now proceed to the consideration of S. 2543, which the clerk will state by title.

The assistant legislative clerk read the bill by title, as follows:

A bill (S. 2543) to amend section 552 of title V, United States Code, commonly known as the Freedom of Information Act.

The Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary with an amendment to strike out all after the enacting clause and insert:

That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is deleted and the following substituted in lieu thereof: "Each agency shall maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall publish, quarterly or more frequently, each index unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost comparable to that charged had the index been published."

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which reasonably describes such records and which is made in accordance with published rules stating the time, place, fees, and procedures to be followed, shall make the records promptly available to any person.".

(2) Section 552(a) of such title 5 is amended by redesignating paragraph (4) as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, the Director of the Office of Management and Budget shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all agencies. Such fees shall be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of such search and duplication. Documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. But such fees shall ordinarily not be charged whenever—

"(i) the person requesting the records is an indigent individual;

"(ii) such fees would amount, in the aggregate, for a request or series of related requests, to less than $3;

"(iii) the records requested are not found; or

"(iv) the records located are determined by the agency to be exempt from disclosure under subsection (b).

"(B)(i) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of

any agency records improperly withheld from the complainant. In such a case the court shall consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

"(ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within forty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all causes and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the Government's withholding of the records sought had a reasonable basis in law.

"(F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) Upon the written certification by the head of an agency setting forth in detail his personal findings that a regulation of the kind specified in this paragraph

is necessitated by such factors as the volume of requests, the volume of records involved, and the dispersion and transfer of such records, and with the approval in writing of the Attorney General, the time limit prescribed in clause (i) for initial determinations may by regulation be extended with respect to specified types of records of specified components of such agency so as not to exceed thirty working days. Any such certification shall be effective only for periods of fifteen months following publication thereof in the Federal Register.

"(C) In unusual circumstances as specified in this subparagraph, the time limits prescribed pursuant to subparagraph (A), but not those prescribed pursuant to subparagraph (B), may be extended by written notice to the requester setting forth the reasons for such extension and the data on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than 10 days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to assign professional or managerial personnel with sufficient experience to assist in efforts to locate records that have been requested in categorical terms, or with sufficient competence and discretion to aid in determining by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions;

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein, in order to resolve novel and difficult questions of law or policy; and

"(iv) the death, resignation, illness, or unavailability due to exceptional circumstances that the agency could not reasonably foresee and control, of key personnel whose assistance is required in processing the request and who would ordinarily be readily available for such duties.

"(D) Whenever practicable, requests and appeals shall be processed more rapidly than required by the time periods specified under (i) and (ii) of subparagraph (A) and paragraphs (B) and (C). Upon receipt of a request for specially expedited processing accompanied by a substantial showing of a public interest in a priority determination of the request, including but not limited, to requests made for use of any person engaged in the collection and dissemination of news, an agency may by regulation or otherwise provide for special procedures or the waiver of regular procedures.

"(E) An agency may by regulation transfer part of the number of days of the time limit prescribed in (A)(ii) to the time limit prescribed in (A)(i). In the event of such a transfer, the provisions of paragraph (C) shall apply to the time limits prescribed under such clauses as modified by such transfer. Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provision of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of 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.".

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1) specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact covered by such order or statute;".

(b) Section 552(b) of title 5, United States Code, is amended by adding at the end the following "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on the Judiciary of the Senate and the Committee on Government Operations of the House of Representatives, which shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) a copy of every rule made by such agency regarding this section;

"(5) the total amount of fees collected by the agency for making records available under this section;

"(6) a copy of every certification promulgated by such agency under subsection (a)(6)(B) of this section; and

"(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(3)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' means any agency defined in section 551(1) of this title, and in addition includes the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds."

SEC. 4. There is hereby authorized to be appropriated such sums as may be necessary to assist in carrying out the purposes of this Act and of section 552 of title 5, United States Code.

SEC. 5. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

Mr. KENNEDY. Mr. President, I ask unanimous consent that Mr. Thomas Susman and Mrs. Hank Phillippi, of the staff of the Subcommittee on Administrative Practice and Procedure, Mr. Al Friendly and Mr. Al From, of the staff of the Committee on Government Operations, and Mr. Paul Summit and Mr. Dennis Thelen, of the staff of the Committee on the Judiciary, be accorded the privilege of the floor during the consideration of this measure.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I yield myself such time as I may use.

The Supreme Court of the United States observed a few years ago that:

> It is now well established that the Constitution protects the right to receive information and ideas.

Continued the Court,

> This right to receive information and ideas is fundamental for our free society.

An important objective behind the Freedom of Information Act, passed by Congress in 1966, is to give concrete meaning to one aspect of this right to receive information—the right to receive information from the Federal Government. This is no meager right. The processes of Government touch almost every aspect of our lives, every day. From the food we eat to the cars we drive to the air we breathe; Federal

agencies constantly monitor and regulate and control. Our Government is the biggest buyer and the biggest spender in the world. It taxes and subsidizes and enforces. And it generates tons of paperwork as it goes about its business.

The Freedom of Information Act guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information. The protections of the act thus become protections for the public's right to receive information and ideas. And the accomplishments of the act become fuller implementation of the first amendment of the Constitution.

There is another significant purpose behind the Freedom of Information Act, perhaps best stated by Justice Brandeis when he wrote:

> Publicity is justly commendable as a remedy for social and industrial disease. Sunlight is said to be the best disinfectant, and electric light the most effective policeman.

Chief Justice Warren echoed this recently when he said that secrecy "is the incubator for corruption." We have seen too much secrecy in the past few years, and the American people are tired of it. Secret bombing of Cambodia, secret wheat deals, secret campaign contributions, secret domestic intelligence operations, secret cost overruns, secret antitrust settlement negotiations, secret White House spying operations—clearly an open Government is more likely to be a responsive and responsible Government. And the Freedom of Information Act is designed to open our Government.

Finally, the Freedom of Information Act is basic to the maintenance of our democratic form of government. President Johnson said on signing the FOIA that—

> A Democracy works best when the people have all the information that the security of the nation permits.

The people can judge public officials better by knowing what they are doing, rather than only by listening to what they say. But to know what Government officials are doing, the people must have access to their decisions, their orders, their instructions, their deliberations, their meetings. The Freedom of Information Act provides an avenue to public access to the records of Government. Through these records the public can better judge, weigh, analyze, and scrutinize the activities of public officials, making sure at every turn that Government is being operated by, of, and for the people. And that Government is fully accountable to the people.

The Freedom of Information Act contains three basic subsections. The first sets out the affirmative obligation of each Government agency to make information available to the public, with certain information to be published and other information to be made available for public inspection or copying. Remedies are provided for noncompliance: No regulation, policy, or decision can affect any person adversely if it is not published as required, and any person improperly denied information can go to court to require disclosure. The second subsection contains exceptions to the general mandatory rule of disclosure, for matters such as properly classified information, trade secrets, internal advice memoranda, personnel and investigatory files. The third subsection makes clear that the Freedom of Information Act authorizes only withholding "as specifically stated" in the exemptions and that the act "is not authority to withhold information from Congress."

I think that it is important to point out that the act attempts to strike a proper balance between disclosure and nondisclosure, providing protection for information where legitimate justification is present. Congress has circumscribed narrowly the boundaries of justifiable withholding in the act's exemptions. Agencies have no discretion to withhold information that does not fall within one of those exemptions. It is equally clear, however, that agencies have a definite obligation to release information—even where withholding may be authorized by the language of the statute—where the public interest lies in disclosure. Congress certainly did not intend the exemptions of the Freedom of Information Act to be used to prohibit disclosure of information or to justify automatic withholding. This is a frequent misunderstanding, shared by many Government officials who insist on citing the act as forbidding release of requested information in specific cases. In fact, the exceptions to required disclosure are only permissive and mark the outer limits of information that may be withheld.

The Freedom of Information Act grew out of the efforts of a special House subcommittee and the Senate Subcommittee on Administrative Practice and Procedure in the mid-1960's. The Administrative Procedure Act had attempted to open up Government records in 1946, but it failed to provide any remedy for wrongful withholding of information. It required persons seeking information to be "properly and directly concerned," and it allowed administrators to withhold information where secrecy was required "in the public interest" or where it was considered "confidential for good cause found." With support and encouragement by the press, Congress, in 1966, enacted the Freedom of Information Act guaranteeing the public an enforceable right to Government records in the broadest sense.

Shortly after I took over as chairman of the Administrative Practice Subcommittee, we undertook a review of agency practices and court decisions under the Freedom of Information Act. We found that many agencies had not yet brought their regulations and procedures into line with the requirements of the act, but we concluded that additional time would be useful to allow them to come into compliance before looking to legislative proposals to change the still-new law. Many of the areas of the act where language was considered unclear or ambiguous were being interpreted by the courts, and we believed that the development of a body of case law on the act would be a useful predicate to any legislative attempt at clarification.

In 1972 a House subcommittee conducted extensive hearings on the operation of the Freedom of Information Act and concluded that there were major gaps in the law through which agencies were able to justify unnecessary delays, to place unreasonable obstacles in the way of public access, and to obtain undue withholding of information. The final report of the House Government Operations Committee described the failure of the act to realize fully its lofty goals because of agency antagonism to its objectives.

When Congress passed the Freedom of Information Act, it issued a rule of Government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital Defense and State secrets, personal privacy, trade secrets, and the like—were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding.

But most of the Federal bureaucracy already set in its ways never got the message. They forgot they are the servants of the people—the people are not their servants.

Agency officials appeared and actually testified under oath that they had to balance the Government's rights against the people's rights. The Government, however, has no rights. It has only limited power delegated to it from we, the people.

Last year, my Subcommittee on Administrative Practice and Procedure began its efforts to define the loopholes in the Freedom of Information Act and to design legislation to close them. After extensive hearings, I introduced S. 2543, which focused on the procedural obstacles to timely access to Government information. Through subcommittee and full committee consideration, we amended and improved some of the sections of the bill. And on May 8 the Judiciary Committee unanimously ordered the bill reported, as amended.

S. 2543 makes a number of changes in the present Freedom of Information Act. Let me briefly outline all of the changes made by the bill, and then discuss in greater detail what I consider to be some of its most significant provisions.

First. Indexes. Under present law, indexes of agency opinions, policy statements, and staff manuals must be made available to the public. To increase the availability of these indexes, S. 2543 requires their publication unless it would be "unnecessary and impractical." This should especially increase their availability to libraries, which play a vital role in making information widely available to the people.

Second. Identifiable records. Under present law a request must be made for "identifiable records." Since some agencies have used this requirement to evade disclosure of public information, S. 2543 requires only that the request "reasonably describes" the records sought.

Third. Search and copy fees. Each agency presently sets its own schedule of fees without review or supervision. Exaggerated search charges and extravagant charges for legal review time can provide effective obstacles to public access to Government information. S. 2543 requires the Office of Management and Budget to set uniform fees, which will only cover direct costs of search and duplication, eliminating any possibility of padded fees or charges for peripheral services. These fees may be waived or reduced under specific circumstances set out in the bill.

Fourth. Venue. The bill establishes alternate concurrent venue for Freedom of Information cases in the District of Columbia, which has built up a special expertise in such cases.

Fifth. Expedition and appeal. Freedom of Information cases are under present law to be expedited in the trial court. The bill adds a congressional intent that expedition of Freedom of Information cases extends to the appellate level also.

Sixth. In camera and de novo review. Presently de novo review with in camera inspection of documents is allowed in all cases except where withholding is justified as being in the interest of national defense or foreign policy. This exception is dictated by the Supreme Court's interpretation of the Freedom of Information Act in the case of Environmental Protection Agency against Mink. S. 2543 would

reverse Mink and extend full in camera judicial review to all areas, including those involving classified documents. Specific procedures are set out in the bill for courts to follow where classification decisions are reviewed.

Seventh. Attorneys' fees. S. 2543 would allow recovery from the Government of attorneys' fees where the plaintiff in a Freedom of Information action substantially prevails and where recovery would be in the public interest. The bill contains criteria to govern the court's award of these fees.

Eighth. Answer time in court. The Government presently has 60 days to respond to a complaint in the Federal District Court. Private parties have 20 days. The bill would expedite the Government's response time, allowing 40 days for its answer. The court may grant an extension of time, or may shorten the response time, for good cause shown.

Ninth. Sanction for withholding. S. 2543 adds a new government accountability provision whereby if the court in a freedom of information case, after a hearing, finds the withholding to have been without a "reasonable basis in law," the official responsibile can be disciplined or suspended by direction of the courts for up to 60 days. This should eliminate many of the cases where obstinate officials disregard the law in order to minimize embarrassment to the agency.

Tenth. Administrative deadlines. S. 2543 sets deadlines for agency handling of freedom of information requests: 10 days for the initial reply and 20 days on appeal. It sets up a certification procedure for extraordinary cases—where a large magnitude of documents subject to numerous requests are widely disbursed geographically—allowing 30 days for the initial answer time. And it provides that 10 days may be added to either the reply or appeal time if "unusual circumstances," as narrowly defined by the bill, are presented.

Eleventh. Exemption (b)(1). In its only amendment of a substantive exemption in the FOIA, S. 2543 makes clear the duty of a court reviewing withholding of classified material to determine whether a claim based on national defense or foreign policy is in fact justified under statute or executive order. Thus the court will not take an official's word for the propriety of the classification, but will look to the substance of the information to see if it had been properly classified.

Twelfth. Responsible officials. The names and positions of all government officials responsible for denying freedom of information requests are required by S. 2543 to be noted in denials and reported annually to the Congress. This supplements the sanctions section in encouraging personal accountability on the part of government officials who would withhold information.

Thirteenth. Segregable records. S. 2543 adds a new provision to the act stating that if exempt portions of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of "portions" of files or records as well as entire files or records.

Fourteenth. Reporting. S. 2543 requires annual reporting of agency handling of freedom of information requests to Congress. Specific information useful to the oversight functions of Congress in assessing implementation of the bill and the act is required in the report.

Fifteenth. Agency definition. The bill expands the definition of agency under the Freedom of Information Act to include the Postal Service, and Government corporations, such as the National Railroad Passenger Corporation.

Sixteenth. Authorization. S. 2543 contains language authorizing appropriations for such sums as may be necessary to assist in carrying out agency freedom of information activities, although it is expected that funds will be appropriated only for special or supplemental agency activities and not for the routine processing of requests.

Seventeenth. Effective date. S. 2543 will become effective 90 days after enactment, to give the agencies time to adapt their internal procedures to the requirements of the new law.

Mr. President, I would now like to focus on some of the most significant portions of the bill we are considering today and elaborate on the purposes and objectives of the legislation in those areas.

One of the key provisions is the new subsection 552(a)(4)(F) proposed by the bill. Under this subsection if the court determines that the Federal employee or official responsible for wrongfully withholding information from the public has acted without a reasonable basis in law, it may order the employee or official be disciplined or suspended from employment up to 60 days. Specifically, the subsection reads as follows:

> Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

The Freedom of Information Act has been in operation for almost 7 years, but one of its great failures is that it does not hold Federal officials accountable for withholding information required by the act to be made public. The only mechanism for enforcing the mandates of the Freedom of Information Act has been for individuals to go to court for an injunction, on a case-by-case basis, with great cost and delay. This is an expensive and not always an effective approach. The sanction is intended to encourage administrators responsible for carrying out the Freedom of Information Act to make sure that their actions faithfully carry out the terms of that law.

Former Attorney General Richardson observed in our hearings that—

> The problem in affording the public more access to official information is not statutory but administrative.

He indicated that—

> The real need is not to revise the act extensively but to improve compliance.

That is precisely why we included this sanction in S. 2543.

There are three problems to which this new accountability provision addresses itself: where officials refuse to follow clear precedent, forcing a requester to go to court despite the clarity of the disclosure require-

ment in the specific case; where officials deny requests without bothering to inform themselves of the mandates of the law; and where obstinacy provides the obvious basis for the official's refusal to disclose information. Let me provide some examples, both from our hearing record and from the subcommittee's day-to-day involvement with agencies on FOI problems.

Mr. Mal Schechter, a senior editor of Hospital Practice magazine, provided the subcommittee with an egregious example of agency handling of his freedom of information requests. He had for several years been attempting to obtain from the Social Security Administration access to medical survey reports done on nursing homes and other medical facilities receiving Federal payments under medicare. Mr. Schechter finally brought legal action under the Freedom of Information Act, and the district court here in the District of Columbia granted him access to 15 reports on nursing homes in the Washington metropolitan area. The Government did not appeal.

The safe assumption would have been that the next time Mr. Schechter asked for access to a medical survey report, it would be made promptly available to him; this was not the case. For in response to his next request for similar documents, the Social Security Administration refused access and stated that they did not acquiesce in the opinion of the court. Mr. Schechter had to go to court again.

The situation is epidemic in the area of requests for information which the Government considers "confidential" but which is neither commercial nor financial. While the language of the fourth exemption of the Freedom of Information Act may on its face have been slightly ambiguous on this point, numerous courts have unanimously held that for information which does not constitute trade secrets to be withheld under this exemption, the information must be both confidential and commercial, or both confidential and financial. Agency refusals to acquiesce in this clearly correct judicial interpretation have been frequent, but in light of the clarity of the case law on the subject the earlier position on this issue could no longer be considered as having a reasonable basis in law.

One of our witnesses, Mr. Peter Shuck, told of a lawsuit brought to obtain access to Agriculture Department inspection reports on meat processing plants. His suit was successful and the Government did not appeal. About a year later, however, USDA refused to turn over similar reports to another requester, alleging that they were exempt from disclosure under the FOIA. Only after Mr. Shuck's attorney intervened on behalf of this second requester did the USDA release reports.

If the persons responsible for the decisions in the nursing home and meat inspection cases knew that their actions the second time around might have resulted in the imposition of administrative sanctions by a Federal judge, their responses would likely have been different. Access would have been expedited, and resort to the courts unnecessary.

In some circumstances agency officials refuse access to information merely because they do not want it released, and they practically dare the requester to bring them to court. One example from our hearing will suffice to illustrate this problem.

Pursuant to statute the Office of Economic Opportunity must

prepare an annual report. A report for fiscal 1972 was prepared prior to the decision by the administration to dismantle OEO, but the report was not submitted to Congress and was not released. Two individuals requested and were denied access to the report. They filed suit under the Freedom of Information Act.

The required disclosure of this document was so clear that the Justice Department took the position it would not defend OEO in court on the question of access to that report. Where the law was clear, and their lawyers wouldn't even defend them, OEO officials nevertheless persisted withholding the report until the last moment in court. If the responsible officials at OEO knew that their actions could result in the imposition of administrative sanctions, perhaps the citizens requesting the information would not have had to wait so long for a final adjudication of their rights.

In one instance, an agency official refused access to documents because he did not think they ought to be made available to the requester, although during a subsequent review it became clear that this official had not even considered application of the Freedom of Information request. In another, an agency lawyer articulated the basis for refusing access to records thusly: the material requested was written before 1967—so the act would not apply, he surmised—and the requester had not given any reason why he needed the information. These are cases that would likely not have arisen if the sanctions provision had been a part of the law at that time.

The concept of administrative sanctions for the nonperformance of a Federal official's duties is not a new one, nor is the concept of sanctioning a Government official for noncompliance with disclosure laws.

Under title 5 of the Code of Federal Regulations, a Federal employee can be reprimanded or suspended without the benefit of a hearing. That sanction applies to a wide range of derelictions ranging from insubordination to tardiness to failure to follow work regulations. Under the adverse action procedures an employee may be suspended for more than 30 days or removed from his job. Although a hearing is required, it is not held until after an employee is removed. An adverse action is used where it is determined that the employee should be disciplined or removed for the efficiency of the service. And under the conflict of interest regulations an employee who is involved in an activity that may give the appearance of conflict and that may affect public confidence in the Government may be administratively reassigned without a hearing or right of review.

The administrative sanctions section of S. 2543 provides only that if a Federal judge has found the withholding of a document was without reasonable basis in law, the responsible employee—after being given notice and a hearing to present his own defense—may be subject to certain sanctions in the discretion of the judge. The recommendation of the agency involved, as to the appropriate sanction, is to be taken into account. This is certainly more protective of a Government employee's rights than those in existing Civil Service regulations. Here, only officials or employees who have clearly violated the law are subject to sanctions—not too great a penalty for guaranteeing the public's right to an open Government.

Fifteen States have penalties for violation of their freedom of information of public records statutes. Most of these penalties are criminal in nature and charge the violating official with a misdemeanor. A list of the State laws with a brief description of the penalties they provide appears in the committee report on S. 2543 at page 63.

In a recent case in the New York Federal district court, a court ordered imposition of a $5,000 sanction against a party to private litigation who obstructed the discovery of information by the adverse party under the Federal Rules of Civil Procedure. The concept of imposing sanctions to guarantee a right of access to information is thus not a novel one in the law.

The administrative sanctions contained in S. 2543 will create an incentive to Government administrators to withhold information from the public only when the Freedom of Information Act specifically exempts disclosure. Without such a sanction the act will remain a right without an effective remedy.

Now I would like to turn to another important feature of S. 2543, which is reflected in two provisions of the bill. That is the strong statement against commingling of exempt with nonexempt materials in order to prevent disclosure of the latter, and against withholding records where deletions would as well serve the purposes of the exemption under which they are withheld. Section 552(a)(4)(B)(i) provides that the court shall in Freedom of Information Act actions "consider the case de novo, with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

Furthermore, a new sentence is added to section 552(b) stating:

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

Taken together these provisions are intended to require agencies, and courts, to look at the information requested—not the title of the document or a restricted-access stamp or the fact that the record is in a file marked "Confidential" or "Investigation"—to determine whether the information should be released under the Freedom of Information Act.

When I originally introduced S. 2543 in October 1973, the new sentence added to section 552(b) would have read as follows:

> If the deletions of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions.

During subcommittee consideration of the legislation it became clear that it would be desirable to apply this deletion principle to other exemptions. For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Deletion of formulas or statistics or figures may also in many cases entirely fulfill the purpose of the

fourth exemption, designed to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Thus the objectives and purposes of these exemptions, as well as of exemptions (1) and (7), could equally be served by selective deletions while the basic document or record or file could otherwise be made available to the public.

It is upon this background that the new language in the Freedom of Information Act must be read. The Association of the Bar of the City of New York, in its recent report on freedom of information legislation, indicated its conclusion that the deletion or "savings clause" is "in its original form one of the most significant proposed amendments of the FOIA. It seems very important," stated the association, "that this deletion concept be included in any final amendment, and be expanded to cover other reasons for nondisclosure and all exemptions." This is precisely what we had in mind, Mr. President, in amending the original language. As stated in the committee report, page 32:

> The amended language is intended to encompass the scope of this original proposal but to apply the deletion principle to all exemptions.

With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection, to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn against Rosen, requiring the Government to sustain its burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new langauge in S. 2543 should extend this deletion principle to all cases, involving all exemptions. As one court observed, "it is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt." "Suitable deletion may be made," said the court. In another case the court found that the legislative history of the Freedom of Information Act "does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information." And another court said that "identifying details or secret matters can be deleted from a document to render it subject to disclosure."

When the Freedom of Information Act, as amended, refers to disclosure of "any part" of a record or to "any reasonably segregable portion of a record" this is intended to provide for release of the record after deletion of the names of informers or sources of information formulas or financial information, confidential investigatory tech-

niques, and the like, depending on the exemption involved. The legislative history of the act and the case law construing it is adequate to provide the basis for those exemptions, against which this deletion principle can be applied and measured.

I would like to take a few minutes to mention some other areas where S. 2543 would strengthen the public's right to Government information. These involve providing meaningful judicial review of classification decisions, setting firm time deadlines for agency responses to information requests, and eliminating abuses in the charging of fees for handling Freedom of Information Act requests, and allowing recovery of attorneys' fees in successful court actions.

Before January 23, 1973, it was generally thought that the de novo review required in Freedom of Information Act cases by section 552(a)(3) of the act applied to documents withheld under all nine exemptions, and that contested documents under all exemptions could be examined in camera by a court deciding whether withholding was justified. On that day, however, the Supreme Court handed down its decision in Environmental Protection Agency against Mink, in which Congresswoman Patsy Mink was attempting to obtain documents relating to the effect of the proposed Amchitka atomic test. The Supreme Court, upholding nondisclosure, held that where information is claimed to be required by Executive order to be kept secret in the interest of National Defense and Foreign Policy, the Freedom of Information Act does not permit an attack on the merits of the classification decision. Thus where the document requested on its face bears a classification marking, in camera review serves no useful purpose.

S. 2543 addresses both aspects of the *Mink* decision—the reviewability of classification decisions in freedom of information cases and the related matter of in camera inspection of records in the course of such review. Under the amended exemption (b)(1), courts must determine whether documents in issue are "in fact covered" by an Executive order or statute in the interest of national defense or foreign policy. In order to make this factual determination, the courts will have discretion to examine the contested documents in Canada.

The bill sets out some procedures to guide judicial review of the propriety of withholding classified documents. In making its factual determination, the court must first attempt to resolve the matter on the basis of affidavits and other information submitted by the parties. If it does decide to consider the documents in camera, the court may consider further argument by both parties, may take further expert testimony, and may in some cases of a particularly sensitive nature entertain an ex parte showing by the Government. This ex parte showing would represent an exception to the normal judicial procedures. Although it may be requested frequently by the Government in order to gain some advantage over its opponent in court, I do not believe that courts should initiate such a procedure lightly. It should be used only in the most exceptional cases, perhaps where the court determines that involvement of plaintiff's counsel in that aspect of the case would itself pose a threat to national security. If the head of the agency involved, and this means a commission chairman, cabinet official or independent agency administrator, files an affidavit with the court certifying that he has personally reviewed the contested documents and finds them properly

withheld under the standards of the applicable Executive order, then the court must resolve whether, in its view, the determination by the agency head is in fact reasonable or unreasonable.

That affidavit should specify which information be required to be kept secret and the reasons for this conclusion. The Court can then order disclosure of the material if it finds the withholding to be without a reasonable basis under the order of statute.

Clearly, Mr. President, the classification system is noted more for its abuses than for its protection of legitimate Government secrets. In May 1973 the House Government Operations Committee issued a report on Executive classification of information that concluded that there has been "widespread overclassification, abuses in the use of classification stamps, and other serious defects in the operation of the security classification system." The committee found the existing classification order inadequate in many respects and thus projected continuing problems in this area.

When he issued a new Executive order on classification in March 1972, President Nixon acknowledged the widespread abuses raging under the existing classification process. Let me quote from President Nixon's statement on the issue:

> Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

In our subcommittee hearings last spring retired Air Force security analyst William Florence observed that—

> There is abundant proof that the false philosophy of classifying information in the name of national security is the source of most of the secrecy evils in the executive branch.

Mr. Florence then listed what he considered the reasons most commonly used for classifying information, and I would like to read this list for my colleagues:

First, newness of the information;

Second, keep it out of the newspapers;

Third, foreigners might be interested;

Fourth, do not give it away—and you hear the old cliche, do not give it to them on a silver platter;

Fifth, association of separate nonclassified items;

Sixth, reuse of old information without declassification;

Seventh, personal prestige; and

Eighth, habitual practice, including clerical routine.

This sentiment was echoed and the list expanded somewhat by retired Rear Adm. Gene LaRocque, who observed in testimony on the House side that for the vast majority of classified information, the reasons for classification are:

> To keep it from other military services, from civilians in their own service, from civilians in the Defense Department, from the State Department, and of course, from Congress.

It is therefore crucial that there be effective judicial review of executive branch classification decisions if the most far reaching barricade of unjustified secrecy in Government is to be penetrated. S. 2543 is designed to provide just such effective judicial review.

Another problem which this bill addresses itself to, Mr. President, is that of undue delays in agency handling of Freedom of Information requests. Time and again our witnesses from the private sector decried the unreasonable and unnecessary delays that are involved in agency responses to requests for information under the act. Our record abounds with example upon example where a request was followed by periods of long silence, with the first word back from the agency often unresponsive. Earlier this spring my Subcommittee on Administrative Practice and Procedure opened oversight hearings on administration of the Freedom of Information Act at the Internal Revenue Service, and we continued to find delays endemic in that agency's process. Clearly legislative restrictions and guidance are necessary to meet this kind of problem

S. 2543 establishes time deadlines for the administrative handling of Freedom of Information requests. It requires agencies to determine within 10 working days whether to comply with a request, and gives them an additional 20 days to respond to an appeal or any denial of access at the initial stage. Agencies can by regulation shift time from the appeal to the initial reply period, but would have to do this across the board, not selectively as to types of documents.

Where there are specific types of documents in large quantities, subject to numerous requests, spread geographically, then the bill provides for a certification procedure allowing the agency 30 days for the initial response time. This is to be considered an exceptional procedure, and I believe that our use in the Senate report of the Immigration and Naturalization Service example best illustrates the committee's intention with regard to this section. INS processes an average of 90,000 formal requests for records each year, seeking access to 1 or more of the 12 million individual files dispersed and frequently transferred between 57 widely scattered service offices and 10 Federal records centers. Few other agencies will be able to rival this example; but then few other agencies should be allowed to take advantage of this special certification process.

Under S. 2543 an agency may, by notifying the requester, obtain a limited extension for a period not to exceed 10 days of either the initial or appellate time limits—but not both. If the agency has certified a longer period of time for its initial response as to records sought, then no additional time extension may be obtained for this period.

Mr. President, I recognize that the sections of the bill imposing deadlines might be subject to abuse by the agencies because they are not airtight. And history has convinced us that whenever there are loopholes in procedural legislation, there is a tendency for administrators to navigate their agencies through them at each opportunity. Nonetheless, we have tried to tighten substantially the exceptions to our basic time limits. We have tried to define their perimeters in the legislation and in a rather extensive report on this point. And we will be requiring agencies to report their practices to the Congress each year, so that both the House and Senate subcommittees with oversight responsibilities can exercise those responsibilities effectively. Certainly language of these escape clauses was not lightly arrived at. We do not expect them to be lightly invoked.

The press often has special problems with its need to obtain information in a timely manner, and testimony at our hearings reflected

how delays in agency responses to press requests can particularly frustrate the operation of the Freedom of Information Act from its perspective. A new provision is included in the law to promote expedited handling of any requests which is "accompanied by a substantial showing of a public interest in a priority determination of the request." I believe that this will assist the press in its efforts to obtain Government information. It should also assist others who have a special need for expedited handling of their request, such as workers or public interest groups requesting information relating to health and safety. The Federal Energy Office set a good example by providing for the answering of press requests within 24 hours whenever possible.

There are two final matters I would briefly mention before concluding my remarks. First is the provision in the bill relating to user charges that may be imposed by agencies under the Freedom of Information Act. Under it the Office of Management and Budget is to promulgate regulations, subject to notice and comment, specifying a uniform schedule of fees applicable to Freedom of Information Act requests. These are to be limited to "reasonable standard charges for document search and duplication," thereby establishing a ceiling and preventing agencies from imposing burdensome and unreasonable fees as barriers to the disclosure of information which should otherwise be forthcoming.

Agencies could not under the bill charge for professional time used to review requested records or to sanitize documents before release. S. 2543 also allows documents to be furnished without charge or at a reduced rate where the public interest is best served thereby. And this public interest standard, spelled out generally in the legislation, is to be liberally construed.

Second, the bill authorizes discretionary assessment of attorneys' fees and costs against the Government where the complainant substantially prevails. This would eliminate another major obstacle to public access to information, assisting the public in their efforts to obtain judicial enforcement of the mandates of the Freedom of Information Act. S. 2543 sets out four criteria for courts to use in determining whether to award fees in a given case. The amount of fees awarded will, of course, also be influenced by application of these criteria. The bill does not state precisely how costs or fees are to be measured, but courts should look to the prevailing rate on attorneys' fees, for example, rather than solely to whether the specific attorney involved is from Wall Street or a public interest law firm.

The effective date of this legislation will be 90 days, from the date of enactment. I hope that agencies will not plan to wait until the last possible moment before implementing this new legislation, since its basic principles have been proposed and debated for over a year, and a similar measure passed the House over 2 months ago. Provisions such as those relating to in camera inspection and attorneys' fees should be applied to cases already filed before the effective date, since these are not dependent on any prior agency preparation or public notice for implementation.

Mr. President, the Freedom of Information Act has already opened substantial access for the public to Government files and records. Under the act citizens have been able to obtain nursing home reports, meat inspection reports, statements of Justice Department intent on

proposed mergers, AEC reports on nuclear generator safety, civil rights compliance documents, IRS agents' manuals, FBI counter-intelligence program guidelines, FHA appraisal reports, and a large number and variety of other documents reflecting what the Government is doing and how it is doing it.

Even now, however, with the law on the side of the American public, it is still an uphill battle with the Government agencies and their deeply inured penchant for secrecy. There are blatantly unnecessary delays and purposeful frustrations.

There are outrageous fees. There is nitpicking over identification and there is bargaining over exemptions. There are lengthy and costly court fights. And with each new request the entire process often has to be repeated.

This is not the intent of the Freedom of Information Act. This is not what is meant by citizens' access in an open government.

The amendments presented in my bill today will give the people of this country more than just a foot in the agencies' doors—it will provide them with the necessary tools to break down the traditional bureaucratic barriers of secrecy, and to gain access to what is granted them by the Freedom of Information Act.

I urge the Senate's adoption of this important legislation.

Mr. HRUSKA. I yield myself 5 minutes on the bill.

Mr. President, I ask unanimous consent that David Clanton, a member of Senator Griffin's staff, be allowed the privilege of the floor during the debate and vote on the pending measure.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HRUSKA. Mr. President, freedom of information is basic to the democratic process. The right of the citizen to be informed about the actions of his government must remain viable if a government of the people is to exist in practice as well as theory. It is elementary that the people cannot govern themselves if they cannot know the actions of those in whom they trust to carry out the functions of Government.

Yet, it is also elementary that the welfare of our Nation and that of its citizens may require that some information in the possession of the Government be held in the strictest of confidence. For example, the individual's right of privacy requires that personal information collected and held in the files of Government agencies under census reporting laws, income tax reporting laws, criminal investigations, and other activities, be protected from disclosure. Indeed, Senator Ervin and I have introduced bills dealing with criminal justice information systems, the primary purpose of which is to insure that this type of information is not disclosed to the public or to any persons not directly engaged in apprehending and prosecuting an offender. Likewise, information which directly bears on delicate negotiations with foreign nations or on the maintenance of our national defense must not be exposed for all the world to see, to the prejudice of our national position or our national integrity.

The Freedom of Information Act, enacted in 1966, recognized the competing interests in disclosure and confidentiality. It attempted to balance and protect all the interests, yet place emphasis on the fullest responsible disclosure. That act imposed on the executive branch an affirmative obligation to provide access to official information that previously had been long shielded from public view. Under that act,

an agency must comply with a citizen's request for information unless it can show that competing interests, such as the right of privacy or the national defense, require the information to remain confidential.

It is my understanding that, by and large, the balancing of competing interests codified in the Freedom of Information Act has proven successful. However, experience with the administration of the act indicates that some changes are necessary. As the Committee on the Judiciary found in reporting on this bill:

The primary obstacles to the act's faithful implementation by the executive branch have been procedural rather than substantive.

In short, the problem lies not with the substantive provisions of the act but with its administration. The real need is to improve compliance with the disclosure provisions we already have on the books.

To this end, S. 2543, as amended, has been reported favorably by the Committee on the Judiciary. It is designed to remove the obstacles to full and faithful compliance with the act. Its basic purpose is to facilitate more free and expeditious public access to the information the act obligates the Government agencies to disclose.

The PRESIDING OFFICER. The Senator's 5 minutes have expired.

Mr. HRUSKA. I yield myself an additional 5 minutes.

The provisions of the bill have already been discussed. The basic features of the bill that I believe deserve elaboration are the following:

First. The bill expedites public access to Government information by requiring Government agencies to repond to requests for information within specified time periods. It is a difficult task to draw the deadline at the most appropriate point. If too much time is granted, there is the possibility that the requester's access to government records may be delayed. On the other hand, if the time limits are too rigid, Government agencies, in a spirit of caution to insure that personal rights and other interests are served, will be forced to deny requests for information that might with more study be granted. In short, time limits that are too rigid, too inflexible will be counter-productive to the interests in affording citizens the greatest amount of access to information that individual rights and good Government will permit.

I believe that the time limit provision of this bill walks the fine line. It imposes reasonable time limits under which an agency must respond to a request but permits the agency to extend the time for certain compelling reasons. For example, an agency could get an extension of time if the records requested are dispersed and cannot be located within the time limits imposed or if the request is for a voluminous amount of records which must be located and reviewed. In my view, this provision is responsive to the needs of both the Government agencies and the public.

Second. S. 2543 insures the integrity of the classification of a classified document by allowing the courts to review the document in camera, if that procedure becomes necessary. However, the bill does not permit a judge to substitute his view of the sensitivity of the document for that of the agency. A judge can overrule the agency's decision to withhold the document only if he is convinced that there is not any reasonable basis for the classification.

Mr. President, I think that this standard is sensible. Under this bill, the court can review the document to determine whether the

classification is reasonably based on an Executive order or statute. But the Court cannot, and should not, be able to second-guess foreign policy and national defense experts.

Third. The bill insures responsible responses to requests by holding accountable those officials who, without a reasonable basis, deny requests for information. If a court determines that the withholding by the decisionmaker was without a reasonable basis, it may order that corrective or disciplinary action be taken. Before making such a decision, however, the agency involved shall recommend what corrective or disciplinary action it deems appropriate and the court shall accord this recommendation considerable weight in making its ultimate decision.

Finally, I want to refer to a provision that is not in the bill. The basic premise under which S. 2543 was drafted is that the problems arising under the Freedom of Information Act are procedural, not substantive. True to this premise, the committee decided not to amend the substantive provisions of the act. One of the substantive provisions considered but deleted by the committee from the bill as originally introduced was a provision changing the word "files" in exemptions 6 and 7 to the word "records." By and large, the reason for this deletion was that there was no evidence that such a change was necessary.

The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. This provision reflects existing law, but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7.

Mr. President, I am pleased to have worked with the Senator from Massachusetts (Mr. Kennedy) to develop this bill which was supported by every member of the Committee on the Judiciary when it was reported. I believe that this bill will insure that the Freedom of Information Act lives up to its title. While stressing the fullest responsible disclosure, it produces a workable formula that, in my view, balances and protects all interests.

Mr. President, I reserve the remainder of my time.

Mr. KENNEDY. Mr. President, I yield 30 seconds to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. HART. Mr. President, during the consideration of this bill I ask unanimous consent that two members of my staff, Burton Wides and Harrison Wellford be granted access to the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CRANSTON. Mr. President, the Freedom of Information Act has become one of the basic charters of the public's right to know what goes on inside their Government's executive departments and agencies.

As a result of the act, more information has been made available to

the public. Entire battalions of rubberstamp wielding bureaucrats have been stripped of their arbitrary, unreviewable, power to keep documents secret from the public.

Before the act, there were an estimated 53,000 officials authorized to classify documents—23,000 at the Department of Defense, over 5,000 at State and hundreds of others scattered through agencies such as General Services Administration and HEW.

Reductions of classifiers at some agencies have been dramatic, for example, before the act there were 7,745 classifiers at the Department of Commerce, today there are 81. At GSA there were 866, today there are 31. But there is still a small army of classifiers at work—17,364 in 25 agencies and 11 White House offices, according to the staff of the Government Operations Committee.

Arrayed against this phalanx is the Interagency Classification Committee, which has no chairman, one full-time employee, and a secretary.

Fortunately, the Freedom of Information Act contemplated more than a toothless guardian of the public's right to know. The act gave to citizens the right to go into court to compel agency heads to comply with the requirements of the act.

But the courts have applied rules of administrative law which have made bureaucrats the final judge of the public's right to know. The seal of approval to this interpretation of the Freedom of Information Act was given by the Supreme Court in *Environmental Protection Agency* v. *Mink*, 410 U.S. 732 (1973). In that case the Court ruled that the Executive's determination as to what shall be kept secret "must be honored."

Justice Stewart in a separate opinion wrote:

> [Congress] has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret", however, cynical, myopic, or even corrupt that decision might have been. . . .

In my judgment, we must not let 17,364 bureaucrats be the final judges of what we are to know from our Government. The courts have been the traditional defenders of the right to know and association first amendment rights. The courts must not be pushed out of the picture.

S. 2543, amending the Freedom of Information Act, brings the courts back into the process of deciding what information shall be withheld from the public and what information shall be disclosed.

It provides that challenges to Government claims of exemption from disclosure under the act shall be reviewed de novo in court and the burden of sustaining the claim of exemption is on the Government.

It eliminates opportunities for arbitrary delay and obstructionism by agencies attempting to deny information to citizens. Among the abuses the bill corrects are denials of records based on the agency's assertion that the citizen has not specified an "identifiable record" when the agency knows full well exactly which documents the citizen is requesting. Arbitrary and unreasonable fees for copying and searching for documents will become uniform under schedules to be set by the Office of Management and Budget. At present agency copying fees range from 5 cents per page to $1 per page and search fees range from $3 to $7 per hour.

The bill further provides for the award of attorneys fees and costs, if the Government loses in court. This provision will discourage unreasonable litigation by the Government undertaken for no good reason except to make as burdensome as possible the effort of a citizen to acquire information from his Government.

These modifications and improvements of the Freedom of Information Act are vitally necessary. But S. 2543 falls short in at least two respects of what can be done to strengthen the public right to know under the Freedom of Information Act.

First, the provisions of section (b)(4)(B)(ii) should be eliminated from the bill.

The provisions in effect require the court to accept without question the Government's word when it decides to keep information secret from the public. The practical result of this direction to the courts is to make hollow the major achievement of S. 2543 in spelling out the right of a plaintiff to a de novo review in court of the agency's determination not to disclose confidential information.

The second change is to spell out the precise grounds on which the Government can withhold information contained in investigatory files. This change has been recommended by the administrative law section of the American Bar Association.

Our Government and way of life thrive on free and open debate. The free flow of information is vital to sustenance of our freedoms. The control of access to information should not be left solely in the hands of bureaucrats whose function it is to deny information. Citizens must have an opportunity to appeal bureaucratic determination in court. The amendments to the Freedom of Information Act proposed by S. 2543 will guarantee full review of refusals by Government agencies to make public information withheld unreasonably.

Mr. MUSKIE. Mr. President, I call up my amendment No. 1356.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk proceeded to read the amendment.

Mr. MUSKIE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered, and, without objection, the amendment will be printed in the Record.

The amendment, ordered to be printed in the Record, is as follows:

On page 10, line 11, strike out "(i)", and on page 10, beginning with line 24, strike out all through page 11, line 15.

Mr. MUSKIE. Mr. President, I call up this amendment in behalf of 27 of my colleagues. I ask unanimous consent that their names be included as cosponsors. I will not undertake to read them all.

The PRESIDING OFFICER. Without objection, it is so ordered.

The names of the cosponsors, ordered to be printed in the Record, are as follows:

Mr. Ervin, Mr. Javits, Mr. Symington, Mr. Hart, Mr. Chiles, Mr. Humphrey, Mr. McGovern, Mr. Gravel, Mr. Clark, Mr. Tunney, Mr. Metcalf, Mr. Mondale, Mr. Mathias, Mr. Hathaway, Mr. Burdick, Mr. Percy, Mr. Ribicoff, Mr. Montoya, Mr. Weicker, Mr. Cranston, Mr. Nelson, Mr. Baker, Mr. Stevenson, Mr. Hatfield, Mr. Abourezk, Mr. Inouye, and Mr. Biden.

Mr. MUSKIE. Mr. President, I rise with some reluctance today to offer an amendment to the generally excellent Freedom of Information Act amendments offered by my friend and able colleague, the

Senator from Massachusetts. No one should underestimate the diligence and concern with which he and other members of the Committee on the Judiciary have worked to insure that the changes made in the 1967 act will, in fact, further the vital work of making Government records readily available for public scrutiny and making the conduct of the public business a subject for informed public comment.

It is because the bill before us is so very rare and important an opportunity to correct the defects we discovered in the administration of the act during joint hearings I conducted with Senator Kennedy and Senator Ervin last year that I wish to insure that we fully meet our responsibility to make the law a clear expression of congressional intent. In many important procedural areas, S. 2543, as the Judiciary Committee has reported it, will close loopholes through which agencies were evading their duties to the public right to know.

For example, this legislation will enable courts to award costs and attorneys' fees to plaintiffs who successfully contest agency withholding of information. The price of a court suit has too long been a deterrent to legitimate citizen contests of Government secrecy claims. Additionally, the bill will require agencies to be prompt in responding to requests for access to information. It will bar the stalling tactics which too many agencies have used to frustate requests for material until the material loses its timeliness to an issue under public debate. And the bill provides long-overdue assurance that agencies will give full report to the Congress of their policies and actions in handling Freedom of Information Act cases.

With all these significant advances in its favor, there should be little reason to argue with the wisdom of the bill's authors. But in one vital respect, S. 2543 runs counter to the purpose I and 21 cosponsors had in introducing its predecessor, S. 1142, and endangers the momentum this Congress is developing toward bringing the problem of Government secrecy under review and control.

Responding to the Supreme Court ruling of January 22, 1973, in the case of *Environmental Protection Agency et al.* v. *Patsy T. Mink et al.*, I had proposed in S. 1142 that we require Federal judges to review in camera the contents of records the Government wished to withhold on grounds of security classification. I agree that such a requirement would have been an excessive response to the Court's holding that the original act prohibited in camera inspection of classified records, and I am completely at ease with the language in S. 2543 that makes in camera inspection possible at the discretion of the judges whenever any of the nine permissive exemptions are asserted. What I cannot accept and what I move today to strike in the subsequent language which would force judges to conduct the proceedings of in their chambers in such a way that the presumption of validity for a classification marking would be overwhelming.

Under the present terms of S. 2543, the Court is permitted to make a determination in camera to resolve the question of whether or not the information was properly classified under the criteria established by the appropriate Executive order or statute. However, if an affidavit is on record filed by the head of the agency controlling the information certifying that the head of the agency in fact examined the information and determined that it was properly classified, the judge must sustain the withholding unless he "finds the withholding is without a reasonable basis under such criteria."

If this provision is allowed to stand, it will make the independent judicial evaluation meaningless. This provision would, in fact, shift the burden of proof away from the Government and go against the express language in section (a) of the Freedom of Information Act, which states that in court review "the burden of proof shall be on the Government to sustain its action." Under the amendment I propose, the court could still, if it wishes, make note of an affidavit submitted by the head of an agency, just as the court could request or accept any data, explanatory information or assistance it deems relevant when making its determination. However, to give express statutory authority to such an affidavit goes far to reduce the judicial role to that of a mere concurrence in Executive decisionmaking.

The express reason for amending the section of the act dealing with review of classified information grows, as I indicated, from concern with the Supreme Court ruling in the Mink case last year. In that case 32 Members of Congress, bringing suit as private citizens, sought access to information dealing with the atomic test on Amchitka Island in Alaska. The U.S. Court of Appeals directed the Federal district judge to review the documents in camera to determine which, if any, should be released. This seemed an appropriate step since the act does provide for court determination on a de novo basis of the validity of any executive branch withholdings.

Unfortunately, the Supreme Court reached a decision in that case which I regard as somewhat tortuous. The Court held that in camera review of material classified for national defense or foreign policy reasons not permitted by the act. The basis of this decision was exception No. 1, which permits withholding of matters authorized by Executive order to be kept secret in the interests of national defense or foreign policy.

The Supreme Court decided that once the Executive had shown that documents were so classified, the judiciary could not intrude. Thus, the mere rubberstamping of a document as "secret" could forever immunize it from disclosure. All the Court could determine was whether it was so stamped.

The abuses inherent in such a system of unrestrained secrecy ae obvious. As the system has operated, there is no specific Executive order for each classified document. Instead, the President issued one single Executive order establishing the entire classification system, and all of the millions of documents stamped "secret" under this authorization over succeeding years are now forbidden to even the most superficial judicial scrutiny. One of the 17,364 authorized classifiers in the Government could stamp the Manhattan telephone directory "top secret" and no court could order the marking changed. Under the Supreme Court edict, the Executive need only dispatch an affidavit certifying that the directory was classified pursuant to the Executive order, and no action could be taken.

Obviously, something must be done to correct this strained court interpretation. It need not be a drastic step. Actually, it was the original intention of Congress in adopting the Freedom of Information Act to increase the disclosure of information. Congress authorized de novo probes by the judiciary as a check on arbitrary withholding actions by the Executive. Typically, the de novo process involves in camera inspections, These have regularly been carried out by lower

courts in the case of materials withheld under other exemptions in the act. They can be barred under exemption No. 1, only through a misguided reading of the act and by ignoring the wrongful consequences.

But in correcting this fault, to permit in camera review of documents withheld under any of the exemptions, S. 2543 would simultaneously erect such restrictions around the conduct of the review when classified material was at issue that the permission could probably never be fully utilized.

By telling judges so specifically how to manage their inquiry into the propriety of a classification marking, we show a strange contempt for their ability to devise procedures on their own to help them reach a just decision. Moreover, by giving classified material a status unlike that of any other claimed Government secret, we foster the outworn myth that only those in possession of military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge.

It should not have required the deceptions practiced on the American public under the banner of national secrecy in the course of the Vietnam war or since to prove to us that Government classifiers must be subject to some impartial review. If courts cannot have full latitude to conduct that review, no one can. And if we constrict the manner in which courts may perform this vital review function, we make the classifiers privileged officials, almost immune from the accountability we insist on from their colleagues.

I object to the idea that anything but full de novo review will give us the assurance that classification—like other aspects of claimed secrecy—has been brought under check. I cannot accept an undefined reasonableness standard as the only basis on which courts may overrule an agency head's certification of the propriety of classification. And I cannot understand why we should trust a Federal judge to be able to sort out valid from invalid claims of Executive privilege in the Watergate affair but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of defense or foreign policy.

Therefore, while I am anxious to compliment the chief sponsor of S. 2543 on the fine work that has been done and to praise the Judiciary Committee for its sincere commitment in improving the working of the Freedom of Information Act, I must respectfully move to strike these 17 offensive and unnecessary lines and to make the bill what we all want it to be—a restatement of congressional commitment to an open, democratic society.

I withhold the remainder of my time.

Mr. KENNEDY. Mr. President, at the outset I want to say how much I have enjoyed joining with the distinguished Senator from Maine, as well as the distinguished Senator from North Carolina, during the course of our joint hearings on the Freedom of Information Act and Government secrecy last year. The kind of joint hearings we had provided an additional dimension and insight into our better understanding the opportunities as well as the problems of the Freedom of Information Act.

Many of the amendments that are included in the legislation today were developed out of and during the course of those hearings, and I want to commend the distinguished Senator from Maine for focusing

attention on the particular provision of the legislation that we are considering here this afternoon. I know of his special interest and expertise in this area.

This area was a matter of considerable interest to the members of the committee. As a matter of fact, when I initially introduced the bill last year, it did not include the language which the distinguished Senator from Maine desires to strike. But during the course of the subcommittee and full committee process of markup, this language in issue was added.

I want to state at the outset that I think the amendment of the Senator from Maine is responsible and reasonable and I intend to support it.

I would like to ask the Senator from Maine just a few questions. The clause which will be excluded by the Senator from Maine's amendment deals with the procedures of how classified documents will be considered in camera.

I ask unanimous consent that the whole section to be struck be included at this point in the Record.

There being no objection, the extract was ordered to be printed in the Record, as follows:

(ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

Mr. KENNEDY. I will highlight these particular lines: "a court may review a contested document in camera if it is unable to resolve the matter on the basis of affidavits:" It continues as follows: "In conjunction with its in camera examination, the court may consider further argument."

There was some suggestion that we require courts to entertain ex parte argument from the Government in every case, but we did succeed in making it permissive.

Our language would add a presumption to the agency head's declaration that if such a matter falls within the statute or an Executive order referred to in subsection (b)(1) of this section, the court shall sustain that provision unless, following its in camera examination, it finds the withholding is without a reasonable basis under such criteria.

I want to indicate to the Senator from Maine that although others may read it differently, I do not interpret that language as indicating a very strong presumption. I cannot understand why it concerns the Senator from Maine, although, as I said before, I intend to support the amendment. I do want the legislative history to be clear that I, at least, do not think it presents a very strong presumption in favor of an administrative agency.

But I understand what the Senator is attempting to do. I think it would strengthen the legislation.

I should like to ask the Senator from Maine some specific questions.

His amendment in no way attempts to require an in camera inspection, but I understand it still leaves that as discretionary in each of these cases. Is this right?

Mr. MUSKIE. The Senator is correct.

Mr. KENNEDY. Furthermore, the Senator's amendment allows the court to question the propriety of classification only under the standards set up in a statute or by Executive order. Is that correct?

Mr. MUSKIE. The Senator is correct.

Mr. KENNEDY. I think that is important.

This is an important, useful amendment, but it does not seek to alter the classification standards or procedures presently applicable.

We do add a slight presumption, which the Senator recognizes from reading the language. It concerns him because it is a presumption. As the author of the bill, I do not want to acknowledge a very strong presumption. At least, that is my interpretation.

Does the Senator believe there ought to be any special exemption for the National Security Administration, NSA, or the Department of Defense in this part of the bill itself?

Mr. MUSKIE. As the Senator probably knows, we are holding hearings at this time on proposals to establish classification control systems and new criteria for classifications. Out of those hearings may come something; but the amendment I have offered does not touch that.

Mr. President, will the Senator from Massachusetts yield further to me?

Mr. KENNEDY. I yield.

Mr. MUSKIE. The Senator, I think, has described the sense of my amendment very accurately and precisely. I have no real quarrel with the procedures which my amendment would remove from the statute. The principal quarrel is with the last 3 lines, as the Senator from Massachusetts has correctly pointed out.

The weight of that presumption has to be analyzed in the light of the classification system. As the Senator knows, fully as well as I do, my amendment relates to the reluctance to declassify. All the momentum in the existing classification system is on the side of secrecy and all the incentives are in favor of classification.

All of that experience with the classification system goes back a quarter of a century or more. It seems to me the language in the bill, read in that context, would reinforce the same presumptive effect. The effect would be different with different judges.

I must say that different members of the committee and of the Senate, I think, would give it a different effect if we started from scratch, with a new law that would define the presumptions dealing with classification.

If we were to start from scratch and have a new law with the presumption of law in that way, I think the presumption would be different from that operating with the existing classification system.

So the inevitable momentum that the bill's language gives supports the classifier and the classification in these words:

The court shall sustain such withholding unless it finds such withholding is without a reasonable basis.

I should think that a judge might feel that anyone who has the responsibility at high levels to classify would not classify without a basis that was reasonable to him.

If he is a responsible man, we have to accept his basis, whether or not someone else would agree. He would make an independent judgment. That basis is reasonable.

That does not say that his basis is the same basis as my reason or the basis of someone else's, presumably that of the classifier.

That language must have a purpose, and putting that language into the bill has a purpose. The purpose clearly is to give greater weight to the testimony which the judge receives from the head of the agency than the evidence received from any other source and greater than the weight of his own judgment.

That is how I read that language. I think that in the context of the momentum of the experience which has been generated under the classification system, we ought to be very reluctant and careful in adopting this kind of language.

Mr. BAYH. Mr. President, I ask unanimous consent that Howard Paster of my staff be granted the privilege of the floor during the debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. Will the Senator permit me 1 minute under the bill?

Mr. KENNEDY. Mr. President, I yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I will yield to the Senator from Mississippi shortly. I simply want to say that I find great comfort in the position of the Senator from Maine.

It seems to me that in a free society, certainly in the light of everything that we have seen occur over the past few months and years, we ought to revise the present position which seems to be that there is a right to mark something classified until it is proved not to be in the public interest. In a free society information ought to be regarded as a matter of public interest and public knowledge unless it can be proven that it should be secret.

Mr. MUSKIE. Mr. President, I thank the Senator from Indiana. In proposing this amendment, I am not asking the courts to disregard the expertise of the Pentagon, the CIA, or the State Department.

Rather, I am saying that I would assume and wish that the judges give such expert testimony considerable weight. However, in addition, I would also want the judges to be free to consult such experts in military affairs as the Senator from Mississippi (Mr. Stennis), or experts on international relations, such as the Senator from Arkansas (Mr. Fulbright), or other experts, and give their testimony equal weight. Their expertise should also be given considerable weight.

I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. He has the additional weight that the exclusive judgment is given to him. He has all of that behind him.

Why should he be given a statutory presumption in addition if he cannot make his case on its merits. He is in a better position to do that than anyone else.

Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.

We ought not to classify information by presumptions, but only on the basis of merit. And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it

and not find it possible to get sustained only through the support of a statutory presumption.

Mr. HRUSKA. Mr. President, I yield 5 minutes in opposition to the amendment to the Senator from Mississippi.

Mr. STENNIS. Mr. President, I certainly thank the Senator from Nebraska.

I have just gone into this matter within the last hour, Mr. President, but I am greatly concerned with the Senator's amendment, the amendment of the Senator from Maine, and that is not discounting his very fine work on the subject.

I think the bill itself, as worked out by the committee, has struck a fair balance that meets the requirements of law and, at the same time, gives a reasonable amount of protection.

The Senator from Maine raised a point of why give a little more weight here to the head of an agency with reference to these matters. It is for the very reason that we have placed that person in charge of that agency and given him all responsibility and power that goes with that entire office. He is the only one who is permitted to file such an affidavit here, as I understand.

I want to focus now primarily on the CIA. I start with the proposition that we have to have a CIA in world affairs; we just must have one, and time has proven its value.

So in the matter of certain information being classified, the average judge—and with all due deference to them personally—and I had the honor at one time of being a judge of a trial court myself—is just short of knowledge and information on a lot of different subject matters, just as a Senator is on a great deal of subject matters that come before him.

So I imagine that the average judge would want to hear and would want to give consideration to the head of this agency and, in matters of great concern, would really have no objection to this amendment. It is a kind of warning to the judge. The head of the agency is the only person who can file an affidavit with a court within a vast worldwide operation such as the CIA. It has to be the head of the agency. If he files an affidavit, if he takes a position on the classification of a document, that is certainly not just another piece of paper.

That is something with the man's honor and official responsibility tied with it. This provision here is one where the judge is still the master of the situation; he is still running his own court, as we use that term. He is still free to reach a conclusion of his own. But this is a mild guideline as the Senator from Massachusetts suggests. It is not a violent presumption. It is not a wall built around this head of agency and his testimony. It is a mild presumption in favor of his testimony. The judge can still weigh it all, and unless there is found a reason that satisfies the judge—and you have got to satisfy this judge—he is not going to stop and back off because it might have satisfied the head of the agency. The judge has all of this other testimony before him, and he is going to have to be convinced himself in view of all other testimony or he is going to rule in favor of reviewing the classified documents now.

I tell you this is a serious matter, Members of the Senate. I do not lean toward trying to protect everything. I want matters to be classified the same as the rest of you do. But I have been at this thing long

enough and on enough subject matters to know that we are flirting here with things that can be deadly and dangerous to our welfare, our national welfare, and we ought not to just throw the gates wide open and say, "All this is to be testimony along with all the other testimony," some of which is usually from biased sources, sources of interest, and not give any consideration here any more than just ordinary consideration to the official certification under oath of the head of the agency.

So I have to rest this thing with the Senate. The committee has worked on it and has come up with something that, I take it, is practical to live with and, at the same time largely gives to the complainants what they might wish in this case.

So until we just strike down this matter that the committee has worked so hard on and has balanced off, let us take a second thought, and I believe we will——

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. STENNIS. I thought he had yielded to me and I will then finish. I thank the Senator. I have not made any remarks here yet about the Department of Defense.

There are matters, and there are many of them, that are of equal importance as those of the CIA. When I leave this floor I am going down here now for a hearing with respect to a gentleman who is nominated to be the Chief of Naval Operations, the highest ranking officer in the Navy. Next week we are going to have a hearing for the Chairman of the Joint Chiefs, the highest ranking officer, military officer, in the whole Government. In addition to that we have the civilian officers over there, men of great esteem, of great competence.

These caliber men do not carelessly file affidavits, that is my point, and committee proposal would put their honor and their official conduct at stake and at issue. Those things are not carelessly done.

So instead of just brushing them aside here in a moment, let us stay or remain with the law of reason as this committee has worked it out.

I thank the Senator again for yielding to me.

Mr. MUSKIE. Mr. President, just a minute or two of response.

May I say to the distinguished Senator from Mississippi that I hardly regard my amendment as throwing the doors wide open to irresponsible disclosure of Government secrets. But on the question as to whether or not the weight of the bureaucracy of Government is on the side of secrecy or openness, let me give you a few statistics. At the CIA there are only five full-time secrecy reviewers for 1,878 authorized classifiers.

In the third quarter of 1973 in the CIA, 1,350 documents were classified top secret, and that has climbed until, during the first quarter of this year, the number has risen to 3,115. So the enormous weight of the bureaucracy is on the side of secrecy. We have all that here, and now we want to add to that weight, a presumption. Arrayed on the other side is a district court judge who treats this issue as a part-time responsibility, who does not have this background, and he is asked to give that weight, that bureaucratic weight, a presumption over anything else he hears, over any other testimony he hears. That is what we are trying to overcome. I do not regard that as throwing the door wide open.

I am happy to yield to the Senator from New York.

Mr. JAVITS. Mr. President, I have joined Senator Muskie and his other colleagues in his amendment for the following basic reasons:

I believe that, one, there is no question about the fact that the whole movement of Government, especially in view of Government's experience in Vietnam, Watergate, and many other directions, is toward more openness, so that the bias, in my judgment, in the Senate, should be toward more openness rather than being toward more closed.

Second, we have finally come abreast of the fact of life that it is not providence on Mount Sinai that stamps a document secret or top secret, but a lot of boys and girls just like us who have all their own hangups and who decide in individual cases what the document should be classified as, and very serious consequences flow to individuals as a result of that classification, very serious consequences in the denial of the basic information upon which the judge releases it to the public. So the bias ought to be for openness not for closeness.

Now, one would say this is a close question normally because of this tension as between the right of the public to know and the necessity of Government in given cases to have secrecy. But the basic question has been decided by the committee, as by us, who are the movers of the amendment, that is, that a judge in camera should have the right to inspect this material. Having done that, and that is the basic question, why put a ball and chain on the ankle of the deciding authority? I cannot see that the balance of wisdom in government should move in that direction, having decided that the judge may see it. We should give him the freedom to determine whether, under all the circumstances, as the umpire between the right of the public to know and the necessity for secrecy—claimed necessity for secrecy—the umpire should not be restricted by ground rules, except ground rules dealing with basic justice and the balance of responsibility and the balance of the national interest as it relates to a given item of information.

It is for those reasons, Mr. President, because I think, having made that basic decision which now has been made by the sponsors of the bill, by the sponsors of the amendment, and by the sponsors of the House bill, I see no case for further restricting that authority and hamstringing it, once it has been given.

I find special support for that proposition in the fact that the committee itself—incidentally, I personally think they are promising a lot more than they can deliver in terms of decisions of the courts, but the committee itself says that this standard of review does not allow the court to substitute its judgment for that of the agency as under a de novo review, and neither to require the court to refer discretion of the agency even if it finds the determination thereof arbitrary or capricious. I respectfully submit it is promising a lot more than it will deliver, because I doubt that judges will do any differently—except judges who want to do differently—they are human like the classifiers in reading the information in camera—than they would without the provision.

In those circumstances, why put it in? Why not put responsibility on the shoulders of the judges, whom we trust enough to allow to see the material anyhow?

For all these reasons, Mr. President, the motion to strike is eminently warranted, and I hope that the Senate will support it.

Mr. HRUSKA. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER (Mr. Helms). The Senator from Nebraska is recognized for 5 minutes.

Mr. HRUSKA. I rise in opposition to the amendment proposed by the senior Senator from Maine (Mr. Muskie). The Freedom of Information Act was enacted at the expense of a lot of time and effort. It took several years to process to the point of balancing the several interests contained in it and a sincere balanced result has been attained.

There is the right to know on the part of the public, but there is also the right and duty on the part of the Government to survive and to take such steps as may be necessary to preserve the national integrity and security.

This amendment would substantially alter that balance which is presently contained in the Freedom of Information Act. It would endanger the passage and approval of the instant bill into law, in my considered judgment. It should be acted on, if we act on it at all, not in connection with a bill where virtual unanimity was reached in the Judiciary Committee and reported unanimously without any objection to the Senate.

Mr. President, I oppose the amendment offered by the Senator from Maine. I believe that the amendment is unworkable and certainly is unwise.

At the outset, it is imperative to realize what is and what is not at issue here. Is the crux of the issue whether the courts should be able to review classified documents in camera? No. Under both the bill and the amendment, the judge can review the documents in camera. Thus, S. 2543, as unanimously recommended by the Judiciary Committee, establishes a means to question an executive decision to stamp a classification on the document.

What is at stake, Mr. President, is the sole question of whether there should be a special standard to guide the judge's decision in this matter pertaining to the first exemption. S. 2543 provides such a standard.

Under the bill, a judge shall sustain the agency's decision to keep the document in confidence unless he finds the withholding is "without a reasonable basis." We could turn that around, Mr. President, and we could ask whether it would be proper for a judge to go ahead and disclose a document even if he finds that a reasonable basis for declassification exists. That is the other end of the dilemma.

In other words, if the court finds a reasonable basis for the classification, it shall not disclose the document.

The amendment of the senior Senator from Maine would eliminate this "reasonable basis" standard and put nothing in its place. It does not substitute any standard in its place. How is the judge to be guided in his decision whether a document is properly classified? In the absence of a specified standard, I must assume that the standard that obtains is the one that applies to all the other exemptions.

Let me take the sixth exemption as an example. That exemption allows an agency to withhold records if it determines that disclosure would constitute an unwarranted invasion of privacy. In determining

whether the invasion is unwarranted, the court attempts to ascertain the extent of the invasion and then balances that against the requester's and the public's need for that information. The burden of proving that the extent of the invasion outweighs the countervailing interests is on the Government.

How would this standard then apply with respect to exemption 1—the exemption that allows the Government to maintain classified documents in confidence. It would allow the judge to balance what he perceives to be the public interest in disclosing the information against Government's, which is to say the people's, judgment that disclosure will jeopardize our foreign relations and national defense. Stated quite simply, the amendment before us purports to allow a judge to release a classified document if he believes that the document should be in the public domain even if there exists a reasonable basis for the classification.

I realize that standards of proof are difficult concepts to understand and apply even for the lawyer. So, let me pose an example. Suppose that the Freedom of Information Act, together with this amendment, was on the books in the 1940's. And further suppose that someone wrote the Government requesting information about the Manhattan project. Now, under this amendment, a judge would be able to examine the project's documents in camera and decide for himself whether the classification was proper. He would realize that the disclosure of documents could jeopardize national defense but, on the other hand, he could also reason that the public should have some information so that it would know how much all this research was costing and what its objectives were. The judge could go on to reason that the public should be informed of the cataclysmic damage that could be done by an atomic weapon upon delivery so that the public could make a moral judgment as to whether such a weapon should ever be used. Balancing these concerns, as the Muskie amendment would call for, the judge could find the public interest in disclosure to outweigh the national defense implications.

Mr. President, such a standard of proof is workable for the other exemptions. If a judge is wrong in a case involving exemption 6—the privacy exemption—the harm is confined. Only one person is injured. But if a judge is wrong in a case involving the first exemption, the damage is not confined. Aspects of our national defense or foreign relations could be compromised. Put in jeopardy is not just one person but a nation and perhaps its allies.

Mr. President, what then is the crux of the issue? Is it a question whether the judge can review the classified documents in camera? No. Under both the bill and the amendment the judge can review the document in camera. Instead, the sole question is whether there should be a standard to guide the judge's decision in this matter.

By eliminating any standard to guide the judge's decision in this area, the proposed amendment would put the courts in the position of making political judgments in the fields of foreign affairs and national defense. Yet the courts have little, if any, experience in these fields. Indeed the courts themselves have declared that they do not have the capacity or expertise to make these kinds of judgments.

In *Epstein* v. *Resor*, 421 F. 2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), the Court of Appeals, for the Ninth Circuit

stated that the judiciary has neither the—and I quote—"aptitude, facilities, nor responsibility" to make political judgments as to what is desirable in the interest of national defense and foreign policy. The Supreme Court took the same view in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111 (1948).

A "Developments in the Law Note on National Security" by the Harvard Law Review reaches the same conclusion. In discussing the role of the courts in reviewing classification decisions, it states that—

> There are limits to the scope of review that the courts are competent to exercise.

And concludes that—

> A court would have difficulty determining when the public interest in disclosure was sufficient to require the Government to divulge information notwithstanding a substantial national security interest in secrecy. 85 Harvard Law Review 1130, 1225–26 (1972).

There is also another reason why the judges should not be making political judgments on foreign policy and national defense. In order to convince a court that national defense interests outweigh any interests in public disclosure, the Government agencies may have to disclose more sensitive information to show how sensitive the documents requested really are. For example, the fact that information is sensitive may not appear from the face of the document. The agency may then be required to divulge more information to show that the document is relevant to secret ongoing negotiations with a foreign nation. Thus the agency may be put in the curious dilemma that it must divulge more sensitive information to protect the information requested.

Mr. President, I believe we all recognize that there have been some abuses in the classification system. But we should also recognize that new classification procedures have recently been promulgated in Executive Order 11652 to correct these abuses. In a progress report just issued by the Interagency Classification Review Committee, the body created to monitor the classification system, the following progress was documented:

First. The total number of authorized classifiers within all departments has been reduced by 73 percent since the order took effect;

Second. The National Archives and Records Service has declassified over 50 million pages of records since 1972;

Third. The Department of Defense alone achieved a 25-percent reduction in its "Top Secret" inventory during 1973;

Fourth. The majority of requests, 63 percent, for the declassification of documents has been granted either in full or in part.

This last point deserves some elaboration. Under the Executive order, a person may request review of classified documents in order to obtain access to the records. If the documents are over a certain age, the agency must review the documents. This is usually a two-step process: the operating division first reviews the document to see if it is properly classified. If it determines the classification is appropriate, the requester may then appeal to the review board in the agency. If he is not successful there, he may appeal outside the agency, to the Interagency Classification Review Committee. He thus has three opportunities to obtain the documents declassified before he files suit under the Freedom of Information Act.

Mr. President, in my own view, a decision by all three of these bodies that the classification is proper should put the matter to rest. Nevertheless, under S. 2543, we will also permit the courts to review the documents in camera to judge whether the classification is proper. Is it too much to ask that a standard be imposed to guide the court's decision so that a document will not be divulged to all the world if there is a reasonable basis for the classification? I think not.

Mr. President, the question whether a document is properly classified is a political judgment. This judgment must take cognizance of a number of factors, such as negotiations with other countries, the timeliness of the moment, the disclosure of other information. Who is in a better position to make this judgment—the Secretary of State or a district judge? Should we permit a judge to balance what he perceives to be the interests of the public in disclosure against the interests of the public in maintaining the document in confidence? I say, most emphatically, no.

I believe the point must be stressed that this standard does not equip the courts with a mere rubber stamp. The courts are granted the authority to review the documents in camera. And the courts can overturn a classification decision in a case involving a request for the classified documents upon finding that there is no reasonable basis upon which the classification decision can be predicated.

But if there is a reasonable basis for the classification, a judge would not and should not be able to divulge the document. It is as simple at that.

Mr. President, Senator Kennedy, the author of this bill, has worked with me and other members of the Senate Judiciary Committee in developing a bill that recognizes and balances all of the interests. The bill was reported by the committee without a dissent. I fear that this amendment will thwart the bipartisan and cooperative efforts of the committee. But more than that, it is unworkable and extremely unwise.

If my colleagues believe that a judge should not be granted the power to disclose a classified document upon finding a reasonable basis for the classification, they should vote against the proposed amendment. I intend to.

Under the amendment offered by the Senator from Maine and under the way the bill as now drafted the judge can review documents in camera. The sole question is whether there should be a standard to guide the judge's decision on this matter.

It is not a ball and chain, Mr. President, because he can decide for himself whether there is a reasonable basis for the classification. Under the bill as presently drafted the judge is governed by the existence of a reasonable basis for the classification and on appeal it would be for the circuit court to decide whether there is a reasonable basis for that classification. I do not know—perhaps I can pose that question to the distinguished Senator from Maine, whether there is an intent to foreclose an appeal under his amendment.

Mr. MUSKIE. There is not, of course, any intention to foreclose. In addition, there is no presumption on the part of the Senator from Maine that, absent the language my amendment would strike—judges would always be unreasonable. What the Senator seeks to tell us is that his language, the language I have described, was inserted

in the bill because otherwise judges would be unreasonable in evaluating the basis for the classification of documents; and that the only way to avoid that unreasonable tendency on the part of district court judges is to create a presumption on the part of the classifier. I listened to the Senator's argument closely, and that seems to be the thrust of the argument.

Mr. HRUSKA. Mr. President, the Attorney General has written a letter, the text of which is on the desk of each Senator, and I ask unanimous consent that it be printed in the Record.

There being no objection, the letter was ordered to be printed in the Record, as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 29, 1974.

Hon. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: The Department of Justice appreciates your interest in S. 2543, a bill to amend the Freedom of Information Act.

You have inquired about a proposed amendment to the bill's provision on judicial review of documents withheld in the interest of national defense or foreign policy. This suggested amendment would alter the provisions on page 10, line 24 through page 11, line 15 of S. 2543. It would subject these documents to standards of judicial review that are the same or similar to standards applicable to ordinary government records.

As the courts themselves have recognized, the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason the constitutionality of the proposed amendment is in serious question.

In addition, the suggested change would call for a de novo review by the court, and shift the burden of proof to the government. Such a change would place a heavy burden on the executive branch to reveal classified material which the judicial branch is unprepared to properly evaluate.

For these reasons the Department of Justice is opposed to an amendment of this nature.

Sincerely,

WILLIAM B. SAXBE,
Attorney General.

Mr. HRUSKA. The letter says, among other things the following:

As the courts themselves have recognized, the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason the constitutionality of the proposed amendment is in serious question.

In addition, the suggested change would call for a de novo review by the court, and shift the burden of proof to the government. Such a change would place a heavy burden on the executive branch to reveal classified material which the judicial branch is unprepared to properly evaluate.

Mr. MUSKIE. I gather that in offering that letter from Mr. Saxbe, the Senator is suggesting another point: If, for example, the bill is amended by my amendment and is passed and enacted into law and its constitutionality is challenged, would it be the Senator's view that Mr. Saxbe's view on the subject of constitutionality ought to be given a presumption over that of any other opinion that the court would consider?

Mr. HRUSKA. The language in the bill is not intended to serve as the basis for the creation of a presumption. That is not its intent at all, and I do not think that is its meaning.

Mr. MUSKIE. What is its intent, if it is not a presumption? If it is not intended to give the classifier's judgment a weight exceeding that of any other witness, what is it intended to do?

Mr. HRUSKA. Let me suggest this. The question of whether a document is properly classified is a political judgment. There is no question about it. It has to be that, when it comes to national security and foreign policy.

This judgment must take cognizance of a number of factors, such as negotiations with other countries, the timeliness of the moment, the disclosure of other information, and so forth. Who is in a better position to make this judgment—the Secretary of State or a district judge? That is what it comes down to.

Should we permit a judge to balance what he perceives, with his relatively parochial interests, to be the interests of the public, in disclosure against the interests of the public, in maintaining the document in confidence? I say, most emphatically, no.

It is a problem of such scope and with so many ramifications that it belongs, as the Senator from Mississippi has said, in the hands and in the minds and in the decisions of those who are versed in that field and who have the expertise for it.

That is the reason for the language in the bill as it exists—to furnish the judge, when he is called upon to pronounce judgment, with the standard and the requirement that if he finds there is a reasonable basis for the classification, he must sustain that classification.

The point should be stressed that this standard does not equip the courts with a mere rubberstamp. They are granted the right and the authority to review the documents in camera. They can overturn a classification decision in a case involving a request for the classified documents upon finding that there is no reasonable basis upon which the classification be predicated.

It seems to me that we are tampering here with a highly important subject. The decision was deliberately made some years ago, when the parent act was passed, and we will be interfering with that political balance and a matter of vital importance if this amendment is adopted.

I hope the Senate will reject the amendment.

Mr. HART. Mr. President, will the Senator yield me a couple of minutes?

Mr. MUSKIE. I yield.

Mr. HART. I should like to ask a question of the Senator from Maine. I have listened to the exchange he has had with the Senator from Nebraska; and, as I understand, the bill, as reported by the committee, says that in the matter of a security document or file, if the head of the agency—let us say the Secretary of Defense—certifies to the court that he has examined the document and has determined that it should be withheld, the court must sustain that finding and certification, unless the court finds the withholding is without a reasonable basis.

Mr. MUSKIE. In other words, he has to find that the Secretary of Defense was unreasonable.

Mr. HART. I have never been confronted with the problem of resolving a national security file, but some of us, at least years ago, were confronted with the homely experience of trying an accident case. Is there not a parallel here?

A plaintiff puts on one eminent physician who describes why the blinking eye is the result of the accident, and the defendant puts on 10 very eminent physicians who say that is nonsense, that the blinking eye is congenital. That court can make a decision, choosing which among the 11 opinions seems most persuasive. But if accident cases were tried under a statute such as this committee bill provides, would not the court be compelled to agree with the plaintiff because there is a reasonable presumption supporting the blinking eye?

If the Secretary of Defense files a certificate, that certificate is a reasonable basis; but five prior Secretaries of Defense and the CIA Director—and name your favorite expert—all say that is nonsense. The court may agree with them; but under this language, unless it is stricken, he is handcuffed, is he not?

Mr. MUSKIE. I think the Senator has described the effect of the amendment as I understand it.

Mr. HART. I would not be comfortable with that kind of restriction.

Mr. HRUSKA. Certainly, the judge has the right to say that the blinking of an eye is, as a defense, unreasonable. Then that case will go to the circuit court of appeals, and I see no harm in that. I trust that the Senator from Michigan does not, either. But it seems to me that the door is open by this amendment and the language in plain and simple: If the basis is considered unreasonable and the judge so finds, then the information must be disclosed.

Mr. MUSKIE. I yield myself 1 minute, and then I will yield to the distinguished Senator from Florida.

The difficulty with the Senator's response is simply this. The Senator minimizes the implication that the Senator from Michigan and the Senator from Maine draw from his language, but then, in the Senator's prepared remarks, in which he justifies his language, he justifies it on the ground that the Director of the CIA is the only man who knows. The Senator clearly wants to give his knowledge, his position, and his judgment a weight far out of proportion to the Senator's response to the question raised by the distinguished Senator from Michigan.

I say to the Senator that he cannot have it both ways. Either this amendment has the effect of giving a weight to the classifier's judgment and certificate that inhibits the disclosure of information that ought to be disclosed or it does not. It cannot do both. I think I read it correctly when I read it as the Senator from Michigan has read it.

How much time would the distinguished Senator from Florida like?

Mr. CHILES. Four minutes.

Mr. MUSKIE. I yield 4 minutes to the distinguished Senator from Florida.

The PRESIDING OFFICER. The Senator from Florida is recognized.

Mr. CHILES. Mr. President, I support the amendment offered by the Senator from Maine (Mr. Muskie), when the Freedom of Information Act was enacted over 7 years ago, it was the congressional intent that from that time forward the general rule to be observed by all bureaucrats was that disclosure of information was the norm and withholding the exception. Recognizing that the ideal is not often observed, the Federal district court was given jurisdiction to litigate differences originating from requests.

The past years' experience with the act has indicated that the fears of bureaucratic obstruction were in large part well founded and that

but for firm guidance by the courts in the more than 200 cases litigated under the act, the public's right to know would still be little more than a wish.

The bill before us today is the result of extensive hearings which pointed out a number of procedural shortcomings in administration of the Freedom of Information Act. I am satisfied that many of the problems will be resolved by this bill. However, I am concerned by the language presently found in a section of the bill which, in my estimation, would reverse the central thrust of the Freedom of Information Act.

As the result of a Supreme Court decision which adopted an interpretation of the language in section (b)(1) of the original act, information claimed to be classified for security purposes could not be examined by the Federal courts to determine if in fact the classification was proper and valid. Rather, the Supreme Court held that the trial judge must be satisfied with an affidavit from the head of the department originally classifying the information which affidavit would attest to the propriety of the classification. Thus, the classifier would, in fact, be the judge of the classification. This result was patently absurd. Yet, the corrective language in the bill before us does little to remedy the situation. Rather than allow true judicial review of this material, the present language once again attempts to hold the view of the department head by stating that the court must accept his affidavit unless it is found to be unreasonable. While seemingly, a step forward, this language actually reverses the general rule of the Freedom of Information Act which puts the burden of proof upon the Government to establish the basis for withholding.

If the present language in (b)(4)(B)(ii) is allowed to stand, the burden of proof will in effect be shifted away from the Government and placed with the courts.

This is a situation which must not be allowed to stand. I do not argue that an affidavit or other submission from the head of an agency should be disregarded. On the contrary, I would hope that the Court, in its in camera examination of contested documents, would call upon whatever expertise it found necessary.

However, to raise the opinion of one person, especially an interested party, to that of a rebuttable presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

I think it really goes against the thrust of what we are trying to do in amending the bill, to again say that the norm is to be to open things up unless a reason can be shown to have them closed.

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

I think we would be much better off with this amendment. I urge the adoption of the amendment.

Mr. KENNEDY. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, in my opening remarks I mentioned some words of the President of the United States when he issued his new Executive order on classification. This concern which has been expressed by the Senator from Florida, the Senator from Maine, and the Senator from Michigan is very real. This is what the President of the United States said in talking about classification, and it supports the basis for the amendment of the Senator from Maine:

> Unfortunately, the system of classification which has evolved in the United States has failed to meet the standards of an open and democratic society, allowing too many papers to be classified for too long a time. The controls which have been imposed on classification authority have proved unworkable, and classification has frequently served to conceal bureaucratic mistakes or to prevent embarrassment to officials and administrations.

I think precisely this kind of sentiment has triggered the amendment of the Senator from Maine. In reviewing hearings before the Committee on Armed Services, dealing with the transmittal of documents from the National Security Council to the Chairman of the Joint Chiefs of Staff, I find the following on page 4 of those hearings, part 2:

> The CHAIRMAN. I do not know of anything now that really is national security. We have not been able to find out anything. But when we get into it it will be a matter of judgment and so forth.
>
> Senator HUGHES. Who is to make that judgment?
>
> The CHAIRMAN. The committee. I am not trying to overrule anyone as a member of this committee, you know that, but it is all right for you to raise the point. Gentlemen, anyone else want to say anything?
>
> Senator SYMINGTON. Last summer when the special prosecutor sent us some papers taken out of the Dean file, in Alexandria, and which had a lot to do with CIA and military matters, they were sent here and also sent to the Ervin committee. Hastily everyone wanted to see us at once, the State Department, the CIA, FBI, DIA. Anybody I left out, Mr. Braswell?
>
> Mr. BRASWELL. NSA, I think.
>
> Senator SYMINGTON. Yes, and they all said these papers from the standpoint of national security must not be utilized by the Watergate Committee. We sat around this table. I said, the best thing to do would be to first read the papers Mr. Dean put in his safe before we consider making a decision to request Senator Ervin not to use them. So we read the papers. They literally had nothing to do, that we could see, with the national security. One of the staff members said, after we had read for 10 or 15 minutes, it looks to me as if this is more a case of national embarrassment than national security. In my opinion, he could not have been more right. So having been through that syndrome last summer, that particular aspect, and because of all of the various stories that have been getting out, I would join the Senator from Iowa and hope we make a full report on this situation, one way or the other because I do not see any national security involved. Admiral Moorer said he knew everything being done. So I do not see the national security angle.
>
> The CHAIRMAN. I have already told you twice that I have not run across anything yet that is national security.

Here, supposedly the most sensitive materials are considered classified by the heads of these respective agencies mentioned, yet the language which would be included in the committee amendment to the Freedom of Information Act would add some presumption to their conclusion. That presumption is what the Senator from Maine is attempting to erase. And these excerpts illustrate his point.

I think the amendment makes sense, and I am extremely hopeful that this body will support the Senator from Maine. I think it is a

responsible approach. It is sensitive, as we reviewed earlier, in terms of protecting the kinds of classified material, where that protection is legitimately essential to our security and the national defense. The amendment would reach the kinds of abuses we have seen far too often in recent times.

I hope the amendment is agreed to.

Mr. MUSKIE. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The Senator from Maine is recognized.

Mr. MUSKIE. Mr. President, first may I say that if the committee bill prevails, I would like to see something that minimizes the question of presumption, but I am afraid to raise the issue because, in the proper perspective, we have to describe the situation as it is.

Then, Mr. President, I would like to make one technical point with respect to the letter to Senator Hruska by the Attorney General, William Saxbe, which was put in the Record earlier. The Attorney General's letter reads:

> In addition, the suggested change would call for de novo review by a court and shift the burden to the government.

I wish to correct that. Section (a) of the Freedom of Information Act provides that in court cases "the burden is on the agency to sustain its action." That is no shifting of the burden. The Freedom of Information Act imposes this burden for a very real reason. That reason is the weight of the Federal bureaucracy, which has made it almost impossible for us to come to grips with secrecy control and limit the classification process.

I withhold the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. MUSKIE. Mr. President, I am happy to yield 4 minutes to the distinguished Senator from North Carolina (Mr. Ervin).

Mr. ERVIN. Mr. President, I rise in support of this amendment. It seems to me that we ought not to have artificial weight given to agency action, which the bill in its present form certainly would do.

It has always seemed to me that all judicial questions should be determined de novo by a court when the court is reviewing agency action. One of the things which has been most astounding to me during the time I have served in the Senate is the reluctance of the executive departments and agencies to let the American people know how their Government is operating. I think the American people are entitled to know how those who are entrusted with great governmental power conduct themselves.

Several years ago the Subcommittee on Constitutional Rights, of which I have the privilege of being chairman, conducted quite an extensive investigation of the use of military intelligence to spy on civilians who, in most instances, were merely exercising their rights under the first amendment peaceably to assemble and to petition the Government for redress of grievances. At that time, as chairman of that subcommittee, I was informed by the Secretary of Defense, when the committee asked that one of the commanders of military intelligence appear before the committee to testify that the Department of Defense had the prerogative of selecting the witnesses who were to testify before the subcommittee with respect of the activities of the Department of Defense and the Department of the Army.

On another occasion I was informed by the chief counsel of the Department of Defense that evidence which was quite relevant to the committee's inquiry, and which had been sought by the committee, was evidence which, in his judgment, neither the committee nor the American people were entitled to have or to know anything about.

And so the Freedom of Information Act, the pending bill, is designed to make more secure the right of the American people to know what their Government is doing and to preclude those who seek to keep the American people in ignorance from being able to attain their heart's desire.

I strongly support the amendment offered by the distinguished Senator from Maine, of which I have the privilege of being a cosponsor, because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

I thank the Senator for yielding.

Mr. MUSKIE. I thank the distinguished Senator from North Carolina.

Mr. President, at this time I withhold the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

A little while ago the question was asked whether the Director of the CIA or the Secretary of State is the only man who knows whether information should be classified or whether a district judge equally situated with regard to matters relating to national security or foreign policy as any other officer of the Government.

Mr. President, it is not a question whether or not he is the only man. The courts themselves have said, as has already been cited in Epstein versus Resor in 1970, wherein certiorari was denied by the Supreme Court, that the judiciary has neither the "aptitude, facilities, nor responsibility" to make political judgments as to what is desirable in the interest of national defense and foreign policy. That is their decision, Mr. President—it is not the court's business to attempt to weigh public interests in the disclosure of this information. These are political judgments outside the province of the courts.

The Supreme Court, in the case of C. & S. Air Lines against Waterman Corp., in 1948, held to the same effect.

The Harvard Law Review note reached that same conclusion.

It is not a matter of any one person's knowing who is the one who would best know. There is the review, the trial de novo, to be sure. The bill is written so as to place upon the district judge the responsibility of determining whether or not there is a reasonable basis. If there is no reasonable basis, then he orders the information disclosed. If there is a reasonable basis, he is charged with the responsibility of maintaining the confidentiality of the information. Under that system, it would be an appealable order. It would be something that could be reviewed.

The further suggestion is made that there is no indication that a district judge will be unreasonable in acting under the amendment of the Senator from Maine. I would not think that any judge would

be unreasonable. But that is not the point. If the district judge finds that there is no reasonable basis for it, should he still have the power to say, "Release the information, anyway"? That is the position for which the Senator from Maine is arguing. That is exactly the position for which he is arguing.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. HRUSKA. I yield myself 3 minutes more.

In all applications for the disclosure of public documents, the procedures, under the amendment of the Senator from Maine as well as under the bill, are the same. The documents would be available if the matter cannot be resolved on the basis of affidavits. The documents are available for examination in camera, and it will be for the judge to examine them and determine whether there is a reasonable basis.

Under the amendment proposed there is no standard to guide the courts in this difficult area. The purpose of the language in the bill is to require the judge to determine whether or not there is a reasonable basis. If there is, he holds the document; if there is no reasonable basis, he may order it disclosed.

Mr. President, there are difficulties in getting papers from the Government and its agencies. There is no question that there are abuses. But, as I indicated in my earlier remarks, many steps have been taken pursuant to the Executive Order 11652 to correct those abuses. However, again, I say that the issue of abuses is not relevant to a consideration of the amendment proposed by the Senator from Maine.

Finally, I must say, Mr. President, that the adoption of this amendment could endanger the passage and approval of the bill into law. It will substantially alter that finely tuned balance. We have competing interests that are highly controversial in this field that must be encompassed and balanced.

Mr. President, it is my hope that the amendment will be defeated.

Mr. MUSKIE. Mr. President, I yield to the Senator from North Carolina.

The PRESIDING OFFICER. The Senator from North Carolina is recognized.

Mr. ERVIN. Mr. President, the question involved here would be whether a court could determine this is a matter which does affect national security. The question is whether the agency is wrong in claiming that it does.

The court ought not to be required to find anything except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge. We ought not to leave that decision to be made by the CIA or any other branch of the Government.

The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong.

With all due respect to my friend, the Senator from Nebraska, is it not ridiculous to say that to find out what the truth is, one has to show whether the agency reached the truth in a reasonable manner?

Why not let the judge determine that question, because national security is information that affects national defense and our dealings with foreign countries? That is all it amounts to.

If a judge does not have enough sense to make that kind of judgment and determine the matter, he ought not to be a judge, and he ought not to inquire whether or not the man reached the wrong decision in an unreasonable or reasonable manner.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President, I yield myself 3 minutes.

Mr. President, will the Senator respond to a question on that subject? He and I have discussed this matter preliminarily to coming on the floor.

If a decision is made by a court, either ordering a document disclosed or ordering it withheld, is that judgment or order on the part of the district court judge appealable to the circuit court?

Mr. ERVIN. I should think so.

Mr. HRUSKA. What would be the ground of appeal?

Mr. ERVIN. The ground ought to be not whether a man has reached a wrong decision reasonably or unreasonably. It ought to be whether he had reached a wrong decision.

Mr. HRUSKA. I did not hear the Senator.

Mr. ERVIN. The question involved ought to be whether an agency reached a correct or incorrect decision when it classified a matter as affecting national security. It ought not to be based on the question whether the agency acted resonably or unreasonably in reaching the wrong decision. That is the point that the bill provides, in effect. In other words, a court ought to be searching for the truth, not searching for the reason for the question as to whether someone reasonably did not adhere to the truth in classifying the document as affecting national security.

Mr. HRUSKA. The bill presently provides that a judge should not disclose a classified document if he finds a reasonable basis for the classification. What would the Senator from North Carolina say in response to the following question: Should a judge be able to go ahead and order the disclosure of a document even if he finds a reasonable basis for the classification?

Mr. ERVIN. I think he ought to require the document to be disclosed. I do not think that a judge should have to inquire as to whether a man acted reasonably or unreasonably, or whether an agency or department did the wrong thing and acted reasonably or unreasonably.

The question ought to be whether classifying the document as affecting national security was a correct or an incorrect decision. Just because a person acted in a reasonable manner in coming to a wrong conclusion ought not to require that the wrongful conclusion be sustained.

Mr. HRUSKA. Mr. President, I am grateful to the Senator for his confirmation that such a decision would be appealable.

However, on the second part of his answer, I cannot get out of my mind the language of the Supreme Court. This is the particular language that the Court has used: Decisions about foreign policy are decisions "which the judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry," *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948).

That is not their field; that is not their policy.

Mr. ERVIN. Pardon me. A court is composed of human beings.

Sometimes they reach an unreasonable conclusion, and the question would be on a determination as to whether the conclusion of the agency was reasonable or unreasonable.

Mr. HRUSKA. Mr. President, I yield myself 2 minutes to read from the Supreme Court case of C. & S. Airlines versus Waterman Corp., 333 U.S. 103 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Mr. President, I think that is pretty plain language. I stand by it.

In this connection, as I understand Senator Muskie's amendment, the burden of proof is upon the Government to demonstrate what harm would befall the United States if such information would be made public and the court is to weigh such factors against the benefit accruing to the public if such information were released. However, no standards for guiding the court's judgment are included.

It seems obvious to me that in an area where the courts have themselves admitted their inadequacies in dealing with these issues, Congress should endeavor to provide the proper guidance. The reported version of this bill does so. It provides that only in the event a court determines the classification of a document to be without a reasonable basis according to criteria established by an Executive order or statute may it order the document's release.

Therefore, I respectfully submit that Senator Muskie's proposed amendment does not adequately come to grips with the various competing concerns involved in this issue.

Mr. MUSKIE. Mr. President, how much time have I remaining?

The PRESIDING OFFICER. The Senator from Maine has 21 minutes remaining.

Mr. MUSKIE. Mr. President, I yield myself 3 minutes.

Mr. President, I have listened to the distinguished Senator from Nebraska expound at length on what he believes to be the facts and say that the judges are not qualified to make evaluations of classification decisions.

If he believes what he says he believes, he has got to be opposed to the committee bill because the committee bill establishes a procedure for judicial review. If he believes judges to be as unqualified as he describes them, eloquently and vigorously, on the floor of the Senate, he has to be against the bill to which he has given his name and support, because that bill rests on the process of judicial review.

The second point that I wish to make is, of course, that judges can be unreasonable, as my good friend the Senator from North Carolina has pointed out. But what about the executives? Let me read, from the committee report, the language of Justice Potter Stewart in concurring with the majority opinion of the Supreme Court in the *Mink* case that we seek in this bill to alter.

Justice Stewart stated:

Congress has built into the Freedom of Information Act an exemption that provides no means of questioning an executive decision that determine a document is secret, however, cynical, myopic, or even corrupt that decision might have been.

Now that is the opinion of a justice who concurred in the decision in the *Mink* case which denied judges in camera review of executive decisions to classify in the national security field, clearly urging the Congress, in my judgment, to do something about it, and that is what we seek to do.

I simply cannot understand the position of the Senator from Nebraska (Mr. Hruska) in supporting, on the one hand, a judicial review process designed to open the door to examination of executive decision, and then on the other hand closing that door part way back again, because that is the clear purpose of the presumption written into the act.

So I hope, Mr. President, that, having taken this step, that we will not take part of it back, and I urge the support of my amendment for the reasons that I have amply discussed this afternoon.

I am ready for a vote at any time, but I will withhold the remainder of my time until it is clear that the Senate is ready for the vote.

Mr. TAFT. Mr. President, the Judiciary Committee deserve our appreciation for the significant work that is embodied in the bill before us today.

These amendments to the Freedom of Information Act will accomplish the committee objective of providing more open access to Government activities. The fresh air that open access will bring can only strengthen our form of Government. Informed citizens and responsive Government agencies will go a long way toward restoring the faith and confidence that the American people must have in our institutions.

The amendment offered to S. 2543 by the Senator from Maine which deals with classified information relating to national defense or foreign policy will not serve the interests of clear legislation or assist in the delicate process of making available such sensitive classified material.

It seems to me that the committee version of S. 2543 offers a definite procedure and a definite standard by which national defense or foreign policy classified information may be examined in a court proceeding. The court is not required to conduct a de novo review, most courts are not knowledgeable in the sensitive foreign policy factors that must be weighed in determining whether material deserves or in fact demands classification. Under the committee version a court needs to determine if there is a reasonable basis for the agency classification. The standard "reasonable basis" is not vague. The standard of reasonableness has been applied in our judicial system for centuries.

The proposed amendment would call for a de novo weighing of all of the factors and leave the determination to the court according to a weighing of all the information which is much more vague than that standard promulgated by the committee.

The executive branch has especially significant responsibilities in foreign policy and national defense. The recently conducted Middle East negotiations by our Secretary of State had to be conducted in secret and we are now enjoying fruit of the successful culmination of these negotiations.

I believe foreign policy considerations and national defense considerations deserve special attention and the committee version of S. 2543 accords them such special attention.

It does not seem worthwhile to confuse the standard that the committee has set nor does it seem useful to diminish the executive branch's flexibility in dealing with sensitive foreign policy matters.

I intend to support S. 2543 and urge my colleagues to approve it without amendment.

Mr. KENNEDY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KENNEDY. Are there a sufficient number of Senators present to order the yeas and the nays?

The PRESIDING OFFICER. There is not a sufficient second.

Mr. HRUSKA. Mr. President, I have no further requests for time on this side or in opposition to the amendment.

Mr. KENNEDY. Mr. President, I suggest the absence of a quorum, with the time to be charged to my time.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on the Muskie amendment.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Maine (Mr. Muskie).

On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollings), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah Mr. (Bennett), the Senator from New York (Mr. Buckley), and the Senator from Illinois (Mr. Percy) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

On this vote, the Senator from Illinois (Mr. Percy) is paired with the Senator from South Carolina (Mr. Thurmond).

If present and voting, the Senator from Illinois would vote "yea" and the Senator from South Carolina would vote "nay."

The result was announced—yeas 56, nays 29, as follows:

[No. 219 Leg.]

Yeas—56

Abourezk	Eagleton	Moss
Aiken	Ervin	Muskie
Baker	Hart	Nelson
Bayh	Haskell	Packwood
Beall	Hatfield	Pastore
Bentsen	Hathaway	Pearson
Biden	Huddleston	Proxmire
Brock	Humphrey	Randolph
Brooke	Javits	Ribicoff
Burdick	Johnston	Roth
Byrd, Robert C.	Kennedy	Schweiker
Case	Magnuson	Stafford
Chiles	Mansfield	Stevens
Church	Mathias	Stevenson
Clark	McIntyre	Symington
Cook	Metcalf	Tunney
Cranston	Metzenbaum	Weicker
Dole	Mondale	Williams
Domenici	Montoya	

Nays—29

Allen	Goldwater	McGee
Bartlett	Griffin	Nunn
Bellmon	Gurney	Scott, Hugh
Bible	Hansen	Scott, William L.
Byrd, Harry F., Jr.	Helms	Stennis
Cannon	Hruska	Taft
Cotton	Jackson	Talmadge
Curtis	Long	Tower
Eastland	McClellan	Young
Fong	McClure	

Not voting—15

Bennett	Gravel	McGovern
Buckley	Hartke	Pell
Dominick	Hollings	Percy
Fannin	Hughes	Sparkman
Fulbright	Inouye	Thurmond

So Mr. Muskie's amendment (No. 1356) was agreed to.

Mr. Muskie. Mr. President, I move that the vote by which the amendment was agreed to be reconsidered.

Mr. Kennedy. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. Bayh. Mr. President, I send my amendment to the desk and ask that it be stated.

The Presiding Officer (Mr. Helms). The amendment will be stated.

The legislative clerk read as follows:

On page 9, line 9, following the word "person" insert the following:

"When such records are made available under this section in matters which the person seeking those records can demonstrate to be of general public concern, the agency complying with the request for the records shall make them available for public inspection and purchase in accordance with the provisions of this act, unless the agency can demonstrate that such records could subsequently be denied to another individual under the exceptions provided for in subsection (b) of this act."

Mr. Bayh. Mr. President, this amendment is designed to make certain Federal departments and agencies comply with both the letter and the spirit of the Freedom of Information Act in making public requested documents in matters of general public concern.

It is not consistent with the intent of Congress for an agency to comply with a request for a certain document under the Freedom of Information Act, but, at the same time, to refuse to make that document available to the public despite the legitimate and broad public nature of the document in question.

Yet, this is precisely what happened in a Freedom of Information Act request which I made earlier this year to the Federal Trade Commission. Probably the best way to demonstrate the real need for adoption of the amendment I have offered would be for me to recount my experience in seeking information from the FTC.

On March 20 a public interest law firm—the Institute for Public Interest Representation at the Georgetown University Law Center—wrote to the Federal Trade Commission on my behalf requesting a copy of a transcript of prehearing conference the Commission had conducted on December 18, 1973 with eight major oil companies which the FTC has charged with engaging in anticompetitive practices.

That request was based on the Freedom of Information Act. Subsequently, on April 3, having received no substantive reply to the letter my attorney had sent 2 weeks earlier, I filed suit in U.S. District Court here in Washington against the FTC to secure a copy of the requested transcript.

While I did not take lightly the significance of a U.S. Senator suing an agency of the Federal Government, I felt the issue was of such importance that this strong action was required. In seeking access to the transcript, I must emphasize, I did not merely want to secure this material for myself.

Certainly the Senator from Indiana did feel it would be helpful to him in weighing current energy-related legislation to have the information being generated in this very important proceeding before the Federal Trade Commission. But beyond the need which I felt I had for the document, I also felt that it was important that the transcript of a proceeding against the eight largest oil companies be available to the public.

Few issues have generated as much concern among the American people in recent months than the energy crisis. Much has been charged about the role of the oil companies in contributing to and exploiting the energy crisis, and the FTC allegations of major anticompetitive practices against the oil companies go directly to the heart of the public concern regarding the role of the oil companies.

It, therefore, seemed to me important that not only should the transcript in question be available to the Senator from Indiana, but that transcript should be part of the public record of the FTC, available for examination and purchase by the media and individual citizens.

However, when, on April 30, the FTC agreed to my request for the December 18, 1973 transcript, it did so on a very limited basis. Specifically, the Commission provided copies of the transcript to me and to three State attorneys general who had requested it. The Commission did not add the transcript to the public docket in its case against the oil companies, and when newsmen requested a copy of the transcript

they were told they would have to make individual requests for copies under the Freedom of Information Act.

This limited release of the transcript was especially incongruous since I was not under any constraint in what I could do with the copy delivered to me. Accordingly, to save those newsmen the time and trouble of bringing individual Freedom of Information Act cases against the FTC, I provided access to the transcript to anyone who wanted to come to my office and examine it.

It is evident, Mr. President, that in its limited response to my request the FTC had complied with the letter of the Freedom of Information Act. But it is equally evident that in refusing to add the requested transcript to the public docket in its case against the oil companies that the FTC had not complied with the spirit of the act.

This amendment is designed to avoid such evasion of the true purpose of the act.

I must note, Mr. President, that the amendment is written in such a way so as to place the responsibility for demonstrating that the requested material is of general public concern on the individual requesting the material. The purpose of this part of the amendment is to guarantee that the various agencies do not have to make general release of all information provided for under the Freedom of Information Act. It would be an unfair and burdensome requirement on the agencies to insist that documents of limited interest—for example, something required for academic research—be made public.

Also, the amendment does permit the agency faced with a request that information be made public to object to that request if the agency can argue successfully that subsequent requests for the documents might be denied under the exemptions provided for in subsection (b) of the act.

If I may take my experience with the FTC as an example, Mr. President, it is obvious that the case against the major oil companies is of general public concern and it is not unreasonable to place the responsibility for demonstrating this fact on the Senator from Indiana or any other individual requesting material in this category.

As for the right of the agency to object, I see no problem in giving the agency the responsibility—if it does not want to make something public—to prove that the material in question might under different circumstances qualify for a subsection (b) exception. I am satisfied once again using my experience as an example, that the FTC could not make a successful argument of this nature in the oil company case.

I do want to emphasize, Mr. President, that in citing my experience as an example I am not trying to pass an amendment of relevance to a single issue in which I was involved. Rather, I cite this experience as an example, with the conviction that if the amendment I propose addresses itself properly to my experience, it would work in the future on matters of similar public concern. In this way, when Freedom of Information Act requests are made in areas of general importance, we can be satisfied that Federal agencies will have to meet both the letter and the spirit of the law.

Mr. President, finally, what this amendment is designed to do is to satisfy what I think the intent was of the original act, and the bill brought to us today by the distinguished Senator from Massachusetts

and others who are joining him, as I am, in proposing the new amendments to the Freedom of Information Act.

My amendment specifies that if an individual, under this act, is entitled to information that is a matter of some public concern, a copy of the information that is given to the individual should also be spread on the agency's public record, so that members of the news media and individual citizens may have access to it.

As I said, I have been involved in this matter with the FTC relative to some of the prehearing conferences they have been holding with the major oil companies. At long last, after having to take them to court or threatening to take them to court, the agency did, in fact, give me a copy of the first conference transcript; and I hope that before we are through, they will promise to give me other transcripts as these hearings are held. Yet while Birch Bayh happens to be a Senator from Indiana who wants this material to make proper decisions on energy issues; but I think the public has a right to know what is going on before the FTC as well. This amendment would make that possible, by requiring that a copy of these documents be put in the public records, pursuant to the provisions of this act.

Mr. KENNEDY. I yield myself such time as I may require.

Mr. President, I urge the acceptance of this amendment, I believe that the Senator from Nebraska has been informed of it as well.

It seems to me to make eminently good sense that if information is going to be made available to a particular individual, and if it meets the other requirements of the Freedom of Information Act relating to disclosure, that information should be available to other citizens as well.

The amendment does have certain protections. When an agency attempts to respond positively and constructively to a request of an individual, even though the act would allow withholding, the amendment has certain protections for the agency so it does not have to release this generally automatically, I think makes a good deal of sense. I believe it carries forward the spirit and the purpose of the legislation in encouraging release of information, and I hope that the amendment will be accepted by the Senate.

Mr. HRUSKA. Mr. President, will the Senator yield me 2 minutes?

Mr. KENNEDY. I yield.

Mr. HRUSKA. Mr. President, upon analysis, it is found that this amendment does clarify the law. The amendment contains a safeguard, by reference to section 4(b) of Public Law 90–23, commonly known as the Freedom of Information Act, which amply takes care of those items which are excluded from its purview.

I have no objection to the amendment. In fact, I favor it.

Mr. KENNEDY. Mr. President, I yield back the remainder of my time.

Mr. BAYH. I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Indiana.

The amendment was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. HRUSKA. Mr. President, I have a brief amendment, which I send to the desk.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

On page 14, line 22, insert the word "working" between "10" and "days."

Mr. HRUSKA. Mr. President, this amendment has to do with the time limitation for the purpose of filing an answer or extending the time within which an answer should be given to certain applications for disclosure. The general reference to time limitations is in terms of "working days." By inadvertence, I take it, line 22, page 14, simply says "for more than 10 days." The amendment, technical in nature, would insert the word "working," so that it would be for not more than 10 working days. That is the purpose of the amendment, and I urge its adoption.

Mr. KENNEDY. Mr. President, this is a technical, clarifying amendment. It is useful and consistent with the other provisions of the bill, and I urge its adoption.

I yield back the remainder of my time.

Mr. HRUSKA. I yield back the remainder of my time.

The PRESIDING OFFICER (Mr. Domenici). The question is on agreeing to the amendment.

The amendment was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment.

AMENDMENT NO. 1361

Mr. HART. Mr. President, I call up Amendment No. 1361.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk proceeded to read the amendment.

Mr. HART. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered; and, without objection, the amendment will be printed in the Record.

The amendment is as follows:

On page 11, line 15, after the period, insert the following new subsection:

(3) Section 552(b)(7) is amended to read as follows: "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

Mr. HART. I yield myself such time as I may require.

Mr. President, this act exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.

Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.

That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.

I am offering this amendment on behalf of myself and the following Senators: Mr. Mathias, Mr. Cranston, Mr. Muskie, Mr. Clark, Mr. Ribicoff, Mr. Moss, Mr. Javits, Mr. McGovern, Mr. Proxmire, Mr. Humphrey, Mr. Hatfield, Mr. Biden, Mr. Nelson, and Mr. Abourezk.

This amendment was proposed by the Administrative Law Section of the American Bar Association. It explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques or procedures.

Our concern is that, under the interpretation by the courts in recent cases, the seventh exemption will deny public access to information even previously available. For example, we fear that such information, as meat inspection reports, civil rights compliance information, and medicare nursing home reports will be considered exempt under the seventh exemption.

Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.

Let me clarify the instances in which nondisclosure would obtain. First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

Second, the protection for personal privacy included in clause (B) of our amendment was not explicitly included in the ABA Administrative Law Section's amendment but is a part of the sixth exemption in the present law. By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. I wish also to make clear, in case there is any doubt, that this clause is intended to protect the privacy of any person mentioned in the requested files, and not only the person who is the object of the investigation.

Third, investigatory files compiled for law enforcement purposes would not be made available where production would deprive a person of a right to a fair trial or an impartial adjudication.

Fourth, the amendment protects without exception and without limitation the identity of informers. It protects both the identity of

informers and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential.

Finally, the amendment would protect against the release of investigative techniques and procedures where such techniques and procedures are not generally known outside the Government. It would not generally apply to techniques of questioning witnesses.

The purpose of the Freedom of Information Act is to provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality. This amendment balances those two interests and is critical to a free and open society. This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

Mr. President, I think that it would be useful if a brief excerpt from the report of the Committee on Federal Legislation of the Association of the Bar of the City of New York were printed in the Record. The full document is captioned "Amendments to the Freedom of Information Act." I ask unanimous consent that that material may be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

S. 2543 and H.R. 12471 do not propose any amendment to Exemption 7, but would add to subsection (b) the "Savings Clause" discussed above.

The courts have agreed that Exemption 7 applies to investigations by regulatory agencies as well as criminal investigations. But there is dramatic disagreement over the question of continued non-disclosure after the specific investigation is completed. The Second Circuit, in *Frankel v. SEC*, 460 F. 2d 813 (1972), held that investigatory files are exempt from disclosure forever, on the theory that disclosure of investigatory techniques would undermine the agency's effectiveness and would choke off the supply of information received from persons who abhor, for whatever reason, public knowledge of their participation in the investigation. The court found:

"These Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement." *Id.* at 817.

Other jurists, however, have reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed. We agree with this view.

The fear that disclosure of investigative techniques *in general* will hinder an agency's operations appears to be illusory. The methods used for such investigations are widely known and relatively limited in type and scope. The realistic problems are those we have already met—the need to preserve the identity of sources of information *in particular cases*, the need to assure an impartial trial and to protect reasonable personal privacy. In the context of Exemption 7, there is the additional consideration that premature disclosure of the Government's case will allow the civil or criminal defendant to "construct" his defense.

Against these real problems must be weighed important policy considerations which are by now also familiar—that our political system is premised upon public and congressional knowledge of the Executive Branch's activities; that the policy of agency actions is ultimately established by Congress and the public; that

importunate decisions or those based on party politics, campaign contributions and the like are less likely if the public has access to the record of such decisions.

Mr. HART. Mr. President, I reserve the remainder of my time, but I hope very much that the committee and our colleagues are persuaded as to the wisdom of the amendment.

Mr. KENNEDY. Mr. President, I yield myself such time as I may use.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I believe that it would be useful for me to outline for my colleagues briefly why S. 2543 did not initially attempt to amend the seventh exemption of the Freedom of Information Act, and why I presently believe that the amendment proposed by the Senator from Michigan is a constructive and desirable one.

Last October, when I introduced S. 2543, the case law on the subject of investigatory files was substantially different that it is today. During our hearings in the spring of 1973, the subcommittee had before it legislation that would have amended in various ways a number of the exemptions of the FOIA. These proposals were fully discussed and debated. Nonetheless, when I introduced the legislation I believe that the public was secure in its right to obtain information falling within the "investigatory file" exception to disclosure mandated by the act. As Attorney General Elliot Richardson had told our subcommittee:

The courts have resolved almost all legal doubts in favor of disclosure.

Thus, I did not propose a change in the language of that exemption.

In the report on S. 2543, as amended, the Judiciary Committee expressed its position generally:

The risk that newly drawn exemptions might increase rather than lessen confusion in interpretation of the FOIA, and the increasing acceptance by courts of interpretations of the exemptions favoring the public disclosure originally intended by Congress, strongly militated against substantive amendments to the language of the exemptions.

But we warned that by leaving the substance of the exemptions unchanged—

The committee is implying acceptance of neither agency objections to the specific changes proposed in the bills being considered, nor judicial decisions which duly constrict the application of the act.

Unfortunately, Mr. President, I must agree with the Senator from Michigan that our initial appraisal of the development of the law in the area affected by his amendment has turned out to be short lived. A series of recent cases in the District of Columbia has applied the seventh exemption of the act woodenly and mechanically and, I believe, in direct contravention of congressional intent when we passed that law in 1966. One court a few years back correctly read this intent when it observed:

The touchstone of any proceedings under the act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.

Yet in the most recent decision interpreting the seventh exemption of the Freedom of Information Act, the District of Columbia Court of Appeals observed that—

Recent decisions of this court construing exemption seven have considerably narrowed the scope of our inquiry.

This, Mr. President, was a foreboding that the court was going astray, since the court was limiting its inquiry to avoid discussion of the intent behind the exemption and whether Congress intended documents of the kind sought, under the circumstances, to be kept secret pursuant to that exemption. The court continued:

> The sole question before us is whether the materials in question are "investigatory files compiled for law enforcement purposes." Should we answer that question in the affirmative, our role is "at an end."

This is the same kind of determination made by the Supreme Court in the Mink case, when it observed that once a judge determined records to be in fact, on their face, classified, then he could not look beneath that marking to determine whether they were properly classified. We are today reversing that holding of the court by the legislation before us, spelling out that it is Congress intention for courts to look behind classification markings. I think it appropriate and useful that we also spell out our disapproval of the line of cases I referred to earlier, and that we make clear our intention for courts to look behind the investigation mark stamped on a file folder.

The Senator from Michigan has made a persuasive case for the amendment he is proposing, and I will not go over the same ground he has covered. I do want to make two points that bear directly on this issue.

First, whether or not this amendment is adopted, I would like to make it clear that I believe the courts have, in narrowly and mechanically interpreting the seventh exemption, strayed from the requirements and the spirit of the Freedom of Information Act. The Supreme Court has not ruled on the subject yet, and there is a division among various circuits on a number of issues arising from application of that exemption. I thus want the record to show that by accepting the Senator's amendment we will be reemphasizing and clarifying what the law presently requires. If it is not accepted, the Supreme Court will still have the opportunity to set things straight.

Second, I would point out that we do address ourselves in S. 2543 to this issue in a less direct manner. Our report and my opening statement contain extensive discussion of new provisions in this legislation relating to release of records "or portions of records" and to deleting or segregating exempt portions of files or records so that nonexempt portions may be released. Judicial and agency adherence to the requirements of these amendments would go a long way to removing strict and undiscriminating adherence to narrow interpretations of the Freedom of Information Act. This would apply to the area of investigatory files as well as to the other exemptions of the act. So I think that courts would have to reconsider their reliance on any restrictive cases after passage of these new provisions anyway.

The approach suggested by the Senator from Michigan in his amendment, which states the policy considerations to be utilized by agencies and courts in determining whether to disclose investigatory information, is a salutory one. It is the same approach—with the same language—proposed by the American Bar Association representative at our hearings last year. Then, Attorney General Elliot Richardson, testifying at our hearings, told the subcommittee that—

> If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered.

These comments were addressed to a rather different proposal to amend the seventh exemption contained in S. 1142, being considered by the subcommittee at the time. And just last week the prestigious Association of the Bar of the City of New York issued its report on amendments to the Freedom of Information Act, in which it too recommended adoption of the language proposed by the ABA, with slight modifications. Since the discussions by the ABA, the Attorney General, and the City of New York Bar Association on this issue are relevant to our consideration of the proposed amendment, I ask unanimous consent that excerpts therefrom be included in the Record at this point.

There being no objection, the material was ordered to be printed in the Record, as follows:

FROM THE STATEMENT OF JOHN MILLER, CHAIRMAN, ADMINISTRATIVE LAW SECTION, AMERICAN BAR ASSOCIATION, JUNE 11, 1973

THE SEVENTH EXEMPTION

S. 1142 also proposes changes in the seventh exemption to the Freedom of Information Act, which relates to investigatory files compiled for law enforcement purposes, by expressly excluding certain specific types of records from the investigatory files exemption (Section 2(d)). However, the Administrative Law Section believes that a better approach is to set forth explicitly the objectives which the investigatory files exemption is intended to achieve in order to assure that information is withheld only if one of those objectives would be frustrated were the information disclosed. Because many different types of information may be contained in an investigatory file for which there are legitimate reasons for nondisclosure, the Section believes that it is unwise to attempt to exclude certain types of records from the exemption under all circumstances. For example, even "scientific tests, reports, or data" (Section 2(d)) contained in an investigatory file, if released prematurely, could interfere with the prosecution of an offense or result in prejudicial publicity so as to deprive an accused of his right to a fair trial. In addition, the proposal set forth in S. 1142 would not resolve the issue as to when the investigatory files exemption terminates, an issue that has arisen in several recent court decisions.

Accordingly, the Administrative Law Section recommends that, if the seventh exemption is to be amended, it be revised to read as follows:

"Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

FROM THE REPORT OF THE COMMITTEE ON FEDERAL LEGISLATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, APRIL 22, 1974

EXEMPTION 7

Exemption 7 now exempts:

"Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

H.R. 5425 and S. 1142 would have amended Exemption 7 to read as follows:

"(7) investigatory records compiled for any specified law enforcement purpose the disclosure of which is not in the public interest, except to the extent that—

"(A) any such investigatory records are available by law to a party other than an agency, or

"(B) any such investigatory records are—

"(i) scientific tests, reports, or data,

"(ii) inspection reports of any agency which relate to health, safety, environmental protection, or

"(iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency."

S. 2543 and H.R. 12471 do not propose any amendment to Exemption 7, but would add to subsection (b) the "Savings Clause" discussed above.

The courts have agreed that Exemption 7 applies to investigations by regulatory agencies as well as criminal investigations. But there is dramatic disagreement over the question of continued non-disclosure after the specific investigation is completed. The Second Circuit, in *Frankel* v. *SEC.* 460 F.2d 813 (1972), held that investigatory files are exempt from disclosure forever, on the theory that disclosure of investigatory techniques would undermine the agency's effectiveness and would choke off the supply of information received from persons who abhor, for whatever reason, public knowledge of their participation in the investigation. The court found:

"There Reports indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its stronger case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement." *Id.* at 817.

Other jurists, however, have reached the conclusion that Exemption 7 was intended only to protect against premature disclosure in a pending investigation, and that once the investigation is completed and all reasonably foreseeable administrative and judicial proceedings concluded, the files must be disclosed. We agree with this view.

The fear that disclosure of investigative techniques *in general* will hinder an agency's operations appears to be illusory. The methods used for such investigations are widely known and relatively limited in type and scope. The realistic problems are those we have already met—the need to preserve the identity of sources of information *in particular cases*, the need to assure an impartial trial and to protect reasonable personal privacy. In the context of Exemption 7, there is the additional consideration that premature disclosure of the Government's case will allow the civil or criminal defendant to "construct" his defense.

Against these real problems must be weighed important policy considerations which are by now also familiar—that our political system is premised upon public and congressional knowledge of the Executive Branch's activities; that the policy of agency actions is ultimately established by Congress and the public; that importunate decisions contributions and the like are less likely if the public has access to the record of such decisions.

For these reasons, we conclude that the strict definitions in the earlier proposed amendment to Exemption 7 could not be relied upon to produce the intended result in all cases. For example, the non-exemption of "scientific tests, reports or data" could easily cause disclosure of special techniques or the extent of the Government's knowledge with respect to a particular investigation. Therefore, we recommended amendment of Exemption 7 instead to state the policy considerations which are to be utilized by the agencies and courts with respect to disclosure. The Department of Justice and the ABA Administrative Law Section reached the same conclusion and recommended similar amendments.

For the reasons discussed above, we recommend adoption of the language proposed by the ABA, modified slightly to make it clear that (a) *completed* investigations must be disclosed except where confidential sources of information will be *unavoidably* revealed, (b) only specialized techniques, not generally used in investigations, are protected from disclosure; and (c) the exemption applies to "records" not "files," so that disclosable material is not exempted merely by being placed in an investigatory file. Thus, Exemption 7 would read:

"Investigatory records compiled for law enforcement purposes, but only to the extent that disclosure of such records would (A) interfere with pending or actually and reasonably contemplated enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) unavoidably disclose the identity of an informer, or (D) disclose unique or specialized investigative techniques other than those generally used and known."

FROM THE STATEMENT OF ELLIOT L. RICHARDSON, ATTORNEY GENERAL OF THE UNITED STATES, JUNE 26, 1973

Section 2(d) of the bill would also limit the coverage of the exemption by excluding: (1) scientific tests, (2) inspection reports relating to health, safety or environmental protection, and (3) any investigatory records which are also used as a basis for public policy statements or rulemaking.

These changes would seriously impair the law enforcement capability of many agencies.

The provision excluding scientific tests, reports or data from the protection of the exemption presents several problems.

First, it could jeopardize the right to an impartial trial by permitting any requestor to obtain and publish any incriminating scientific tests, such as ballistic reports, before the defendant is brought to trial.

Second, because the act does not permit an agency to determine whether a requestor has a rational basis for seeking information, anyone could insist on obtaining autopsy reports or other medical reports on victims of crime, which reports may not be exempt under exemption six if the victim is dead.

Because this same information can be obtained in discovery proceedings, in which the need of the individual for the reports is a proper consideration, we do not believe an amendment is necessary.

The provision denying the protection of exemption seven to inspection records relating to health, safety or environmental protection would impede the efforts of agencies to take law enforcement action against offenders.

It would permit offenders to obtain these records and thereby discover all of the details that an agency intends to use against them in any law enforcement action, whether civil or criminal.

Finally, the provision excluding from the coverage of exemption seven records which serve as a basis for public statements or regulations not only would inhibit rulemaking in important regulatory areas but also would restrict the flow of information to the public by discouraging official discussion of public business.

For example, if a Justice Department spokesman announced that on the basis of an investigation by the FBI and the Criminal Division a grand jury would be convened to consider indictments, all of the investigatory reports apparently would no longer be protected by exemption seven.

The protection of this information cannot depend on the continued silence of officials in making public statements or issuing regulations.

If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered along the following lines:

The provisions of this section shall not be applicable to matters that are . . . (7), investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided*, that This exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments.

Mr. KENNEDY. Mr. President, I recommend the adoption of the amendment of the Senator from Michigan.

Mr. HRUSKA. Mr. President, I yield myself 10 minutes to speak in opposition to the amendment.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HRUSKA. Mr. President, again we have a situation here where an amendment is proposed that goes to the substance of a bill which was enacted after years of processing. In 1966, agreement was finally reached among several competing interests in this field for the disclosure of public documents. Those issues were resolved and we have a very well balanced act, the deficiencies of which are such that they called for amendment but amendments which have procedural features rather than substantive features. I do believe that while the public has a right to know, there is also the duty of a government to survive. There must be sufficient safeguards under which officials of our Government can preserve national integrity, security, and public interest, and in the case of the instant amendment, law enforcement.

In my judgment, the approval of this amendment would endanger the passage and approval of this bill into law, and I would urge the

Members of the Senate to reject the amendment for that reason and for additional reasons which I shall now recite.

Mr. President, in considering this bill, the Judiciary Committee reviewed an amendment that did not go as far as this one. The Committee decided to reject it because it could hinder the FBI in carrying out its law enforcement responsibilities and, further, because the forced disclosure of FBI information could infringe on the individual's right of privacy. I must oppose this amendment for the same reasons.

The FBI has been successful in the past in apprehending criminal offenders and for carrying out its other investigative duties because of one chief and important asset—that is, its ability to obtain information from its informants and private citizens throughout these United States. In many instances it has not solved a crucial case because of deductive reasoning or a specific clue but because a private citizen was not afraid to come forth and offer a piece of information. In the past, the FBI has usually taken the information it receives as a matter of confidence and assured the individual his name would be kept in confidence.

The passage of this proposed amendment would undoubtedly have the effect of inhibiting FBI informants and citizens from coming forth to offer vital bits of information to the FBI. They will no longer feel confident that their names will remain secret from public scrutiny, possibly subjecting them to embarrassment and/or reprisals. The net result will be a crippling effect on the FBI's ability to garner information and obtain successful prosecution in criminal cases.

Moreover, the release of any material into the public domain is likely to cause embarrassment to individuals mentioned in FBI files. This Congress has exhibited a marked increase in the concern for the protection of privacy of U.S. citizens. There are literally dozens of bills being circulated in Congress today with various provisions attempting to protect private citizens from unauthorized disclosure of many Government records which may concern them.

Indeed, I fear that this amendment will work cross-purposes to the bills on criminal justice information systems, such as the measures introduced by the senior Senator from North Carolina (Mr. Ervin) and this Senator.

The basic thrust of these bills is to maintain the confidentiality of law enforcement records. We have held extensive hearing on these bills and throughout these hearings the point has been repeatedly stressed that information in law enforcement files must be kept in confidence to insure that the individual's right to privacy is secure. Yet, this amendment purports to give anyone the right to request and receive some of these very same records. I can think of no other instance where an amendment to a bill has posed such a grave threat to the very thrust of a major bill that is still in committee and has yet to come to the floor.

Mr. President, the threat to personal privacy that such an amendment poses can already be documented. The Department of Justice has adopted regulations which authorize release of files which are over 15 years old to historical researchers. Like the proposed amendment, the regulations provide that the FBI can delete information which might reveal the identity of informants.

In one instance, a researcher asked for the files on the investigation of Ezra Pound for treason. Pursuant to its regulations, the FBI deleted the names of the informants and other information that it thought could reveal his identity. Yet, the research was so knowledgeable about the facts of the case that he was able to link the information in the file to the actual informants. The researcher then went on in his article to criticize these informers for cooperating with the FBI and squealing on their friend, Pound.

Apart from the merits of it, apart from the justice or injustice of it, Mr. President, if it becomes known that files may be released subject to deletions such as those enumerated in the amendment proposed by the Senator from Michigan, if it becomes known and if by deduction and by the supplying of additional extraneous information, those names can, in effect, be restored by a researcher, then the forecast can be readily and reliably made that the sources for FBI information will dry up and become fewer and fewer as time goes on. This was an issue in the Pound case that arose more than 15 years after the file was current. But the Department is finding administrative difficulties with the regulations which have been adopted, regulations which are very similar to those which the Senator from Michigan seeks to put into the concrete form of a statute.

Mr. President, a few more instances like that of the Ezra Pound case and the FBI will be hard put to use informants as legitimate law enforcement techniques.

Mr. President, the FBI is very strongly opposed to this amendment. They focus on the point that their files are investigatory for law enforcement purposes, not for the purpose of writing stories. It is for one purpose only, and that is a law enforcement purpose. Since that is their mission and since enforcement of the law is a matter of prime importance to this country, this amendment should be denied and rejected.

The proposed amendment would apply to records of any age, including those most recently compiled. And it is commonsense that the more recent the case and the more recent the forced disclosure of the identity of the informant, the more impact such a disclosure will have on other individuals who may wish to do their part to assist the FBI in enforcing the law.

In my judgment, the mere approval of this amendment, even without any further procedures under it, will have that effect, Mr. President, because there will always be the imminent potential that there will be a release of that document and that there will be, through it, notwithstanding the deletion of names, the ability to trace the informant's name, address, and location.

Furthermore, it is going to be very difficult for the FBI to know how much information can be disclosed without exposing an informant. The FBI cannot know the extent of the requester's knowledge on the subject, what other information the requester may have to link certain items to the informants or even the purpose for which the requester wants to use the information.

Mr. President, I yield myself 5 minutes more.

The identification of an informant, even if accomplished by other information, together with a reference that portions of an FBI file

were obtained, can strike fear in the hearts of those who already have cooperated with the FBI. This fear will be not only for their reputations but also for their own safety and that of their families.

Mr. President, as I already have mentioned, the FBI is operating under guidelines that apply to records over 15 years old. Those guidelines protect categories of information similar to the categories the proposed amendment purports to protect. However, as is clearly documented, the FBI is experiencing some difficulties under standards which go further and protect more information than those proposed in the amendment. In addition to the problem of revealing informants, it is my understanding that the estate of one individual whose file or portions of it were disclosed intends to bring suit against the FBI for invading the privacy and adversely affecting the reputations of the relatives of the individual.

In my view, we should allow the FBI to have more time to gain more experience in this difficult field before we embalm any standards in a statute. Perhaps some of the problems can be ironed out. Let us legislate on the basis of experience, not on unfounded forecasts of what might occur in the future, and certainly not in the vacuum of saying that the public has a right to know without referring to the rights that society possesses, as well as the rights of private individuals who are involved.

Mr. President, we are dealing in this matter with what I believe to be the most important rights, and in some respect the most important rights, an individual may possess, his right to privacy, and his right to personal safety. This amendment poses a threat to those rights.

For that reason, Mr. President, I oppose the amendment, and I urge my colleagues to take the same step when they come to casting their votes.

Mr. President, I ask unanimous consent that there be printed in the Record a statement by the distinguished senior Senator from South Carolina (Mr. Thurmond) on this particular subject and on this particular point, he being absent from the Senate on official business.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATEMENT BY SENATOR THURMOND

When the Freedom of Information Act was enacted in 1966, it was well recognized that Congressional intent behind such an Act was directed towards regulatory agencies as distinguished from investigative agencies. This premise is reaffirmed when it is noted that Congress went to great lengths to insure that data contained in investigatory files would not be disclosed to unauthorized agencies or individuals, by specifically listing as one of the nine exemptions to disclosure under the Act exemption seven pertaining to investigatory files. The passage of time has failed to produce worthwhile evidence that would encourage a change from that original stance.

All of us are aware of the general feeling permeating the country that our citizens want to know what their Government is doing and therefore, should have access to the files, of various Governmental agencies. However, by the same token, we are also concerned about a mutual problem of invasion of an individual's privacy. I contend that this fundamental right of privacy is as great, if not greater, than the right owed to the general public for open disclosure.

The FBI, being an investigative agency of the Federal Government, obtains raw, unevaluated data from individuals from all walks of life who furnish this information with the implied or expressed understanding that such information is being furnished the Government in confidence, never to be disclosed unless to an official, authorized individual or agency. Senate Report No. 813 supports this view

by stating in part, "it is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." The House, in Report No. 1497 also took note of exemption seven providing protection for data such as that which is contained in the files of the Federal Bureau of Investigation.

This position has also come under judicial review and has been sustained in a number of legal proceedings. In *Weisberg* v. *Department of Justice*, which involved a suit by Mr. Weisberg for an FBI Laboratory report which was part of the investigation of the assassination of President Kennedy, the court held that once it has been determined by a District Judge that files, "(1) were investigatory in nature; and (2) were compiled for law enforcement purposes, such files are exempt from compelled disclosure." As recently as May 15, 1974, the Supreme Court denied certiorari in this case.

In a more recent case in which some Members of Congress brought suit against the FBI for any data it might have in its files concerning them, the District Court of the District of Columbia held that in regards to background-type investigations conducted on an individual being considered for Federal employment, such investigations are protected from disclosure under the seventh exemption of the Freedom of Information Act. It is clearly apparent that both Congress and the courts have seen the wisdom of excluding from disclosure data contained in investigatory files compiled for law enforcement purposes.

Departmental Order 528–73 which became effective in July of last year, basically provides that although Justice Department investigatory files are exempt from compulsory disclosure, persons engaged in historical research projects will be accorded access to material of historical interest that is more than 15 years old as a matter of administrative discretion. It is my understanding that since July of last year, the FBI has attempted to implement the provisions of this Order, even though it has been confronted with enumerable problems relating to the invasion of an individual's privacy.

"The New York Times" in its April 21st issue, reported that the researcher, who had requested and received data concerning Ezra Pound from the files of the FBI, was successful in identifying a number of individuals who had furnished the Bureau data concerning Pound. This, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished. The researcher went on and not only identified the individuals furnishing information to the FBI by name, but also described the data they gave as well as expressed surprise that Pound's "closest friends" cooperated with the FBI. This points out the futility of attempting to protect a source of information, by deleting identifying data, from an experienced researcher who can easily put the pieces of the puzzle together.

Disclosures of this type of information can only hinder the investigative responsibilities of the FBI or those of similar agencies whose primary responsibility is to investigate criminal activities. The FBI has always staked its high reputation on the fact that information given to it in confidence is kept secret. It is just such assurance as this that encourages individuals from all walks of life to furnish this agency information felt to come within its investigative responsibilities. If we now attempt, through legislation, to discourage such people from reporting to their Government violations of law because of fear that their identities will be made public, we will be doing a disservice to our country.

Therefore, I am unalterably opposed to any amendment which will weaken the investigative effectiveness of the FBI or other agencies responsible for investigating criminal activities, by shutting off one of their greatest sources of information—the American public.

Mr. HART. Mr. President, I yield 10 minutes to the distinguished Senator from Connecticut.

Mr. HRUSKA. Mr. President, will the Senator yield half a minute to me on my time?

Mr. WEICKER. I yield to the distinguished Senator from Nebraska.

Mr. HRUSKA. Mr. President, reference was made to the standards set forth in the amendment which the Senator from Michigan has offered as an American Bar Association proposal. That suggestion was not made by the Senator from Michigan. He correctly described it as a position recommended by the administrative law section of the American Bar Association. All of us who are familiar with the pro-

ceedings of that association know that that section, when it reports to the House of Delegates, thoroughly canvass and make their effort an additional process. After it has been carefully considered and recommended, it then goes to the House of Delegates.

The Senator has correctly described it. However, it has come to be known as an American Bar Association proposal, and it is not.

Mr. WEICKER. Mr. President, I wish to speak in favor of the amendment offered by the distinguished Senator from Michigan. I think it is a great amendment. I think it relates to a matter that should have received our attention and the attention of the American people a long time ago. If it had and if we had acted, many of the abuses which we place under the heading of Watergate would never have occurred.

Mr. President, I notice in the memorandum distributed by the Federal Bureau of Investigation to various Members of the U.S. Senate, a statement is made in opposition to the amendment of the Senator from Michigan, that the Hart amendment would:

> Destroy the confidence of the American people in the Federal investigative agencies.

I have been asked by many young people in my State as to what for me was the greatest surprise of Watergate. I have responded by saying that the greatest revelation was the fantastic scope and quality of abuses committed by the Federal law enforcement and intelligence community; that these various agencies—be they the FBI, the CIA, the military intelligence, or the Secret Service—had escaped accountability for such a long period of time that it was only a matter of time before the little acknowledgements and the little favors snowballed into the types of massive abuses which surfaced before the Senate Select Committee.

There is nothing stated in the Constitution which places any of our law enforcement agencies in some special status separate and apart from either the executive, or congressional or judicial branches.

Yet there is not one Senator who can attest to the fact that we have exercised the type of supervision and have demanded the type of accountability of these agencies as we do of other agencies of the Government. Slowly but surely, as our legislative processes mature, one after another of the sacred bureaucratic cows comes tumbling down. And as they have, we have produced better government.

How long ago was it, for example, that it would have been unpatriotic for us to question the Defense Department? Now, we are long over that hurdle, and we have better defense because of it.

It was not too long ago that we could not question our foreign policy. We will have better foreign policy because Congress participates.

The time is long overdue to say that the intelligence agencies are performing a special function, and that we should not be a part of that function.

Abuses committed are our responsibility because there is nothing in the Constitution that says that we should not act. Rather, it is our responsibility to achieve accountability, to exercise supervision over all agencies of Government.

So when the Senator stated that it would destroy the confidence of the American people in the agencies and that that was a reason to be

against the amendment, let me say that the American faith in those agencies has never been at a lower point, because we have never had the type of legislation as is contained in the amendment offered by Senator Hart this afternoon.

I have already made the statement to the Senator from Michigan and the Senator from Massachusetts that I consider the amendment too weak.

My feeling is that supervision ought to be directed and not via the courts. When I am elected a U.S. Senator from the State of Connecticut, I have my security clearance. It could be that I am a crook or in the pay of a foreign government. Sorry about that. That is one of the risks of a democracy. However, I have faith in that the democratic process minimizes that possibility.

When a man or woman is elected, he or she represents the people. And he or she is the one who should supervise. That is the democratic way.

We should make sure that we get into what every Government agency is doing. Otherwise, how can we tell whether they are performing their function under the Constitution? I cannot assure my constituents that I am performing my duty if I am not allowed to look here or not allowed to look there.

So by our nonaction we have built up a new type of government. It operates under a new Constitution, and that new Constitution and that new type of Government brought us Watergate.

Let me say this insofar as law enforcement is concerned. I remember well an interview several years back Justice Black had with Martin Agronsky.

Martin turned to Justice Black and said:

> Because of these recent Supreme Court decisions, doesn't it make it more difficult to convict an individual of any particular crime or, to put it in the words of others, aren't you being soft on the criminal?

Justice Black responded, he said:

> Well, of course, it makes conviction more difficult. Have you read the Bill of Rights? The fact that a man is entitled to counsel makes it more difficult to convict him. The fact that you have a right as an American to a trial by jury makes it more difficult to convict an individual.

He went down the whole list of rights that we, as Americans, had, and which makes it more difficult to close that prison door on any one of us.

That is the view that he took upon our rights as American citizens, in making it more difficult, to incarcerate an American.

I make no bones about the fact that from a law enforcement and efficiency standpoint, ours is a very inefficient system of government because its whole emphasis is on the individual rather than society as a whole.

I have heard this term, "What's good for society." If that is the focus, we have lost the greatness that is ours as a nation; for, we have achieved a strength way beyond our head count because each of us has been allowed to flourish, as an individual rather than as a dot in a mob.

It is an inefficient form of government, but a very great form of government.

So I correlate this to what sits before us insofar as this amendment is concerned.

Yes, it is going to make the job of the law enforcement agencies more difficult in that it brings them out into the open. But, let me assure you, the far greater danger lies behind closed doors and in locked files. None of the abuses that we have seen come out of this system would have happened if more people, more eyes, more ears, had been on the scene. I would hope this body would adopt the amendment of the distinguished Senator from Michigan (Mr. Hart) because to sit and groan as to all the horrible things that have happened without action would be ludicrous. A finger-pointing exercise insofar as the executive branch of Government is concerned is not good enough. Congress has to have the guts to stand up and say, "We are doing something." We cannot do something by traveling the old ways.

What is expected of each of us now is that we stand up and look where we have not looked before, and that is exactly what this amendment attempts to achieve, and why it is supported so wholeheartedly. It is not antilaw enforcement, and it is not antipatriotic. This amendment is democracy. This amendment is the patriotism that I stand for.

I thank the distinguished Senator from Michigan.

Mr. HART. Mr. President, I have felt very strongly that this amendment was sound and desirable. I salute the Senator from Connecticut. I have no doubt this is precisely the way we must go. I wish very much, others had been free to hear him.

The Senator from Nebraska correctly cautions us that there is an obligation and a duty and a right of a government to survive. But survival for a society such as ours hinges very importantly on the access that a citizen can have to the performance of those he has hired. That is important to the survival of government, too. That is what this amendment seeks to do. As the Senator from Connecticut stated so eloquently, this is really the meat and potatoes of the society that we so often describe as a free society.

I reserve the balance of my time.

Mr. HRUSKA. Mr. President, I yield myself 5 minutes.

Mr. President, the first duty of a nation is to survive. We figure that usually in terms of national defense where we are supposed to be equipped with such weapons and such military forces that we will be able to withstand and successfully resist invasion.

Yet, it has been written many, many times in political history and in philosophical government discussions that if this Nation is going to fall it is not going to fall because of external pressure or invasion from without. It is going to fall because of events that happened within its interior, and we have witnessed here for the last several decades an on-rush and an increase in crime and increasing problems in the field of law enforcement.

Mr. President, as against any individual rights to see what is in an FBI file, such as those to which we were just referred by the senior Senator from Michigan, what is the price for giving individual citizens a right to go into Government files? There will be a continued and increasing inability of the Government to deal with violators of the law and enforcement of the law, that price is unacceptable, totally unacceptable. This Nation cannot survive if we are not able to deal with the lawless elements.

It is nice to say that our freedoms are valuable and we must have the right to know and to do this and that or the other thing, but if, in the process of getting those things we are going to be unable to deal with organized crime, if we are going to be unable to deal with those who willfully violate our criminal laws and we impair the tools or even do away with the tools that we have available to us now for the purpose of dealing with those violators of law, then indeed we will have been very, very misguided in this business of trying to see that the Nation survives.

I say again that the adoption of this amendment, together with the adoption of the amendment offered here by the Senator from Maine (Mr. Muskie), Mr. President, will gravely endanger the enactment and the effectiveness of the bill before us today.

The better course of wisdom earlier this afternoon would have been to put the substance of the amendment of the Senator from Maine (Mr. Muskie) on a separate and independent basis.

That same thing is true in reference to the pending amendment. Let us put this Freedom of Information Act into a position where it can operate effectively, efficiently and for its declared purposes in those areas upon which we find agreement, and then go onto the proposition of taking substantive amendments to the Freedom of Information Act and treating them on their own merits.

They are two separable problems, and I say the price is just too high; it is too high to pay to try to treat the whole subject in one bill when the passage and the approval of certain of these amendments will actually endanger its becoming law.

It is my hope that the amendment will be defeated.

Mr. WEICKER. Mr. President, will the distinguished Senator from Nebraska yield for a question?

Mr. HRUSKA. I am happy to yield.

Mr. WEICKER. The distinguished Senator from Nebraska refers to the increase in lawlessness, and so forth. How do we deal, since these matters have come to our attention of late, with the lawless elements within the Federal Bureau of Investigation, within the CIA, within military intelligence, within the Secret Service, within the Internal Revenue Service? How do we deal with lawless elements within those Government agencies?

Mr. HRUSKA. The pending amendment does not bear upon that in any way whatsoever, because if we are going to say they must all function in the open, they must all function in total frankness and with total public disclosure, there may well be an erosion of our law-enforcement capabilities.

The answer to the question is simply this: There are regular oversight practices and procedures available to the Congress for the purpose of investigating these abuses, if they are abuses, that come to light. Furthermore, criminal abuses can be prosecuted in the courts.

I cite the case of the narcotics agents in Illinois, who allegedly raided a wrong address in search of heroin or whatever the controlled substance was. For awhile, it was said they may have infringed upon the rights of the individuals. They were tried in court. They were tried in court for lawless entry and a violation of law. Those issues were submitted to a jury and they were found innocent.

Yes, bring to court Government officials who abuse the law if there is any violation of law. Furthermore, as I earlier indicated, we also have adequate procedures here in Congress. We have legislative oversight committees.

Mr. WEICKER. I do not believe that the amendment of the Senator from Michigan involves throwing the FBI open to the mob. The amendment of the Senator from Michigan, as I understand it, employs regular court procedures, Mr. President, and is very restrictive and specific.

I repeat my question: How do we find out? How do we find out unless we have access to information as to the lawlessness that could take place or has taken place in the agencies? How do we find out?

Mr. HRUSKA. There are ways of doing it. We have legislative oversight. We have the courts to resort to where there is a violation of law.

But, Mr. President, there is a more fundamental question involved here: How are we going to find out about illegal doings of the law enforcement agencies?

I ask this question, to which I should like an answer from the Senator from Connecticut: How are we going to investigate effectively violations of law, how are we going to investigate organized crime when, if this amendment is passed, individuals will say, "Nothing doing, Mr. FBI, because if we give you a statement, it will be in that file, and there will be a court order saying that the file should be disclosed. My name may be deleted but there are other ways to find out, and they may identify me, threaten my family, or myself." These are not possibilities I am dreaming up. They can be documented by the examples I referred to earlier.

The question is, therefore, how are we going to investigate successfully to the prosecutorial and conviction stage the violation of law at large in the community?

It is a big, a massive, and a serious proposition, as all of us know.

Mr. WEICKER. I am glad to respond to the Senator from Nebraska. The fact is, there has not been a good job done in those areas of law enforcement where the agencies operated illegally. The problem is that in the quest for law and order, case after case after case after case has been thrown out because the law enforcement and intelligence communities acted illegally. So I do not think we attain any particular status of accomplishment in conquering organized crime, or any crime whatsoever for that matter, with illegal activities resulting in cases being thrown out of court.

I would suggest that the record speaks for itself. Frankly, I never thought the record of former Attorney General Ramsey Clark was that good. But, comparing his record with that achieved by succeeding Attorneys General, he looks like Tom Dewey in his prosecutorial heyday.

Mr. HRUSKA. That record is bad, but do we want to make it worse by adopting this amendment which threatens to tie the hands of the FBI and dry up their sources of information? I say, with that, the soup of the broth is spoiled, and I see no use in adding a few dosages of poison.

The pending amendment should be rejected.

Mr. KENNEDY. Mr. President, I do not recognize the amendment, as it has been described by the Senator from Nebraska, as the amendment we are now considering. I feel there has been a gross misinterpretation of the actual words of the amendment and its intention, as well as what it would actually achieve and accomplish. So I think it is important for the record to be extremely clear about this.

If we accept the amendment of the Senator from Michigan, we will not open up the community to rapists, muggers, and killers, as the Senator from Nebraska has almost suggested by his direct comments and statements on the amendment. What I am trying to do, as I understand the thrust of the amendment, is that it be specific about safeguarding the legitimate investigations that would be conducted by the Federal agencies and also the investigative files of the FBI.

As a matter of fact, looking back over the development of legislation under the 1966 act and looking at the Senate report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the "investigatory file" exemption would be extremely narrowly defined. It was so until recent times—really, until about the past few months. It is to remedy that different interpretation that the amendment of the Senator from Michigan which we are now considering was proposed.

I should like to ask the Senator from Michigan a couple of questions.

Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Mr. HART. The Senator from Michigan is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do.

Mr. President, while several Senators are in the Chamber, I should like to ask for the yeas and nays on my amendment.

The yeas and nays were ordered.

Mr. KENNEDY. Furthermore, Mr. President, the Senate report language that refers to exemption 7 in the 1966 report on the Freedom of Information Act—and that seventh exemption is the target of the Senator from Michigan's amendment—reads as follows:

> Exemption No. 7 deals with "investigatory files compiled for law enforcement purposes." These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court.

It seems to me that the interpretation, the definition, in that report language is much more restrictive than the kind of amendment the Senator from Michigan at this time is attempting to achieve, of course, that interpretation in the 1966 report was embraced by a unanimous Senate back then.

Mr. HART. I think the Senator from Massachusetts is correct. One could argue that the amendment we are now considering, if adopted, would leave the Freedom of Information Act less available to a concerned citizen that was the case with the 1966 language initially.

Again, however, the development in recent cases requires that we respond in some fashion, even though we may not achieve the same breadth of opportunity for the availability of documents that may arguably be said to apply under the original 1967 act.

Mr. KENNEDY. That would certainly be my understanding. Furthermore, it seems to me that the amendment itself has considerable sensitivity built in to protect against the invasion of privacy, and to protect the identities of informants, and most generally to protect the legitimate interests of a law enforcement agency to conduct an investigation into any one of these crimes which have been outlined in such wonderful verbiage here this afternoon—treason, espionage, or what have you.

So I just want to express that on these points the amendment is precise and clear and is an extremely positive and constructive development to meet legitimate law enforcement concerns. These are some of the reasons why I will support the amendment, and I urge my colleagues to do so.

The PRESIDING OFFICER (Mr. Domenici). The Senator from Nebraska has 6 minutes remaining.

Mr. HRUSKA. Mr. President, I should like to point out that the amendment proposed by the Senator from Michigan, preserves the right of people to a fair trial or impartial adjudication. It is careful to preserve the identity of an informer. It is careful to preserve the idea of protecting the investigative techniques and procedures, and so forth. But what about the names of those persons that are contained in the file who are not informers and who are not accused of crime and who will not be tried? What about the protection of those people whose names will be in there, together with information having to do with them? Will they be protected? It is a real question, and it would be of great interest to people who will be named by informers somewhere along the line of the investigation and whose name presumably would stay in the file.

Mr. President, by way of summary, I would like to say that it would distort the purposes of the FBI, imposing on them the added burden, in addition to investigating cases and getting evidence, of serving as a research source for every writer or curious person, or for those who may wish to find a basis for suit either against the Government or against someone else who might be mentioned in the file.

Second, it would impose upon the FBI the tremendous task of reviewing each page and each document contained in many of their investigatory files to make an independent judgment as to whether or not any part thereof should be released. Some of these files are very extensive, particularly in organized crime cases that are sometimes under consideration for a year, a year and a half, or 2 years.

Mr HART. Mr. President, will the Senator yield?

The PRESIDING OFFICER. All time of the Senator has expired.

Mr. KENNEDY. I yield the Senator 5 minutes on the bill.

Mr. HART. Mr. President, I ask unanimous consent that a memorandum letter, reference to which has been made in the debate and which has been distributed to each Senator, be printed in the Record.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

MEMORANDUM LETTER

A question has been raised as to whether my amendment might hinder the Federal Bureau of Investigation in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.

However, my amendment would not hinder the Bureau's performance in any way. The Administrative Law Section of the American Bar Association language, which my amendment adopts verbatim, was carefully drawn to preserve every conceiveable reason the Bureau might have for resisting disclosure of material in an investigative file:

If informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosures;

If the Bureau's confidential techniques and procedures would be threatened, there would be no disclosure;

If disclosure is an unwarranted invasion of privacy, there would be no disclosure (contrary to the Bureau's letter, this is a determination courts make all the time; indeed the sixth exemption in the Act presently involves just such a task);

If in any other way the Bureau's ability to conduct such investigations was threatened, there would be no disclosure.

Thus, my amendment more than adequately safeguards against any problem which might be raised for the Bureau. The point is that the "law enforcement" exemption has been broadly construed to include any investigation by a government agency of a federally funded or monitored activity. The courts only require that the investigation might result in some government "sanction" such as a cutoff of funds—and not necessarily a prosecution. The investigations of auto defects, harmful children's toys, or federally-assisted hospitals could all be hidden completely from public view, and from criticism of government inaction or favoritism, unless my amendment is adopted. This is the danger which the ABA proposal seeks to correct. These are rarely FBI investigations.

Beyond these legitimate concerns, the Bureau's letter presents arguments which reject the entire Freedom of Information Act and all efforts by the press and the public to find out what their government representatives are actually doing.

The Bureau objects that government employees would have to review files to determine whether disclosure would really be harmful, and that someone might sue if he disagrees with an agency's refusal.

But the fundamental premise of the Freedom of Information Act is precisely that the opportunity to seek information is essential to an informed electorate. It is also axiomatic that an official should not be the sole judge of what he must disclose about his own agency's activities.

Surely if the events of the last two years, collectively known as Watergate have taught us anything, they have underlined vividly the wisdom of these two assumptions.

Sincerely,

PHILIP A. HART.

The PRESIDING OFFICER. The question is on agreeing to the amendment. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollings), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel) and the Senator from Rhode Island (Mr. Pastore) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett), the Senator from New York (Mr. Buckley), and the Senator from Idaho Mr. (McClure) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. Thurmond) would vote "nay."

The result was announced—yeas 51, nays 33, as follows:

[No. 220 LEG.]

YEAS—51

Abourezk	Hatfield	Nelson
Aiken	Hathaway	Packwood
Bayh	Humphrey	Pearson
Beall	Jackson	Percy
Biden	Javits	Proxmire
Brooke	Kennedy	Ribicoff
Burdick	Magnuson	Roth
Case	Mansfield	Schweiker
Chiles	Mathias	Stafford
Church	McGee	Stevens
Clark	McIntyre	Stevenson
Cook	Metcalf	Symington
Cranston	Metzenbaum	Taft
Eagleton	Mondale	Tunney
Fong	Montoya	Weicker
Hart	Moss	Williams
Haskell	Muskie	Young

NAYS—33

Allen	Curtis	Huddleston
Baker	Dole	Johnston
Bartlett	Domenici	Long
Bellmon	Eastland	McClellan
Bentsen	Ervin	Nunn
Bible	Goldwater	Randolph
Brock	Griffin	Scott, Hugh
Byrd, Harry F., Jr.	Gurney	Scott, William L.
Byrd, Robert C.	Hansen	Stennis
Cannon	Helms	Talmadge
Cotton	Hruska	Tower

NOT VOTING—16

Bennett	Hartke	Pastore
Buckley	Hollings	Pell
Dominick	Hughes	Sparkman
Fannin	Inouye	Thurmond
Fulbright	McClure	
Gravel	McGovern	

So Mr. Hart's amendment was agreed to.

Mr. KENNEDY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. MOSS. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President——

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. I yield to the Senator from Pennsylvania without losing my right to the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. HUGH SCOTT. Mr. President, I thank the Senator from Massachusetts.

The PRESIDING OFFICER. Will the Senator suspend? Who yields time?

Mr. KENNEDY. I yield 5 minutes to the Senator from Pennsylvania, or whatever time he needs.

AMENDMENT OF FREEDOM OF INFORMATION ACT

The Senate continued with the consideration of the bill (S. 2543) to amend section 552 of title 5, United States Code, commonly known as the Freedom of Information Act.

The PRESIDING OFFICER. The bill is open to further amendment.

Mr. KENNEDY. Mr. President, I yield myself 1 minute.

The Senator from Kansas has mentioned to me an amendment which he was considering offering to expand one of the exemptions dealing with medical research, and its relationship to the category of confidential information. Although we have no specific information about its impact at this time, I have indicated that I will work with him to review the proposal and make a determination as to its merit. The Senator would then have the opportunity to offer his amendment at a later time, perhaps to a health bill that will be pending.

Mr. DOLE. Mr. President, based on that assurance, I would like to commend the Judiciary Committee's Subcommittee on Administrative Practice and Procedure, under the very capable leadership of the distinguished Senator from Massachusetts (Mr. Kennedy), for its work on this bill to refine the provisions of the Freedom of Information Act.

I think they quite properly endeavored to correct some of the many problems of implementation created by the deficiencies and shortcomings of the existing law under section 552 of title 5, United States Code. However, I am concerned that, as spelled out on the first page of its report, the committee chose not to approach and attempt to resolve the difficulties emanating from the "exceptions to disclosure" contained in subsection (b) of the relevant section.

They did so, apparently, on the premise that such "exceptions" had been substantially clarified through numerous reported court decisions. I would have to take issue with this position, particularly as it involves item 4 pertaining to "trade secrets," and the definition thereof. For there are many yet unsettled questions in this area, probably as the result of our failure to adequately specify by statute exactly what is meant by such a "secret."

Accordingly I had considered offering to S. 2543 the following amendment to which Senator Kennedy has referred:

On page 17, between lines 12 and 13, insert the following new subsection:
Section 552(b)(4) of title 5, United States Code, is amended to read as follows:
"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential, including applications for research grants based on original ideas."

Mr. President, very briefly, this was a simple amendment intended to clarify in part the application of the Freedom of Information Act

as it directly relates to research grants. I have received several letters on this subject from Kansas educators—especially those associated with medical or other scientific investigations—all expressing criticism of the act's interpretation and ultimate impact on original experimental project studies.

COMPETITION IN RESEARCH

Basically, their arguments have been that research, like any other free enterprise, is highly competitive. And while individuals capable of performing experiments using the ideas of others are rather plentiful, creative individuals with new ideas of their own are much less common. Therefore, it is extremely important that the ideas of such investigators be protected.

It seems to me, then, that the scientist who applies for a research grant, based on his original idea, should not have to risk the exposure of that notion in a public document for anyone to test before he himself has the opportunity to be awarded funds to perform the necessary experiments; that is, the confidentiality of an application for a research grant being the integral part of the granting process that it is, the safeguarding of the ideas contained therein should be imperative.

PROTOCOL OF GRANT APPLICATIONS

This very standard has been generally invoked in the past, as described by Dr. John F. Sherman, Deputy Director of National Institutes of Health, during his testimony before a House subcommittee surveying the granting process in hearings of June 1972. Certain portions of his remarks are particularly pertinent, I think, and merit the attention of my colleagues.

Reading from his statement, Dr. Sherman said that—

> The information provided in grant applications submitted to the NIH is treated as confidential. Because research scientists and academic clinicians owe their advancement and standing in the scientific community to their original research contributions, their creative ideas are of critical importance and research scientists carefully protect their ideas. Thus, to the scientists and to the research clinician, research designs and protocols are regarded and treated as proprietary information, just as trade secrets are protected by the commercial and industrial sector.
>
> If we are to encourage vigorous competition in health research, the NIH must respect applicants' ideas and protect them. If they could not be assured of this confidentiality, we believe the NIH review system and its encouragement of scientific competition could not be sustained. Scientists would not supply the explicit details of their proposed research approach and methodology essential for competent review, and the NIH ability to obtain effective evaluation of scientific merit for further programmatic judgments would be markedly hampered.

Mr. President, I ask unanimous consent that the remaining selected extracts of Dr. Sherman's testimony be included in the Record at this point.

There being no objection, the testimony was ordered to be printed in the Record, as follows:

PARTIAL EXTRACT OF TESTIMONY OF DR. JOHN F. SHERMAN, DEPUTY DIRECTOR, NATIONAL INSTITUTES OF HEALTH, DURING HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS

FLOW OF INFORMATION TO THE PUBLIC REGARDING THE RESEARCH GRANT PROGRAM

1. Applications

While the substance of the research grant applications is considered to be privileged information, a notice of the application is sent to the science information exchange. The science information exchange is an informational system operated by the Smithsonian Institution.

Section 1 of the research grant application is entitled "Research Objectives." This particular sheet contains no privileged information. It includes the name and address of the applicant organization as well as the name and other pertinent information regarding the professional personnel engaged on the project, the title of the project, and an abstract of the proposed project which has been prepared by the principal investigator.

This sheet is sent to the science information exchange and is available from them when the project is funded. The public, particularly the scientific community, may request that information about individual projects or aggregates of projects from that organization. At the time an award is made, this information is also provided to the SSIE, plus information regarding the dollar amount of the award.

2. Research grant awards

Public notices of the research grants awarded by the NIH are made available in a number of publications:

(*a*) Each year a cumulative list of awards made during the previous fiscal year is published in a series of volumes entitled "Public Health Service Grants and Awards" through the U.S. Government Printing Office. Data with regard to the awards are broken down in a number of fashions. Principally, however, this is by institution, by States, by principal investigator, the project title, the initial review group, the grant number, and the dollar amount.

(*b*) The Division of Research Grants also issues a two-volume series each year entitled "Research Grants Index," which displays the grant awards by major rubric headings, such as arthritis, brain injury, gastrointestinal circulation, et cetera. The research grants are also indexed by number and alphabetical listings of investigators.

(*c*) In addition to these formal publications, interim listings of grant awards are also available to interested individuals or organizations, including members of the press. Notice of a grant award is also sent to the congressional Representative in whose district the grantee institution is located.

3. Notification to principal investigator re applications which are disapproved or "approved but not funded"

For those applications which are disapproved or, though approved are not awarded, information summarizing the reviewer's opinions regarding scientific merit will be sent to the principal investigator upon his request. Since this information relates to the original ideas of the principal investigator and reflects on his qualifications as a scientist, it is not released to any other request or without the principal investigator's consent.

Mr. DOLE. Mr. President, in spite of this practice in the treatment of grant applications, the courts have, unfortunately, not always seen fit to accept it as being in compliance with the Freedom of Information Act provisions. And I think this may be due in great part to the vague language used in the previously mentioned "exemptions" subsection.

In fact, in ruling last November that privileged research grant information must be made public, U.S. District Judge Gesell admonished Congress for its "* * * imprecise and poorly drafted freedom of information statute." I believe the entire backdrop and rationale of that decision—which is currently on appeal—is important in the consideration of this amendment, and ask unanimous consent that the complete memorandum opinion and order be printed in the record.

There being no objection, the decision was ordered to be printed in the record, as follows:

[U.S. District Court for the District of Columbia—Civil Action No. 1279–73]

WASHINGTON RESEARCH PROJECT, INC., PLAINTIFF, VERSUS DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND CASPAR W. WEINBERGER, DEFENDANTS

MEMORANDUM OPINION

Plaintiff invokes the Freedom of Information Act, 5 U.S.C. § 552, and seeks to compel production of certain records from the Department of Health, Education, and Welfare and one of its constituent agencies, the National Institute of Mental Health (NIMH). An injunction and declaratory judgment are sought. Plaintiff's written request for production, inspection and copying of specified records has been fully processed through appropriate administrative channels and the issues are accordingly properly before the Court, which has jurisdiction under 5 U.S.C. § 522(a)(3).

On April 13, 1973, plaintiff requested, with detailed specification, documents relating to eleven designated research grants by the Psychopharmacology Research Branch of NIMH for studies on the drug treatment of children with learning difficulties or behavioral disorders, particularly hyperkinesis. All but two of the research grants involve the use of one or a combination of stimulant or antidepressant drugs, including methylphenidate (Ritalin), dextroamphetamine, thioridazine and imipramine, on selected school age and/or pre-school children.

All of the grants are administered by public or private non-profit educational, medical or research institutions. None of the grants is concerned with the production of marketing of the drugs being tested. Their purposes include the determination of optimal dosage levels and treatment schedules; the identification of possible harmful side effects such as drug addiction and loss of weight; the measurement of the effect of different drugs on learning, including the existence of state-dependent learning; and the development of improved assessment techniques to measure the efficacy of drug treatment on children.

Following a series of conferences and administrative actions, which need not be reviewed here in any detail, a considerable number of documents were furnished. However, as of July 27, 1973, the following categories of documents were still being withheld, and it is upon these that the litigation has finally focused:

(a) with regard to previously approved grant applications, the narrative statement and any related exhibits describing in detail the research plan to be followed (sometimes referred to as the research protocol or research design);

(b) with regard to previously approved continuation, renewal or supplemental applications, the comprehensive progress reports describing the results and accomplishments of the projects since the last such report;

(c) the entire text of all site visit reports and "pink sheets" prepared by outside consultants and NIMH staff during the agency review of the applications;

(d) the entire text of all continuation and renewal applications which have not yet been approved.

For the purposes of analysis, these various documents will be referred to simply as grant applications, site visit reports, and "pink sheets."

After some discovery, the matter came before the Court for final hearing under an arrangement developed at a status conference. The parties presented *in camera* a portion of a single grant file marked to show the type of information defendant believes may properly be withheld under the Act. This file, as marked, was also given plaintiff informally. It was agreed that the determinations, made by the Court based on this example would control the disposition as to other similar material covered by plaintiff's request and presently withheld. After the record was completed, the parties presented argument and were allowed to file post-trial briefs.

I. NIMH grant procedures

Before turning to the conflicting interpretations of the Freedom of Information Act presented by the parties, the nature of the material requested must be elaborated and its significance in the chain of the grant process explained.[1]

The National Institute of Mental Health operates a dual system of review for all major research projects. The first stage involves the initial review group (sometimes called a study section or review committee), made up of from 10–20 nongovernmental technical consultants, who are appointed by the Director of NIMH for overlapping terms of up to four years. Each branch or center of the NIMH is served by one or more review groups qualified in a specific field. There are approximately 20 NIMH review groups for research project grants, as well as review groups for long-term program grants, small grants, fellowships and training. There is an Executive Secretary for each review group who is an NIMH employee and a chairman who is appointed by the Executive Secretary.

Each application is assigned by the Executive Secretary to one or more members (assignees) of the initial review group for study and comment. Assignees are selected because of their experience and competence in the areas covered by the proposed research. Non-committee members may also be asked to review a project on an *ad hoc* basis, when the Executive Secretary feels that the committee itself lacks expertise in a necessary area.

When additional information is needed, the Executive Secretary may obtain it through correspondence, by telephone, or by a site visit conducted by the review group assignees. Site visits may also be requested by the assignees themselves when they believe it will aid in their review of the project. Site visits are generally used for unusually large or multidisciplinary applications, or when it is deemed important to meet personally with the investigator and his or her associates in order to observe the physical facilities and equipment which will be used or to observe a particular experimental technique in operation. Visitors may make suggestions for changes in the proposed research plan, and a revised protocol or addendum is sometimes submitted to NIMH following the site visit.

At the conclusion of the site visit, the team meets in executive session to discuss their reactions and to formulate a recommendation. One assignee is delegated to write up the team's findings, sometimes with the assistance of written reports from the other visitors. The site visit reports are prepared on behalf of the team as a whole and they do not identify evaluations with particular members of the site visit team.

The site visit report or, when no site visit was held, a written evaluation prepared by one of the assignees is made part of a grant book which is sent to each member of the initial review group four to six weeks before its meeting. The grant book also contains a copy of the complete grant application for each project which is scheduled to be reviewed.

Initial review groups meet three times a year. The Clinical Psychopharmacology Research Review Committee, which reviewed the grants involved here, considers an average often to fifteen applications at each meeting, including supplemental and renewal applications.[2] Each proposed research project is reviewed separately for approximately 45 minutes to an hour. The principal assignee described the project and presents the findings of the site team visit. The other visitors also present a critique of the project, and NIMH staff may be asked to comment.

Following the discussion and after a consensus has been reached, a formal vote is taken on each project. If it is approved, each member of the committee then assigns a rating to the project, which is used for determining funding priorities. The minutes of each meeting contain a complete attendance list and data on the number of approvals, disapprovals and deferrals of applications considered, but they do not contain a summary of the discussion regarding any application.

After the meeting of the initial review group, an NIMH staff person prepares a Summary Statement ("pink sheet") for each grant, containing in a single docu-

[1] The following textual description of the NIMH grant review process is taken principally from the deposition of Dr. Ronald S. Lipman, Chief of the Clinical Studies Section of the Psychopharmacology Research Branch of NIMH and from the NIMH Handbook for Initial Review Staff (1970), plaintiff's 1 exhibit in evidence.

[2] Supplemental applications are for additional funds above the amount previously approved for the current or any future project year. Renewal applications are for funds beyond the project period previously approved. Continuation applications are filed at the beginning of each year in the previously approved project period. Generally, supplemental and renewal applications must compete for available funds with other applications, new or otherwise; they are processed through both stages of the review process. Continuation applications are generally noncompeting and not subject to the review process.

ment a brief description of the proposed research or training grant request and the substantive considerations that led to the specific recommendation, including in the case of a split vote the reasons for both majority and minority opinions. The Statement will normally discuss the background and competence of the investigators, any special aspects of the facilities and equipment, and whether the budget is appropriate to the aims and methodology of the project. Where human subjects are involved, the Statement should include the opinion of the review group on the risks involved. In addition, the site visit report, if one has been written, is incorporated by reference into the Statement.

All Review Committee actions are considered to be collective and anonymous. Therefore, the Summary Statement does not attribute evaluations or comments to any individual member. If two or more members voted against the majority recommendation, their opinion is also summarized in the Statement, without identifying the members involved.

The Statements are the principal source of information regarding the application and the recommendation provided to the National Advisory Mental Health Council; they are also used by NIMH staff to provide information concerning disapprovals to applicants and to follow the results of approved projects. According to the NIMH Handbook, at 32, the Statements are "perhaps the most informative document in the history of the grant."

The second stage in the dual NIMH review process involves the National Advisory Mental Health Council, a body set up by statute to "advise, consult with, and make recommendations to, the [Secretary] on matters relating to the activities and functions of the [Public Health] Service in the field of Mental Health." 42 U.S.C. § 218(c). The Council is specifically authorized "to review research projects or programs submitted to or initiated by it in the field of mental health and recommend to the Secretary . . . any such projects which it believes show promise of making valuable contributions to human knowledge with respect to the cause, prevention, or methods of diagnosis and treatment of psychiatric disorders." 42 U.S.C. § 218(c). The members of the Council are the Assistant Secretary for Health, the Chief Medical Officer of the Veterans' Administration, a medical officer designated by the Secretary of Defense, and twelve public members appointed by the Secretary of HEW.

The National Advisory Mental Health Council meets three times a year for two or three days to review the "recommendations" of all of the initial review groups within NIMH. The Council reviews from 500 to 1,000 grants during each meeting. Except where a special request is made, the Council members do not receive individual grant applications. Their decision is based solely on the review group Summary Statements. Except for grants on which a special question is raised (no more than five percent of the grants), the Council approves the recommendations from each review group in a block. Consequently, the Council's concern is with questions of general policy and of program priority, and not with the scientific merit of any individual applications.

Following approval by the National Advisory Mental Health Council, funding of a project is contingent upon the availability of funds. General priorities for funding are determined by the Director of NIMH, with the advice of the National Advisory Mental Health Council. Within these general priorities, 90 percent of the approved grants are funded in the order of numerical priority set by the initial review group. Researchers are notified of the grant award by an award letter and a formal notice, both of which are signed by the NIMH branch chief. The award letter states that the project has been approved by the initial review group and the National Advisory Mental Health Council.

II. The act

These procedures generate a prodigious amount of information concerning the proposed research projects and the allocation of funds among them. NIMH incorporates into its application instructions a warning that some of this information must be made available to the public under the Freedom of Information Act. However, it specifically assures the applicants that the following information does not fall within the terms of the Act and will not be disclosed to the public:

a. Applications for research grant support are considered to be privileged information. Until such time as an application is approved and a grant awarded, no information is disclosed except for the use of Section I of the application form PHS–398 and the notice of research project form PHS–166 by the Science Information Exchange in connection with its responsibilities for exchange of information among participating agencies.

b. Section II of the application form PHS–398 or the corresponding material in application form PHS–2590.

c. Details of estimated budgets.

d. Discussions of applications by advisory bodies.[2a] Plaintiff challenges this interpretation of the Act and NIMH's consequent withholding of substantial portions of the grant applications, "pink sheets," and site visit reports requested.

In resolving this dispute, the Court is faced with the initial difficulty that the Act on its face does not give special consideration to the field of medical research or the problem of grant applications. Accordingly, as is usually the case where the Court must attempt to apply this imprecise and poorly drafted statute to a situation apparently never contemplated by the Congress, it becomes necessary to resolve the controversy by reliance on the high gloss which the learned decisions of this Circuit have been required to place on the legislation.

The initial question for consideration is whether the "pink sheets," site visit reports and grant applications are documents coming within the disclosure provisions of § 552(a). Under the decisions in this Circuit, it is clear that the NIMH initial review groups constitute "agencies" as that term is used in the Act. *See, e.g., Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, No. 71–1730 (D.C. Cir. July 3, 1973) ("Grumman II"). They "serve as a discrete, decision-producing layer" in the application process and the priorities they set receive only perfunctory review by the National Advisory Mental Health Council. *Id.* at 10. It is equally clear—indeed not contested—that the "pink sheets" represent the final opinions of the initial review groups, presenting authoritative reasons for assigning each application to a particular priority. The site visit reports must be viewed as integral parts of these final decisions, since, as indicated by the sample file, they are incorporated by reference into the "pink sheets" and are cited as a basis for the review groups' final decisions. *See Sterling Drug, Inc.* v. *F.T.C.*, 450 F. 2d 698, 704–08 (D.C. Cir. 1971); *American Mail Lines, Ltd.* v. *Gulick*, 411 F. 2d 696, 703 (D.C. Cir. 1968). Both types of documents are therefore subject to disclosure as an agency's "final opinions . . . made in the adjudication of cases . . ." 5 U.S.C. § 552(a)(2)(A). As for the grant applications, they are "identifiable records" of an agency and are therefore subject to disclosure upon specific request, which plaintiff has duly made. *See* 5 U.S.C. § 552(a)(3); *Bristol-Myers Co.* v. *F.T.C.*, 284 F. Supp. 745, 747 (D.D.C. 1968).

All of the documents sought by plaintiff must therefore be produced in full unless the Government can establish that certain papers or sections thereof fall within the specific exemptions enumerated in the Act. Defendants suggest that three of these exceptions are applicable to the documents at issue. In considering this claim, the Court must construe the requirement of disclosure broadly and the exemptions narrowly in order to promote "the clear legislative intent to assure public access to all government records whose disclosure would not significantly harm specific governmental interests." *Soucie* v. *David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

Defendants argue that all descriptions of an applicant's proposed research, whether in its application or in agency reports, constitutes confidential material within the terms of the fourth exemption.[3] However, that exemption shields only trade secrets and other confidential information that is either "commercial" or "financial" in nature. *Getman* v. *N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971). None of the applicants for NIMH grant funds are profit-making enterprises, nor are such funds sought for the production or marketing of a product or service.[4] Whatever Congress may have meant by the admittedly imprecise terms in the fourth exception, the Court cannot, consistent with its duty to construe the Act's exemptions narrowly, find that scientific research procedures to be under-

[2a] National Institutes of Health, Grant for Research Projects, Policy Statement 14 (1972). This interpretation of the Act is consistent with HEW's more general interpretation, codified at 45 C.F.R. § —.

[3] 5 U.S.C. § 552(b)(4): "This section does not apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . ."

[4] In recent testimony before Congress, Dr. John F. Sherman, Deputy Director of the National Institutes of Health, argued that the fourth exemption should apply to grant documents because "to the scientist and to the research clinician, research designs and protocols are regarded and treated as proprietary information, just as trade secrets are protected by the commercial and industrial sector." Hearings on U.S. Government Information Policies and Practices Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 3620 (1972). However, this analysis is only relevant to the extent that Dr. Sherman recognizes that research procedures are not actually trade secrets, nor are research part of the "commercial or industrial sector." His arguments are exceptional * * *.

taken by non-profit educational or medical institutions fall within those terms.[5] Even if the Court were to find otherwise, however, defendants would not prevail, for they have wholly failed to meet their burden of proving that the particular research designs and protocols at issue in this case contain material that would normally be kept confidential by the researchers themselves, regardless of the agency's own assurances of confidentiality. *See Sterling Drug, Inc.* v. *F.T.C.*, *supra*, at 709.

Defendants also raise the fifth exemption,[6] which shields inter- and intra-agency memoranda. However, this Court's finding that the "pink sheets" and site visit reports constitute final agency opinions takes those documents out of the fifth exemption, *see Grumman U*, *supra*, at 13, and the applications are not protected because they were written by non-agency personnel, *see Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063–66 (1973), and contain essentially factual material, *see Bristol-Myers Company* v. *F.T.C.*, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824 (1970).

Similarly, there is no merit to defendants' claim that the disclosure of any agency reference to the professional qualifications or competence of a particular researcher would constitute a clearly unwarranted invasion of personal privacy under the sixth exemption.[7] That provision shields only "personnel and medical files and similar files" from disclosure. Although the term "files" has been justifiably criticized as vague, *see K. Davis, supra* note 4, at 798, it cannot be ignored.[8] The sixth exemption was intended to protect "detailed Government records on an individual," H. Rept. 1497, 89th Cong., 2d Sess. 11 (1966), and it cannot be extended to shield a brief analysis of professional competence written into a final agency opinion.

Perhaps in recognition of this distinction, Congress incorporated another privacy provision into the Act which is not limited to Government files. Immediately following the disclosure requirement in § 552(a)(2), the Act states: "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing." Portions of the "pink sheets" and the site visit reports could fall within the terms of this exemption, but the Government has the burden of establishing that disclosure in each instance would be "clearly unwarranted." *See Getman* v. *N.L.R.B.*, *supra*, at 674.

Upon careful consideration of the competing interests involved, the Court concludes that the Government may, to the extent described below, delete identifying details from statements of opinion concerning the professional qualifications or competence of particular individuals involved in the research project under consideration. Disclosure of such information might substantially injure the professional reputations of researchers, while deletion would not, in most instances, significantly obscure the reasons for assigning an application to a particular priority.

It must be stressed, however, that the holding of this Court is narrowly limited. Normally, only the names of the individuals under discussion may be deleted, leaving the opinions themselves free to be disclosed, *Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 580–81 (D.C. Cir. 1970) ("Grumman I"). If, as is the case with many of the documents sought by plaintiff, the names of the

[5] The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967), at 34, apparently reached a contrary conclusion, based upon comments in the congressional reports to the effect that "technical data" concerning "scientific or manufacturing processes" would be covered by the fourth exemption. However, Professor Davis points out that the quoted language was derived from a Senate report on an earlier version of the exemption which did not contain the limiting words "commercial or financial," and that the shielding of non-commercial technical information would be contrary to the clear wording of the statute. K. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 789–91 (1967). In resolving this dispute in Davis' favor, the Court finds it significant that the D.C. Circuit in Getman followed Davis and interpreted the fourth exemption narrowly (although if did not specifically consider the disputed language in the congressional reports), while the Attorney General's Memorandum interpreted it broadly to cover all confidential material.

[6] U.S.C. § 552(b)(5): "This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ."

[7] U.S.C. § 552(b)(6): "This section does not apply to matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ."

[8] An earlier version of the sixth exemption shielded the specified files and all "similar matter" (emphasis added), but Congress amended that phrase to use the more limited term "files" throughout, K. Davis supra note 4, at 798 n. 94.

researchers have already been disclosed or if for any other reason the deletion of such names would not conceal the identity of the individuals under discussion, the statements of opinion might have to be deleted in their entirety. But in every case the defendants may only delete that minimum amount of information necessary to conceal the identity of those individuals whose privacy is threatened in the manner described above.

As a further limitation, no deletions whatever may be made from documents relating to an application—whether initial, continuation, renewal or supplemental—which has actually been granted, since in such cases the public's interest in knowing how its funds are disbursed surpasses the privacy interests involved. Nor may the identity of an institutional applicant be concealed, because the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association. *K. Davis, supra* note 4, at 781, 799.

Apart from resolution of the instant controversy, plaintiff asks for assistance to insure that subsequent similar requests for information from NIMH will not be delayed and obfuscated by drawn-out negotiations and Court proceedings. Plaintiff's concern is well taken, for the Act should, to the extent practical, be self-operative to assure prompt disclosure as contemplated by Congress. At a minimum, the defendants should promptly modify existing regulations and grant application instructions to bring them into conformity with the decision of this Court. It is particularly important that grant applicants be placed on notice that information submitted pursuant to an application for NIMH grant funds and final agency opinions concerning the award of such funds, as defined above, cannot normally be kept confidential nor withheld from the public.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

GERHARD A. GESELL,
U.S. District Judge.

NOVEMBER 6, 1973.

[U.S. District Court for the District of Columbia—Civil Action No. 1279-73]

WASHINGTON RESEARCH PROJECT, INC., PLAINTIFF, VERSUS DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND CASPAR W. WEINBERGER, DEFENDANTS

ORDER

In accordance with the Court's Memorandum Opinion filed this 6th day of November, 1973, it is hereby

Ordered that the defendants promptly amend all relevant application instructions and agency regulations, including those codified at 45 C.F.R. § 5, to bring them into conformity with the decision of this Court, and it is further

Ordered that the defendants promptly produce and make available to plaintiff for inspection and copying all documents listed in its request for information dated April 13, 1973, except that, if any such document relating to an application that has not been granted contains a statement of opinion by a Government officer, employee or consultant concerning the professional qualifications or competence of an individual involved in the research project under consideration, the defendants may delete from that document any detail which would identify a particular individual as the subject of that statement, or, if such deletion would be impossible or ineffectual, the defendants may delete the statement itself.

GERHARD A. GESELL,
U.S. District Judge.

NOVEMBER 6, 1973.

Mr. DOLE. Mr. President, I think the situation in this case of Washington Research Project, Inc., against Department of Health, Education, and Welfare clearly demonstrates the need for congressional action to insure that research ideas are indeed accorded the confidential status which they deserve. It is for that sole reason that I drafted the said amendment, in anticipation of proposing its adoption.

While it is not our business to preempt the courts in matters of judicial concern, it is our affirmative legislative duty to lay down

proper statutory guidelines. Regardless of the outcome in the cited case, therefore, we still have the obligation to protect against any future unnecessary, unwise, and unfair premature disclosure requirements in the specific area of scientific experimentation.

Certainly, the whole idea of "disclosure" and the public's "right to know" is of paramount importance at this time in our Nation's history. And I have no desire or intention of placing undue restrictions on those fundamental concepts. But I feel very strongly that, in the area of research grants, nondisclosure entitlement is justified—and completely within the spirit of the Freedom of Information Act itself.

It is my sincere hope that my colleagues will agree, and join me at the appropriate time in moving to identify such matters as specifically excepted from categories of information which should be disseminated to the public. I urge this problem to be the subject of special hearings at the earliest opportunity, and that it be resolved coincident with future health legislation, as the distinguished floor manager of the present bill (Mr. Kennedy) has suggested.

The PRESIDING OFFICER. The question is on agreeing to committee amendment in the nature of a substitute, as amended.

The amendment was agreed to.

The PRESIDING OFFICER. The question is on the third reading of the bill.

The bill (S. 2543) was ordered to a third reading and read the third time.

Mr. KENNEDY. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 12471.

The Presiding Officer laid before the Senate H.R. 12471, to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The PRESIDING OFFICER. The bill will be considered as having been read twice by title, and without objection the Senate will proceed to its consideration.

Mr. KENNEDY. Mr. President, I move to strike all after the enacting clause of H.R. 12471 and insert in lieu thereof the language of S. 2543 as amended.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Massachusetts to insert the Senate language as a substitute for the House bill.

The motion was agreed to.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on final passage.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill (H.R. 12471) was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

Mr. GRIFFIN. Mr. President, is the Senator from Nebraska entitled to recognition?

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HRUSKA. Mr. President, I shall take not more than 3 or 4 minutes to recapitulate what has transpired today on this bill.

First, I point out that this bill was reported unanimously and without objection from the Judiciary Committee to accomplish certain procedural changes in the Freedom of Information Act, which was enacted in 1966.

Some substantive changes were offered in committee. They were turned down. The purpose was to make it an effective and an efficient implement and in a very vital field; namely, the right of the public to know, on the one hand, and, on the other hand, to conserve the confidentiality of Federal Government departments and documents and to enable them to function properly and effectively.

Mr. President, it is to be regretted that some major, substantive changes were effected by amendments on the floor of the Senate today.

It is my intention—and I shall do so—to vote against the bill because of the agreement to those amendments. It was my prior intention to vote for the bill, but it is my present intention to call to the attention of the President the very undesirable features of the two amendments.

In my judgment, there has been a disastrous effect upon law enforcement, particularly by the Federal Bureau of Investigation and the law enforcement agencies of our national Government. The amendments will have an effect also on the local law enforcement agencies as well.

I shall urge the President as strongly as I can to veto this measure. It is my belief that it is sufficiently disadvantageous and detrimental that it requires a veto. It is to be regretted, Mr. President, because we had a good bill. We should go forward and make the Freedom of Information Act as effective as possible. I think a fine balance had been worked out with the many interests competing for information that either should be disclosed or should be held confidential, and with other interests such as permitting the courts to review classified documents in camera.

Mr. President, I make this as a statement in connection with the future proceedings on the bill.

Mr. President, I ask unanimous consent that a brief statement summarizing those points be printed in the Record.

There being no objection, the statement was ordered to be printed in the Record, as follows:

STATEMENT

Mr. President, my points of summary are as follows. First as to the Muskie amendment, I fear that we are giving undue latitude to the courts in dealing with a very important national issue. The amendment asks the courts to review documents to determine their effect on the national defense and foreign policy of the United States. Yet the amendment offers the courts no guidance in performing this task. It asks the court to make political judgments.

Indeed, this is a task for which the courts themselves have found that they lack the aptitude, facilities and responsibility. This is not my own flat statement. These are the words the Supreme Court used in *C. & S. Air Lines* v. *Waterman:*

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Likewise, a Harvard Law Review Developments Note reached the same conclusion.

In discussing the role of the courts in reviewing classification decisions, it states that "there are limits to the scope of review that the courts are competent to exercise," and concludes that "a court would have difficulty determining when the public interest in disclosure was sufficient to require the Government to divulge information notwithstanding a substantial national security interest in secrecy." 85 Harvard Law Review 1130, 1225–26 (1972).

Furthermore, the Attorney General in a letter which I earlier introduced in the Record expressed the opinion that grave constitutional questions arise in the adoption of this amendment. As the Attorney General concluded, "the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason, the constitutionality of the proposed amendment is in serious question."

Second, I believe that the amendment to exemption 7 could lead to a disastrous erosion of the FBI's capability for law enforcement notwithstanding the safeguards and standards contained in that amendment. To be sure, the standards contained in the amendment look well on paper. However, based on the experience that the FBI has accumulated to date under standards similar to these, it is clear that they are difficult if not impossible to administer.

Here are some of the effects which adoption of the Hart amendment could have.

1. It could distort the purpose of agencies such as the FBI, imposing on them the added burden of serving as a research source for every writer, busybody, or curious person.

2. It could impose upon these agencies the tremendous task of reviewing each page of each document contained in any of their many investigatory files to make an independent judgment as to whether or not any part thereof should be released.

3. It could detrimentally affect the confidence of the American people in its Federal investigative agencies since it will be apparent these agencies no longer can assure that their identities and the information they furnish in confidence for law enforcement purposes will not some day be disclosed to the subject of the conversation.

Fourth, and finally, it could set the stage for severe problems regarding the privacy of individuals.

Mr. President, in my view, nothing would be lost by deferring action on this amendment because the FBI is now operating under standards virtually similar to those contained in the amendment. It would be well to allow a suitable interval of experience to be accumulated under these regulations in order to ascertain the wisdom or lack thereof in putting these standards in statutory form.

Mr. President, the highly detrimental and far-reaching impact that these two amendments taken together pose is so grave and sweeping that it is my intention to address a letter to the President urging as strong as I can that he veto this measure if it passes in this form.

Mr. McCLELLAN. Mr. President, will the Senator yield?

Mr. HRUSKA. Mr. President, I gladly yield to the distinguished Senator from Arkansas.

Mr. McCLELLAN. Mr. President, I wish to associate myself with the views expressed by the distinguished Senator from Nebraska. I fully intended to support the measure as it came to the floor of the Senate. However, in view of the amendments that have been agreed to today, which destroys the purpose of the bill, in my judgment, and violate the Nation's security on documents and records, I cannot support the measure. I shall now have to vote against the bill.

Mr. KENNEDY. Mr. President, I yield myself 2 minutes.

The Freedom of Information Act was passed in 1966. This legislation we are considering today is really a response by Congress to the past experience we have found with the failure of Government agencies to respond to the public's legitimate interest in what had been taking place inside their walls. It is precisely the extreme and unreasonable

secrecy of the past that this bill addresses, and I think the overwhelming support by the press and across the country for some legislative response to this secrecy can be answered by this bill.

I should say that the amendments that have been agreed to by a strong vote in the Senate today in no way infringe upon national security or upon the law enforcement agencies and their responsibilities in this country. I think this is the most important legislative action that can be taken to open up the Government to the American people, who require it, who demand it, who are begging and pleading for it.

I want to acknowledge the constructive and supportive efforts of Senator Hruska and his staff in developing this legislation for floor action. I am disappointed that he does not feel that he can support this bill as amended on the floor.

The bill provides ample protection for the legitimate interests of Government agencies. It also insures that they will be open and responsive to the American people.

I hope that the bill will be passed.

I am ready to yield back the remainder of my time.

Mr. HRUSKA. Mr. President, may I ask of my colleagues if there are any requests for time? Apparently there are none, so I yield back the remainder of my time.

Mr. KENNEDY. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The bill having been read the third time, the question is, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from California (Mr. Cranston), the Senator from Arkansas (Mr. Fulbright), the Senator from Alaska (Mr. Gravel), the Senator from Indiana (Mr. Hartke), the Senator from South Carolina (Mr. Hollins), the Senator from Iowa (Mr. Hughes), the Senator from Hawaii (Mr. Inouye), the Senator from South Dakota (Mr. McGovern), the Senator from New Mexico (Mr. Montoya), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from Alabama (Mr. Sparkman), are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. Gravel), the Senator from South Dakota (Mr. McGovern), the Senator from Rhode Island (Mr. Pastore), the Senator from Rhode Island (Mr. Pell), and the Senator from California (Mr. Cranston) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett), the Senator from New York (Mr. Buckley), and the Senator from Idaho (Mr. McClure) are necessarily absent.

I also announce that the Senator from Colorado (Mr. Dominick), the Senator from Arizona (Mr. Fannin), the Senator from Arizona (Mr. Goldwater), and the Senator from South Carolina (Mr. Thurmond) are absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. Thurmond), would vote "nay."

The result was announced—yeas 64, nays 17, as follows:

[No. 221 Leg.]

YEAS—64

Abourezk	Eagleton	Moss
Aiken	Ervin	Muskie
Baker	Fong	Nelson
Bartlett	Gurney	Packwood
Bayh	Hart	Pearson
Beall	Haskell	Percy
Bellmon	Hatfield	Proxmire
Bentsen	Hathaway	Ribicoff
Bible	Huddleston	Roth
Biden	Humphrey	Schweiker
Brock	Jackson	Scott, Hugh
Brooke	Javits	Stafford
Burdick	Johnston	Stevens
Byrd, Harry F., Jr.	Kennedy	Stevenson
Cannon	Magnuson	Symington
Case	Mansfield	Taft
Chiles	Mathias	Tunney
Church	McGee	Weicker
Clark	McIntyre	Williams
Cook	Metcalf	Young
Dole	Metzenbaum	
Domenici	Mondale	

NAYS—17

Allen	Hansen	Randolph
Byrd, Robert C.	Helms	Scott, William L.
Cotton	Hruska	Stennis
Curtis	Long	Talmadge
Eastland	McClellan	Tower
Griffin	Nunn	

NOT VOTING—19

Bennett	Gravel	Montoya
Buckley	Hartke	Pastore
Cranston	Hollings	Pell
Dominick	Hughes	Sparkman
Fannin	Inouye	Thurmond
Fulbright	McGlure	
Goldwater	McGovern	

So the bill (H.R. 12471) was passed.

Mr. KENNEDY. Mr. President, I move that the vote by which the bill was passed be reconsidered.

Mr. Moss. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President, I move that S. 2543 be indefinitely postponed.

The motion was agreed to.