November 21, 1974

CONGRESSIONAL RECORD—SENATE

Mr. President, at the outset, I ask unanimous consent that the following persons, who are members of staffs of affected committees in connection with this measure, be permitted to privileged persons: Robert Germond, Associate Director of Staff, Al From, Jan Alberghini, and Mr. Susman.

Mr. KRUSKE. Mr. President, will the Senator yield for the purpose of adding the name of Douglas Marvin, a member of the staff of the Committee on the Judiciary.

Mr. KENNEDY. I add that name, Mr. President. I ask unanimous consent that those persons have the privilege of the floor during the discussion of this matter and the vote.

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

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

Mr. President, the Senate is today faced with an important challenge. We are moving out of the “Watergate era,” the era focused on our energies on the pressing economic issues of the day. But one question that our children, and our children’s children, will surely ask in the years to come is how our Nation and its elected representatives responded to the abuse and misuse of the institutions of government, and to the corruption of the political processes, that characterized Watergate.

We will surely tell them about how the Senate Watergate Committee and the House Judiciary Committee laid bare the evidence of official misfeasance and malfeasance, leading to the resignation of a President and the prosecution of some of the highest officials in the executive branch.

We will tell them that Congress enacted campaign finance reforms to begin to free our election processes from the corroding influence of large private campaign donors.

I hope we can tell them about legislation enacted to protect individual privacy, and to guard against future misuse of governmental institutions.

I also hope that we can tell them about how Congress stood up against a hostile bureaucracy and passed, over a President’s veto, legislation to give the public greater access to Government information.

President Ford last summer promised the American people an “open Government.” Congress gave him a chance to give substance to that promise when it sent to the White House last month H.R. 12471, a bill to strengthen the Freedom of Information Act. With his veto of this bill, however, returned to the Congress just minutes before our recess on October 17, the President yielded to the pressure of his bureaucracy to keep the doors shut tight against public access in many areas.

I do not believe that President Ford personally harbors views to perpetuate the kind of insidious secrecy that characterized the Watergate years. But that is precisely the result of his veto of the Freedom of Information Act amendments. The President’s former press secretary, Mr. Henry Kissinger, stated the problem most clearly in his statement this week when he wrote:

“The Nixon holdovers in the Administration have sandbagged the new President’s pledge of new openness to government, new exposure. The lesson for Ford is that there still remains an excessive amount of anti-media sentiment among the尼克委员会 in government, despite his own desire that federal agencies make more, not less, information available to the public.

I think that a vote today to override the President’s veto must be viewed not as any affront to the President, but rather as a visible and concrete repudiation by Congress of both the traditional bureaucratic secrecy of the federal establishment and the special anti-media, antipublic, anti-Congress secrecy of the Nixon Administration.

The late Chief Justice Earl Warren made the need for this override clear last year when he observed:

‘If we are to learn from the debates we are in, we should first strike at secrecy in government whenever it exists, because it is the only way to stop it.

Extensive hearings in both the House and Senate have brought out clearly the need to broaden and strengthen the 1966 Freedom of Information Act. Court decisions in recent years have eroded visions in the law have opened gaping loopholes which have engulfed entire buildings of Government files. Even where the law clearly and unambiguously requires disclosure of certain documents, bureaucratic sleights of hand continue to keep them out of reach of the public and the press.

Our hearings identified the problems. In the course of extensive subcommittee, committee, floor, and conference deliberations the legislation was sharpened, clarified, adjusted, and readjudged. At each stage, agency views were heard, considered, debated, and accommodated.

The end product was H.R. 12471. The bill was passed by the House and Senate overwhelmingly; the conference report was approved by both houses overwhelmingly. This legislation, Mr. President, was given close attention at each stage of the legislative process.

President Ford objected to the legislation. Last week before a journalists’ group he called his objections “minor differences” that could be cleared out of the way.

Unfortunately, the President’s proposals, which he sent up a few weeks ago, are simply warmed-over agency suggestions which have been made time and again at each level of congressional deliberation. They involve the shopworn incantation that our bill threatens national security and imposes extreme burdens on the already overworked Federal bureaucracy. The difference is that now the old national security scare tactic and the old national security scare tactic have been emblazoned with a Presidential seal.

These proposals would give us more of precisely what our bill was carefully de-
signed to avoid—more secrecy, more foot-dragging, and ultimately more government irresponsibility. Let me discuss each of the administration objections and suggested changes in turn.

First, the administration wants to tie the hands of Federal judges in reviewing executive classification decisions. This, we are told, is necessary to protect our national security.

This national security argument should be placed in its proper perspective. John Ehrlichman gave us a clue to how the executive branch views national security when he told President Nixon, during a discussion of the Ellsberg break-in, "I would put the national security tent over this whole operation."

"National security improvements to the San Clemente swimming pool; national security wiretaps on journalists; national security burglaries. The White House taped conversations of April 17, 1973, has the President summons up the Watergate coverup thusly.

It is national security—national security is all that is at stake.

What about the operation of the formal classification system, carried out under Executive order by Federal officials with specially delegated authority? The former President shed some light on this system when he said:

"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 of officials and administrations."

We know too well how the classification system has been overused and misused. We know too well that of the millions of documents marked "secret," most are open to the public, to senators, journalists, and the interested public.

Yet the administration proposes to limit inspection delay, allowing courts to require disclosure only if the Government had no reasonable basis whatsoever to classify them. This would make the secrecy stamp again practically determinative.

The President writes the classification rules in his Executive order. If those rules are inadequate to protect important information vital to our national defense, then let the President change those rules. But make the Government abide by them. Judicial review means executive accountability. Judicial review will be effective only if a Federal judge is authorized to review classification decisions objectively, without any presupposition in favor of secrecy. That is what our system of checks and balances is all about.

I think Senator Ensminger best presented the issue of judicial review standards to the Senate during our debate on the original legislation.

The good news is to be not whether a man has reached the correct decision reasonably or unreasonably. It ought to be whether he had reached the wrong decision.

This bill is not going to endanger military secrets or defense information. It will not require disclosure of sensitive international negotiations or confidential military weapons research.

Our conference statement of management states: "A release of government materials is expected to be preceded by the executive agency's head to be subject to judicial determination."

If the agency can show that it has properly classified the document in the interest of national defense or foreign policy, then that document should be withheld, and the courts will so rule.

I therefore reject out of hand the President's argument against this bill's provisions for de novo judicial review of classified material, and I reject along with it his proposed changes.

Second, there is the issue of time limits. Our bill provides an agency 10 working days to respond initially to a request for information. If no response, there are 20 working days to appeal, and an additional 10 working days where unusual circumstances are present. This gives the agency 40 working days of calendar time—30 calendar months—more than enough time for any agency to complete the process of finding and reviewing requested documents.

If a person sues the agency after that time, and the agency is still diligently trying to complete review of the materials under these circumstances, then we have another escape valve in the bill—added by specific request of the Administration during our conference.

The agency may ask, and the court is authorized to grant, additional time pending completion of such review.

The President agrees to add 25 working days to the time limits in our bill. This, Mr. President, is even more time than the administration asked for when they sought to delay from the Judiciary Committee. And it is certainly longer than any journalist or member of the public should have to wait to get information about the Government.

Let me give a most recent example of agency delays. The IRS just released documents relating to the Special Services Group requested over a year ago. Little wonder that this agency, which is probably the most dilatory of all in responding to citizen requests for information, waited a year before handing over the documents; they show that the IRS had been gathering intelligence, at White House request, on groups like the Americans For Democratic Action, the National Council of Churches, the Congress of Racial Equality, the Urban League, the Grinch Society, and the John Birch Society. This is a case where the record that even after a year, it took a law suit to dig out the requested records.

The administration also wants to allow the agency to go to court on its own initiative to get unlimited extensions of time to respond to an information request. This extension would be unconstitutional—since it puts the Government in Federal court where no "case or controversy" exists—but it is assuredly unacceptable. With information, like justice, delay can be tantamount to denial. That is just what we want to avoid, and that is just what the administration would do.

The third issue relates to the cost of Freedom of Information Act implementation. Extensive testimony during our markup showed that fees and charges have been imposed by agencies as "bill gates on public access," and H.R. 12647 attempts to remedy this problem. Yet the amendment would require new charges in excess of $100 to be levied against a person requesting information where agency review and examination of records is involved. This $100 minimum is totally meaningless; an agency could easily drive up the cost of access to any record simply by adding layers of review and examination, or by convening committees or using higher-level officials to discuss the matter. And then when this review and examination is through, the documents must not even be turned over. I should note that this is one issue where we thought we had met the administration's objections way back at the committee markup, and the complaint on this point until the President sent up his suggested changes to the vetoed bill. This is just one more indication that the administration is not just proposing last minute changes to iron out minor differences, but is really trying to remove the entire bill and start from scratch again.

There is no evidence that excessive or unreasonable expenditures have been required to implement the Freedom of Information Act over the past seven years. In fact, the evidence points in just the opposite direction. Agencies have been overestimating and using fees to dock release of public records. We continue specific authorization for agencies to charge for search and duplication fees, with the requirement that records be reasonably described in the request, should serve as an adequate deterrent to any idle request to clutter busy bodies for voluminous files.

Government agencies spend millions of dollars to promote dissemination of information they want the public to have. It is not too much to ask that they use some of these funds to provide the public and press with information they specifically request.

Specification on future costs cannot justify our taking the chance of imposing the substantial barriers to access contained in the administration's proposal. In any event, freedom of information should not be for sale only to the highest bidder.

Finally, the President has asked that we allow agencies to deny access to records where the agency considers a review of the records to be "in the interest of national defense." The bill concludes that they probably contain only investigatory records. This is but another attempt, hardly disguised, to shunt the door to access to F.R.I. files, and Congress should reject it.

I would like to point out and emphasize that the President does not object to our opening investigatory files to public access. We have been most careful to protect privacy and law enforcement inter-
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CONGRESSIONAL RECORD — SENATE

The President's veto last week of amendments to the Freedom of Information Act was not a defensible effort to preserve this invasive legislation. The U.S. Supreme Court ruled in 1974 that the informed public must have access to government documents.

The court also agreed that the purpose of the Freedom of Information Act is to provide greater public access to government documents that are pertinent to the legitimacy prevented the courts from reviewing the classifications given to documents. The court ruled that Congress should be scrutinized on this basis.

The judicial review provision is one of several amendments to the Freedom of Information Act intended to make it easier for the public to learn about government actions. By vetoing the measure, President Ford was critical of the court review provision. As he declared that it would have an adverse impact on national security by permitting courts to pass on matters in which they lack expertise.

A major function of the courts is to hear arguments on disputed issues and rules on the validity of the arguments. The court did this on a vast array of complex issues. Judges are not capable of ruling on the constitutionality of the government's actions, making them more likely than other decisions by government officials.

It is essential that government officials not be vested with unreviewable power to hide information. Justice Potter Stewart declared that if the government has "... the power to classify documents to avoid legal review of executive decision making, then the democratic process is paralyzed."

Government officials notoriously over-classify documents and use the secrecy stamps to hide their mistakes. The Freedom of Information Act has helped the public in the dark about matters they have a right to know.

The watchdogs of government revealed how government officials used "national security" to justify illegal wiretaps and a host of other improper activities. It is disturbing to read President Ford's claim this recent history and invoking "national security" to defend the same old secrecy practices which enabled the White House to launch secret missions and the press that promised open government when he took over in the wake of the Nixon secrecy and distortion of facts about government.

Congress has an obligation to override the veto and declare in unmistakable terms that the Freedom of Information Act should be preserved.

[From the Kansas City Star, Oct. 21, 1974]
reservations. Nevertheless the veto has fallen, and even though a lot of good was in the veto if it stands or unless Congress can come back with a good bill that can survive, the people will have won. It is dark concerning a lot of subjects they need to know more about.

The essential purpose of the law and its refinements was to prevent federal agencies, their state and local overseers, and vested bureaucrats from hiding information from the public under the guise of "national security" or clashing the election recess, most congressmen will surely have heard enough about the widespread distrust of government to conclude that the last thing they want is that President Ford's veto of important amendments to the Freedom of Information Act be sustained.

The bill which the President vetoed, first of all among other things, was opposed by a majority of more than two-thirds in both the House and the Senate. One reason the Senate should stick to their guns when they act on the veto during the lame-duck session in November was that it is common sense. It was to combat the federal bureaucracy's inclination to hide things from Congress. The law it was to help citizens keep track of what their government was doing by giving them access to the documents, reports, records and files that are the life's blood of official Washington. Nine categories of material are exempt, including national security information, trade secrets and law enforcement investigative data.

Because civil servants have an unfortunate instinct for delay and concealment, reinforced no doubt by similar tendencies in the Nixon White House, the law has turned out to be less than the Congress intended. Requests for information sometimes go unanswered for months. Controversial material that is supposed to be public can be hidden behind a national security classification.

The high court litigation has discouraged journalists and others from challenging an agency's decision to withhold a document.

The bill Mr. Ford vetoed contains a number of amendments designed to remedy these deficiencies. One of them would amend controversial provisions and one to which the President was opposed would permit federal judges to examine classified documents in secret to determine whether the classification is justified by the government's undisputed need to keep some material confidential. Under the law now, the courts cannot review a security classification.

Congress has recognized that there must be some procedure for balancing the public's need to keep certain matter secret against national defense and diplomatic matters expected to come to the eyes of federal judges in the expertise to make such decisions. But as Sen. Sam Ervin has pointed out, if a federal judge were a national secret after hearing arguments for and against the release of a document, then he has no business being in the civil sector that the act could take on its greatest significance. The nation has just gone through a tumultuous era where Congress was overthrown because information was hidden and lied about. There was a concerted effort to pass of the Watergate break-in as an operation of the Central Intelligence Agency and thereby. Foisted off investigation by the Federal Bureau of Investigation. If this was not a matter that would have been uncovered by the Freedom of Information Act, at least the direction of the president in the same spirit.

This is hardly the time for the executive branch to act as if it can be business as usual in secreting what ought to be public information.

The Freedom of Information Act is useful only in so far as the people can use it. As it stands, the individual citizen has had no luck in running up against the civil beat wall of government reticence and concealment unless he is able to spend a fortune on legal fees.

President Ford has vetoed a good bill and has not given good reasons for his most disappo

[From the Louisville (Ky.) Times, Oct. 28, 1974]

A VETO THAT CONGRESS SHOULD UPRIGHT

By the time they return to Washington after the election recess, most congressmen will surely have heard enough about the widespread distrust of government to conclude that the last thing they want is that President Ford's veto of important amendments to the Freedom of Information Act be sustained.

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[From the Louisville (Ky.) Times, Oct. 28, 1974]

FORD LASHES ON PROMISES TO OPEN UP GOVERNMENT

In light of the news of openness President Ford has pledged to bring to the federal bureaucracy in Washington, his recent veto of changes in the Freedom of Information Act was unfortunate and misguided.

The act was passed in 1966, and was designed as a matter, not behavior, for the public to know what the government was doing. The law, however, contained numerous exemptions that allowed the feds to keep secret from the very agency which for far too long has permitted governmen

The new amendments to the act were designed to eliminate some of the key loopholes in the law. The President vetoed it, and was overridden by both houses of Congress.

The amendments would put a time limit of 10 working days on a request for a law to decide whether it would honor a request made by a public agency to decide whether it would honor a request for information public, and 10 working days to decide appeal when it is denied. These are not unreasonable limits, and they would force agencies to come to grips with the public's right to know, instead of indulging in bureaucratic foot-dragging.

Something more important of course is the right to information. The government is a public agency of the people, and one of the most fundamental rights the people have is the right to know about the government. The government is a public agency of the people, and one of the most fundamental rights the people have is the right to know about the government.

The president said he would submit pro

[From the Charlotte (N.C.) Observer, Oct. 28, 1974]

KEEP IT SECRET—THIS VETO DOES JUST THAT

Take away Linus's blanket and this usually mild-mannered inhabitant of the Peanuts comic strip becomes a tatter. Bureaucrats sometimes react similarly when some one threatens to take away their precious "keep it secret" obfuscation stamps. All their efforts to keep information from the people, they now have received a boost from Presid

Awaits when he assumed office that people were wise and tired of secrecy, or to let it be known that finding that Washington was a Byzantium on the Potomac, President Ford promised to make candor and openness the touchstones of his Administration. But now he is buying the tried arguments that have been so effective in many cases to defend secrecy.

In his veto of a bill to strengthen the Freedom of Information Act, he said it was a threat to American "military intelligence secrets and diplomatic relations." But he also said it would give the press in an area where they were unfamiliar with and complained that it would require too much bureaucratic work to sift through three mountains of classified documents in complying with requests for information.

The intent of the amendment was to strengthen the bill, particularly by putting the burden not on the citizen seeking infor-
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[From the Washington Post, Oct. 21, 1974]

A REGRETTABLE VETO

President Ford's assurances of openness in government were dealt a serious blow by his decision Thursday night to veto the amendments to the Freedom of Information Act. These assurances were made in a speech that he delivered in this chamber last week. Ford's action last night is an obvious effort to hide something. It is not surprising that the President has decided to take this action. The Freedom of Information Act is a powerful tool that the American people have put at the disposal of Congress to make sure that the government is transparent. It is distressing to see the President take this step.

[From the Chicago Daily News, Oct. 21, 1974]

PRESSING SECRECY Too Far

One of Congress' first actions when it reconvened this week was to override President Ford's veto of legislation amending the Freedom of Information Act. An override is required because the President vetoed the bill 492 to 2, and the Senate approved it by voice vote without a roll-call vote. Congress overrode the President's veto in the name of the people's freedom to know more about their government.

[From the Sacramento Bee, Oct. 30, 1974]

FREEDOM OF INFORMATION

President Gerald Ford missed an opportunity to strike a blow for openness in government by vetoing a bill which would open up the public files and documents pertinent to government actions.

[From the Sacramento Bee, Oct. 30, 1974]

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President Gerald Ford missed an opportunity to strike a blow for openness in government by vetoing a bill which would open up the public files and documents pertinent to government actions.

[From the Tennessee Valley Authority]

The TVA levied the &dollar;76,875-an-hour charge against reporter James Barabions of the Mountain Eagle, a weekly in Letcher County, Ky., and which could ill afford to wait for the tariff for information about the TVA operation.

[From the Daily News, Oct. 21, 1974]

As an addition to doing away with any such practice as charging for government agency information, the new amendments would have required agencies to keep an index of the documents they generate so citizens, for the first time, would have some sense of what is going on in government, and that the government agency is doing.

[From the Sacramento Bee, Oct. 30, 1974]

A government agency that would have 90 days to respond to a suit claiming that valid information had been denied a citizen or a journalist.

Government officials who withheld information the court believed they should have provided, and judges, not executive officials, would decide the legitimacy of the security claim.

Congress expressed its clear intent that citizens should have relatively easy access to government information.

The President was wrong in vetoing the bill. It is hoped that Congress will override the veto in the name of the people's freedom to know more about their government.
recent years. To many observers, these events reflect the voters' cynical belief that most of the public's business is conducted far from the public's eye.

In my view, the reading is correct and I believe it is—then one of the best ways to deal with such cynicism is to open up the business of government to greater public inspection. When legislation changed in 1966, the Freedom of Information Act, it was a step in the right direction.

During joint hearings on the Freedom of Information Act held last year by Senators Ervyn and Goodwin and myself, it became evident that loopholes in the original 1966 law were interfering substantially with the public's right to know.

The cost of challenging Government secrecy claims in court remained too great for most citizens to bear.

Red tape and delay generated in response to a request for information tested with the patience and endurance of the citizen making the request.

And, as demonstrated in the case of the Justice Department against Press, there was no mechanism for challenging the propriety of classifications under the national defense and foreign policy exemptions of the 1966 act. Thus, the mere rubberstamping of a document as "secret" could forever immunize it from disclosure.

The legislation before us today is designed to close up the loopholes which have led to such abuse of both the spirit and the letter of the law. It will enable courts to award costs and attorneys' fees to plaintiffs who successfully contest agency withholding of information. It will require agencies to respond promptly to requests for access to information, and thereby help bar the stalling tactics which too many agencies have used to frustrate the information seeker.

And, most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classifications outside the agency which made the classification.

These amendments are not just a hasty, patchwork effort. On the contrary, they represent many months of careful study by three subcommittees in the Senate, and the Subcommittee on Foreign Operations and Government Operations in the House. And they were sent to the President with the overwhelming support of both Houses of Congress.

Unfortunately, the same President who blocked his administration with a promise of openness, sided with the secret-makers on the first big test of that promise.

The President claims to have several problems with the legislation we sent to him. But his major problem goes to the heart of what these amendments are all about.

When the Freedom of Information Act amendments were first considered by the Senate, there was a change which would authorize the courts to conduct in camera review of documents classified by the Government to determine if the public interest served would be better served by keeping the information in question secret or making it available to the public.

My amendment was a response to the increased reliance by former administrations to use national security to shield errors in judgment or controversial decisions.

It was a response as well to the mounting evidence, more recently confirmed in tapes of Presidential conversations, that classified documents were released and used to liberally build blocks of investigation of White House involvement in Watergate.

That amendment was incorporated in the legislation sent to the President for his signature. And it is primarily that amendment which caused the President to veto the legislation.

The President does not seem to object to the concept of judicial review of classified documents. The changes he proposed in returning the bill to Congress adopted the same mechanism of in camera review.

What the President objects to is the standard to be used in reviewing such documents. My proposals would deal another setback to the public's right to know.

The legislation passed by Congress and delivered to the President by the judge reviewing the documents in question that the documents were properly classified, in accordance with rules and guidance, were made available for in camera inspection by the executive branch itself.

The President would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.

The President's counterproposals on this point would make it even more difficult to extract information of questionable classification from the executive branch. Under his proposal, the court could only enjoin an agency from withholding agency records after finding the agency had no reasonable basis whatsoever for classifying them in the first place.

Thus, in spite of the record of abuse, we are being asked once again to assume that the Government is right, on the basis of a very vague standard indeed, and to accept the stamp of secrecy is challengeable only in the most blatant cases of misuse.

The President's charge that this bill is unconstitutional is a serious one to make. I hope that my colleagues will not be swayed by it, for I believe it to be without foundation.

In closing, I want to underscore my feeling that this legislation represents a unique opportunity to bring the people of this country closer to the facts and figures on which governmental decisions are based.

We must not delay any further the people's opportunity to know more about their Government. For too long that opportunity has been eroded by not enough candor and too much secrecy. The people are saying that they want to know more. I hope that by our action today, we will give them that chance.

PRESIDING OFFICER (Mr. Burns). Who yields time?

Mr. HART. If I may have 2 minutes, Mr. President.

PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. HART. Mr. President, I rise under a very limited request to suggest that we be aware of the Executive administration with respect to the treatment of disclosure of investigatory files has shifted. Initially, and through a very
long conference, they insisted that the safeguards were inadequate to protect against the identification of an informant by the President in a confession or the conference report to insure against that possibility. Now the objection with respect to the investigative files is that the administrative burden is too great to be imposed.

Mr. President, I suggest that the burden is substantially less than we would have to endure if the President were to insist that the record of the conference be made public. But I conclude on the point, Mr. President, that the price of some administrative inconvenience is not enough to pay to increase public confidence in the accountability of government. That is precisely the issue that confronts us.

Mr. President, in September, when President Ford made his forthright assurances of openness in Government, I welcomed them as another sign that the President is blowing through the White House. I did not expect that 2 months later, I would be asking my colleagues to override his veto of the Freedom of Information Act amendments. The veto was even more of a surprise because of the major efforts to accommodate the President's views which were expressed by the conference from the House and Senate in the conference.

One of the reasons given by the President for his veto is that the investigative files amendment which I offered would hamper criminal law enforcement agencies in their efforts to protect confidential files. We made major changes in the conference to accommodate this concern.

My amendment to the Freedom of Information Act permits the disclosure of investigative files only after elaborate safeguards are met—that is, that disclosure will not:

(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) cause undue prejudice, (D) disclose the identity of a confidential source, and, in the case of a request for a criminal law enforcement file, (E) disclose information on personal privacy, (F) disclose the identity of a source or disclose confidential information furnished only by the confidential source, (G) disclose investigative techniques and procedures, or (H) endanger the life or physical safety of law enforcement personnel.

After lengthy negotiations during the conference on the bill, the Justice Department apparently agreed that these safeguards are adequate. The major change in conference was the provision which permits law enforcement agencies to withhold "confidential information furnished only by a confidential source". In other words, the agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information which would disclose the identity of a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informant's identity. It is possible that the FBI or Federal Bureau of Investigation might disclose that the information was furnished by a confidential source and it is exempt. In fact, this protection was introduced by the conference in response to the specific request of the President in a letter to the Senate. All of the conferences endorsed the Hart amendment as modified.

Now the administration has shifted its position. In accordance with a statement in the conference report, the amendment will be too burdensome. Specifically, the President's message singles out investigative files for exemption from the amendment's command that "any reasonably segregable portion of a record shall be provided—after deletion of the portions which are exempt."

The President's substitute allows the agency to classify a file as a unit without close analysis, alleging that the time limits and staff resources are inadequate for such intensive analysis. This would allow an agency to withhold all the records in a file if any portion of it runs afoul of the sections above. It is precisely this opportunity to exempt whole files which gives an agency incentive to commingle various information into one record and then claim it is too difficult to sift through and effectively classify all of that information.

The "combination technique" has been widely used by agencies to thwart access to publicly valuable information in their files. If investigatory files are unique in terms of length and complexity, an agency's logistical difficulty in conducting a thorough analysis would strongly influence a court to extend the time for agency analysis, as is authorized by the bill. Therefore, a procedure is already available to provide for accurate and thorough analysis.

The President's objection to the Hart amendment, as was the objection to the time limits, is one of degree. In light of the fact that the FOIA was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duties in the public interest," Wellford v. Hardin, 444 F. 2d 21, 24 (1971) disclosure of severable portions of investigatory documents does not appear to be an excessive burden.

In conclusion, the agencies will not be overburdened for the following reasons:

First, the agencies will be able to charge search and copying fees—up to $5 an hour, 10 cents per page—which will, in most cases, be more than enough to discourage frivolous requests.

Second, the Hart amendment has six "pigeonholes into which the agencies can place information that they do not want to release. It is reasonable to expect that they will be required to prove in these cases for nondisclosure to keep them from being overburdened by public requests for access to their files;"

Third, the agencies can withhold information furnished by a confidential source relieves it of the burden of showing that disclosure would actually reveal the identity of a confidential source.

Fourth, the clauses providing for "segregation of records" and "search fees" are designed to filter out of the President's amendment those files which those portions which often are arbitrary and unnecessary and heavy costs of time and money have been imposed on the persons requesting access. One example is the Provision for TIME and MONEYS.

The tax laws were not intended to be used for political harassment. The interesting point about these disclosures is that they were made possible by the utilization of the Freedom of Information Act.

Second, the Justice Department recently renewed its policy of protecting the records of the counterintelligence operations of the FBI. Much of this information about the use of dirty tricks against the left and the fair right have not been released earlier this year, again because of action taken under the Freedom of Information Act.

Third, I know that this country have a strong freedom of information law that will make it possible for the public to learn of such activities—and to learn of them as quickly as possible.

Finally, we should remember that these amendments were necessary because the agencies have not made a good faith effort to comply with the act. The President is asking that the agencies be given more discretion, not less, to undermine the act.

The American Civil Liberties Union which has studied the FBI's response to requests for historical information from scholars over the last 2 years. The ACLU concludes that the FBI's historical records policy has been a dismal failure. In case after case, significant historical research has been curtailed by administrative decisions which often are arbitrary and unnecessary and heavy costs of time and money have been imposed on the persons requesting access. One example is the Provision for TIME and MONEYS.

Prof. Sander Gillman, chairman of the Department of German Literature.
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at Cornell University, is preparing a biography of the German playwright and poet, Bertolt Brecht. On December 14, 1973, the FBI responded to Gilman’s request for access to Brecht materials by informing him that it had “approximately 1,000 pages” in its files on Brecht, and stating initially that if Gilman would “submit letters from his physician or other appropriate” to his research, the FBI would provide him with the materials at a “processing” cost of $160.

On January 16, 1974, Professor Gilman sent the Bureau a deposit and a letter to him from Brecht’s only son, dated a week earlier, stating that the son had “no objection to your use of FBI files on my father.” Two months later the FBI provided Gilman with 30 heavily deleted pages from its long files as the “final disposition” of his request. It refused to produce the bulk of the files on the ground that Gilman had not provided the bureau with written authorization from the heirs of each of the hundreds of persons—many of them public figures, such as Thomas Mann—whose names appear in the files. Gilman’s application, the 30 pages—3 percent of the entire file, for which Gilman paid $40, were 8-10 magazine and newspaper clippings on Brecht’s rehabilitated travels in the United States.

Mr. President, I urge that the Senate override the veto.

THE PRESIDENT. OFFICER, Who yields time?

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

Mr. President, I supported the freedom of information bill as it was reported out of the Senate Judiciary Committee. It was—was—and is—my belief that amendments to the Freedom of Information Act are necessary to remove the obstacles to full and faithful compliance with the mandate of the act to grant citizens the fullest access to records of Federal agencies that the right of privacy and effective Government will permit.

The bill was amended on the floor, however, in a way that could open confidential files to any person who requested them at the expense of our Nation’s interest in foreign relations and defense and every individual’s interest in law enforcement, the right of privacy and of personal security. Because of these amendments, the President was compelled to veto this bill.

I. DEFENSE AND FOREIGN RELATIONS INFORMATION

The first objectionable feature of the bill concerns the review of classified documents. It is important to stress one thing that is what is and what is not the issue here.

The issue is not whether a judge should be authorized to review classified documents. The law permits judicial review of presidential decisions. The issue is the justification for their classification. The President, in his vetoes message, stated that he was prepared to accept such a provision.

No, the issue is whether a court should be able to question an agency’s decision to add a classification stamp to a document. Instead, the issue is whether this judicial scrutiny should be unconditioned. It is not to be minimized or emaciated. The executive branch could ask the courts to review a document to determine whether the executive’s decision to classify was arbitrary or clearly unreasonable. The courts could rule that the executive agency’s decision to classify was a proper one and that the document should not be made available to the public. The courts could determine that the document should be released to the public.

The vetoed bill does not check judicial authority. There are no standards, such as the requirement that the agency’s decision be reasonable or that the court withdraw the classification. It is the position of the American Bar Association that the courts should have the right to review the executive’s decision to classify a document.

It is clear that the President has a constitutionally based power to withhold information. The disclosure of which would impair the President’s conduct of our foreign relations or maintenance of national defense. An incident of this power has been observed in New York Times v. United States, 403 U.S. 713, 723-30 (1971):

It is clear to me that it is the constitutional duty of the Executive—a matter of sovereign prerogative and not as a matter of law, as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and defense.

In C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 144 (1948), the Supreme Court stated that the President . . . possesses in his own right certain powers conferred upon him by the Constitution as Commander-in-Chief and as the head of the Government.

Acting in these capacities, the Supreme Court added:

The President has available intelligence services whose reports are not and ought not to be published to the world...

Just this past summer, in a unanimous decision in the United States v. Nixon case, 945 Ct. 3090, 3108 (1974), the Supreme Court emphasized that the President has a constitutionally based power to withhold information from the courts. The Court stated:

As to these areas of Art. II duties (military or diplomatic secrets) the courts have no constitutionally derived right to deference to presidential responsibilities . . . Nowhere in the Constitution, as we have noted earlier, have any express reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s responsibilities, it is constitutionally based.

Another recent court decision, United States v. Marchetti, 446 F.2d 1309 (4 Cir. 1973), is particularly noteworthy. The Court summarized the law in this area as follows:

Gathering intelligence information and the other essential activities, including clandestine affairs against which nay be are all within the President’s constitutional responsibilities, function as the Chief Executive and as Commander in Chief of our Armed forces. Cointelpro, in particular, is clandestine, as is the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest . . . (Emphasis supplied.) 460 F.2d at 1316.

It is clear then that the Constitution vests in the Chief Executive the authority to maintain our national defense and to conduct our foreign relations. It is also clear that in order to discharge these responsibilities effectively, the President must take measures to ensure that information which would jeopardize the maintenance of our national or the conduct of our foreign relations is not disclosed to all the world.

From the foregoing, it is clear that it is unwise for the President to be able to order a judge to determine, on his own, whether this same type of information should be disclosed to the public. Therefore, in order to discharge these responsibilities effectively, a court should be unable to determine, on its own, whether a document should be classified as to empower a court to substitute its decision for that of the agency and, in certain cases, the President.

Attempts to grant courts unfettered powers of judicial scrutiny of classified documents have been criticized in several recent law reviews. The 1974 Duke Law Journal, in an article on “Developmental Under the Freedom of Information Act the 1966-73," a report of the Senate from Maine (Senator Muskie) unjustly infringes upon the privilege of the Executive to protect national secrets.

In this regard, Senator Muskie recently proposed an amendment to the FOIA which would broaden the scope of de novo judicial review. Pursuant to the proposed amendment a court would be empowered to question the Executive’s claim of secrecy by examining the classified records in camera in order to determine whether “disclosure would be harmful to the national defense or foreign policy of the United States.” This proposal, however, extends judicial authority too far into the political decision-making process, a field not appropriately within the province of the courts. If Congress, through the FOIA, seeks a solution to this problem, it should create a judicial procedure which would not unduly restrict the Executive’s prerogatives but which would simultaneously provide a limited judicial check on executive determinations. An acceptable compromise of these competing interests might be a procedure in which the agency assessing the privilege would separately classify each document and portions thereof, using a description and index of this classification scheme for the court. Then, the court could adequately ascertain whether the privilege was based upon a reasonable determination rather than an arbitrary classification without sub-
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jeering the material to be in camera scrutiny. Such a procedure would prevent indefinable
and arbitrary classification yet not un-
duly protect the privacy and confidentiality of those pro-

The Columbia Law Review’s June 1974 issue included a comprehensive study entitled "The Freedom of Information Act: A Seven Year Assessment," says:

To advocate some form of judicial scrutiny is not to assert that a court must be utterly
That a court should assume the burden of declassifying documents seems altogether improper. Judgments as to the independent classification of genuinely secret information should be left to the executive. Little can be said, however, for exempting from declassi-
closure non-classified information solely be-
cause of its physical nexus with a classified
document. The function of winnowing the state secret from the spurious accendant document does violence neither to the language of the Act as an integrated statute, nor to the declara-
tions of policy enshrined in the first example. Even conceding that existing interspersed but non-secret from secret matter necessarily implicates the power of some subset of the public. In the judgment, this does not amount to a de facto power of declassification. Only materials that are as intensely non-classified as secret should be deleted and dis-
closed on the court’s initiative. In close cases, the personal and the judgmental character of the responsibility of the Presi-
dent for our foreign “safety,” should defer to the executive assessment of secrecy. (Emphasis supplied) 74 Col. L. Rev. 828.

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’s role in deciding whether declassifying when the public interest in disclosure was su-

cient to require the "Government to re-
grieve, to make a showing in camera hearings to substi-
tute of its own decision for that of the agency. This is not review of agency decisions but the making of the decision itself.

I simply cannot understand why a different standard should be applied to agency decisions to classify certain docu-

ments.

By conferring on the courts un-

alternatives to the classification decisions, thus

not only wise but also apparently unwise.

II. LAW ENFORCEMENT INVESTIGATORY INFORMATION

The second issue relates to the criminal and civil filings that should be open to law enforcement agencies. The confidentiality of criminal law enforcement files containing infor-
mation of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law en-
forcement but, the individual’s right to privacy and personal security, and to be secure in the knowledge that information he furnishes to a law enforce-
ment agency will not be disclosed to anyone without his corri

The enrolled bill requires the FBI and other law enforcement agencies to re-

provision of the enrolled bill would increase the number of cases in which the investiga-

Mr. President, it is extremely difficult if not impossible to assess what informa-
tion, if disclosed, would invade a person’s privacy or impair the investiga-
tion. The magnitude of such a task and the standards for deciding when a state secret is, in the context of the amendment create serious doubt as to whether such a provision is work-

able aside from its questionable wisdom. As regards personal and political security are at stake, measures should not be adopted that even tend indirectly to undermine fundamental civil rights.

Mr. President, the issue here does not involve a denial or rejection of "freedom of information." This concept has the support of most, if not all of us.

The real issue relates to the provisions for determining how the right to know can be exercised without impairing the effective operation of our Government and also infringing the rights of privacy and security.

Mr. President, as I stated at the out-

I believe that amendments to the Freedom of Information Act are neces-

sary. Freedom of information is basic to the democratic process and it is elemen-
tary that the right of the citizen to be informed about the actions of his Gov-

ment must remain viable if a govern-

ment of the people is to exist in practice as well as theory.

Yet, it is also elementary that the well-

fare of our Nation and that of its citi-

ens may require that some information in the possession of the Government be held in the strictest confidence. The right to know must be balanced against the right to privacy. Likewise the right to know must be bal-

anced against the interest of our Na-

tion to conduct successful foreign relations and to maintain our military secrets in confidence.

I cannot support the enrolled bill be-

cause it emphasizes the right to know to

the detriment of the right of privacy and

security and the interests of us all in a re-
ductive governmental. These interests must be accommodated. One cannot be

elevated above the other because all of

the interests are so important.

The enrolled bill does not balance and protect all of these interests. Therefore, I urge my colleagues to sustain the veto of the President. And, in turn, I urge my colleagues to reenact the bill with the amendments proposed by the

President so that we will have legislation that balance and protects all of the in-

terests while insuring the Nation’s re-
sponsibility for the effective operation of the Government.

Such a bill is S. 4172, introduced by Senator from Pennsylvania (Mr. Sceltz), and now pending.

It is within the province of the enrolled bill will improve the present statute on making Government held infor-

mation available, without violating the Constitution, and yet in a fashion that will not seriously intrude on the orderly and effective conduct of the Na-

tion’s business. It will protect the privacy and personal security of those who co-

operate with the State and Justice De-

partments by furnishing necessary, vi-

tually needed information. It will enable law enforcement to proceed without im-

pairment so that it will fulfill its in-

forms the necessary confidence that

they will not be endangered by disclo-

sure. S. 4172 should be enacted.

Mr. President, I yield 4 minutes to the

The PRESIDING OFFICER. Who yields time?

Mr. TAFT. Mr. President, I appreciate the Senator’s yielding, and I appreciate also the Mr. Taft. by good sense and reasonableness of his approach in his remarks.

Mr. President, I intend to vote to sus-

tain the veto of the President. In casting this vote, I want to make clear that I am not less committed to the right of the public to know the actions of their Gover-

nment than the President. I am simply that in the current climate of our society, I cannot assure my colleagues to approve it without amendment in accordance with the Judicial Committee’s recommendations.

Freedom of information is the hall-

mark of a democratic society. I believe the need to the people cannot govern themselves—that this cannot be a Gov-

ernment of the people in which the people cannot know the actions of those in whom they trust to discharge the functions of Government.

But, Mr. President, the right to know, like any other right, cannot be exercised at the expense of other rights that are also fundamental. Some information in the possession of the Government must be held in the strictest confidence. For example, the individual’s right of privacy requires that certain information collected by the Government in either census reports or law enforcement investiga-

tions must be protected from disclo-

sure. Information bearing on our Na-

tion’s endeavors to pursue peace through negotiations with foreign nations must also be held in confidence if the disclo-

sures are to be frustrated. And, of course, our military secrets must be safeguarded.

In this respect, the President objects to, and I voted against, the floor amend-

ment offered by Senator McGovern on May 30, 1974, which granted a court the authority to disclose a classified docu-

ment even where there is a reasonable basis for the classification. Most secrets are not knowledgeable in sensitive for-

eign policy and national defense consid-
The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAKER. Mr. President, I thank the distinguished junior Senator from Massachusetts for yielding.

Mr. President, events of the past 3 years have deal harshly with the concept of "secret" in Government. We have witnessed two national tragedies—Watergate and the Vietnam war—which might not have occurred, and surely could not have turned out as they did, had not the Presidents and his advisors been able to mask their actions in secrecy.

This experience, coupled with my belief in the axiom that "sunshine is the most effective disinfectant," prompted me in 1973 to introduce the Full Disclosure of Information Act Amendments of 1974. I regret that President Ford returned this legislation to the Congress without his approval, and I shall vote to override his veto. While I believe that the President's action was taken in good faith, I particularly disagree with his position that judicial review of classified documents should uphold the classification if there is a reasonable basis to sustain it.

During my tenure as a member of the Senate Select Committee on Presidential Campaign Activities, I reviewed literally hundreds of documents that had been classified as "secret" or "top secret". And I have had the opportunity to examine closely the process by which papers are considered for classification. I have come to believe that the President's veto was taken in good faith, and I shall vote to override it.

Mr. President, I have a feeling that the veto of the enrolled bill is sustainable on the ground that it is unnecessary. Mr. President, I have a feeling that the veto of the enrolled bill is sustainable on the ground that it is unnecessary.

Mr. BAKER. Mr. President, I rise to explain my vote on the motion to override the veto of the Full Disclosure of Information Act Amendments of 1974.

Mr. President, I am pleased to have the opportunity to explain my vote on this important legislation. I believe that the President's veto was taken in good faith, and I shall vote to override it.

Mr. President, I have a feeling that the veto of the enrolled bill is sustainable on the ground that it is unnecessary.

Mr. BAKER. Mr. President, I rise to explain my vote on the motion to override the veto of the Full Disclosure of Information Act Amendments of 1974.
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intelligence, and foreign policy informaon, while allowing citizens, scholars, and perhaps even Congress access to information which should be in the public domain.

"In balancing the minimal risks that a Federal judge might disclose legitimate national security informaon against the potential for a leak of secret infor- mation under the cloak of secrecy, I must conclude that a fully informed citizenry provides the most secure protection for democracy."

Consequently, I urge that the veto of H.R. 12471 be overridden.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield 3 minutes to the Senator from North Carolina.

Mr. President, the executive agencies of the United States government reminded me of a young lawyer in Charlotte, N.C. Years ago he brought suit for damages against the American Telephone and Telegraph Company, and he filed a motion to require the plaintiff to make his complaint more specific.

The judge who had to pass on the motion happened to see this young lawyer and asked him to come back and make his complaint more specific in the respects that had been asked for. The young lawyer told the judge he would not do it.

He said: "Mr. Tillotson is going to want me to tell him what this lawsuit is all about. He is just a damn fool."

Every time Congress or the American people or the American press seek informaon from the executive branch of the Government they have an equivalent reply in most cases from the executive branch of the Government.

For some reason that is understood, the executive branch of the Government thinks that the American people ought not to know what the Government is doing.

I have been a believer in the right of the people to know what the truth is about the activities of their Government. For that reason I supported the original Freedom of Information Act of 1966. We had a good bill when we started out. But, as a result of the limitations and exemptions that were inserted in the bill and, as a result of the reluctance of the executive branch of the Government to obey that part of the bill which survived, the existing law is totally ineffective for the purpose that was sought to be accomplished.

Now, the distinguished Senator from Massachusetts just stated what I think is the truth about this matter. Every one of the objections which were set forth by the President to the veto motion was considered at length by the Senate com- mittee during the original hearings on the bill. They were considered minutely and carefully by each member of the committee. Every one of these legislators, who, after all, are the people who are supposed to enact our laws, came up with, a majority of them came up with, the conclusions that these objections did not

merit the defeat of the bill or the al- ternative."

I ask unanimous consent that a copy of the letter written on October 31, 1974, by the distinguished Senator from Maryland, the ranking member of the Senate from New Jersey (Mr. Case), the distinguished Senator from New York (Mr. Austin), the distinguished Senator from Tennessee (Mr. Staggers), the distin- guished Senator from Massachusetts (Mr. Kennedy), the distinguished Senator from Michigan (Mr. Hart), and myself be inserted in the Record at this point.

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

WASHINGTON, D.C., October 31, 1974.

Dear Congressmen,

Due to your ascertain- ing your support to override President Ford's veto of the Freedom of Information Act Amend- ments and other legislation now returning from the current recess, we believe that this veto is unjustified and urge that the legislation be passed as improved by Congress.

The Freedom of Information Act has worked neither efficiently nor effectively. There are loopholes in the statute. Agencies have engaged in delaying and obstructionist tactics in attempting to request for government information. The Freedom of Information Act will facilitate public access to information while preserving confidentiality where appropriate.

The President has made numerous specific changes to this legislation. Similar proposals were made by government agencies time and again over the past year and a half. These proposals were considered, they were debated, and in the end they were rejected during the legislative process.

The President has suggested that the Freedom of Information Act Amendments pose a threat to our national security because they do not sufficiently restrict federal agencies from releasing documents. As an alternative, the President has proposed that courts be allowed to require disclosure of classified documents only if the agency had no reasonable basis whatsoever to classify them. We do not believe a court would be a determinative body.

We believe that the approach taken in the Amendments is the correct one. Federal courts should have the authority to review agency classification of documents and make their findings on the weight of the evidence.

The Executive writes the classification rules, since documents are classified under an Executive order, not a statute. A federal judge should be empowered to review classification decisions as an objective umpire, and he should determine whether Executive branch officials have complied with their own rules. This is consistent with administrative procedures and the need for checks and balances. We are confident that the legislation poses no threat to this nation's security interests.

The President has also decreed the possibility of an administrative burden placed on large federal agencies by the new amendments, although we are pleased to note that he did not object to the amendment of some new materials to the public. We believe, however, that the additional delays, charges, and exclusions required by the President's more than alleviate administrative burdens—they would effectively devastate the press, the nonofficial, and the scholar.

Freedom of Information is too precious a right to be sacrificed to false economy. Due process, it may carry some cost, but that is a cost to be borne by all Americans who believe in an open and accountable and responsible government.

Government agencies universally opposed the original enactment of the Freedom of Information Act in 1966, and they likewise opposed enactment of amendments to the Act this year. As a practical matter, the heavy workload for the remainder of this session contains an implicit threat to any strengthening of the information available to the President to override the President's veto next year, after the publication of any improvements to the Act for a substantial period of time.

We have too recently seen the injustices related to national security review rampant. Everyone knows that H.R. 12471 can do no harm to the public interest in public scrutiny, while at the same time providing appropriate safeguards for materials that should remain confidential. I urge you to join us when Congress returns in voting to enact the Freedom of Information Act Amendments over the President's veto.

Sincerely,

[Signatures]

Mr. ERWIN, Mr. President, I ask unanimous consent that an editorial from the New York Times of November 21, 1974; and the speech I made on the bill be printed in the Record. I thank the Senator from Massachusetts.

There being no objection, the editorial and speech were ordered to be printed in the Record, as follows:

FEDERAL PRIVILEGE: FREEDOM OF INFORMATION

Just before the election recess, President Ford used his power of veto and sent back to the Congress a piece of very important legislation, the 1974 amendments to the Freedom of Information Act. Those amendments were important because they strengthened a law that was fine in principle but poor in practical terms. The Freedom of Information Act had been weaken in 1965 in the hope of making it possible for the press and the public to obtain documents from within government to which they are entitled. Because of cumbersome provisions of the act, however, obtaining such information was difficult.

This year, after long hearings, much haggling between the House and Senate and two renouncing votes, a series of amendments was ready for presidential signature. The President shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to obstruct access to information. Most important, the amendments would be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, the President vetoed the bill.

This year, after long hearings, much haggling between the House and Senate and two renouncing votes, a series of amendments was ready for presidential signature. The President shortened the amount of time a citizen would be required to wait for the bureaucracy to produce a requested document. They removed some restrictions on the kinds of information that could be obtained; and they placed sanctions on bureaucrats who tried to obstruct access to information. Most important, the amendments would be released in the public interest. In light of President Ford's previous statements in support of openness in government, it was assumed that the President would welcome this legislation and sign it into law. Instead, the President vetoed the bill.
Mr. Enzi. The question involved ought to be whether an agency properly has made a decision, or an incorrect decision when it classified a document as affecting national security. It ought not to be based on the question of whether the agency acted reasonably or unreasonably in making the decision. That is the point that the bill provides for in other words, a court ought to be searching for the reason for the decision as to whether the decision reasonably did not adhere to the truth in the document as affecting national security.

Mr. Hruska. The bill presently provides that a judge under specified circumstances, not document if he finds a reasonable basis for the classification. What would the Senator from North Carolina say in respect 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. Enzi. 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 or not an agency or department did the wrong thing and 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 is correct or an incorrect decision. Just because a person acted in a reasonable manner, the wrong conclusion ought not to require that the wrongful conclusion be sustained.

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

Mr. Enzi. I am not sure I can 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 President or his agents, notwithstanding their responsibility and which has long been held to belong to the domain of political power not subject to judicial review." United States v. C. & S. Air Lines v. Waterman Corp., 333 U.S. 103 (1948).

Mr. Enzi. Is not their field; that is not their policy.

Mr. Enzi. Pardon me. A court is composed of human beings. Sometimes they reach an unreasonable conclusion, and the question is as to whether the conclusion of the agency was reasonable or unreasonable.

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

Mr. Burr. Mr. President, I yield 3 minutes to the Senator from South Carolina.

Mr. Thurmond. Mr. President, the Freedom of Information Act, H.R. 12471, was vetoed by President Ford on October 17, 1974. I rise in support of the President's veto decision and ask that my colleagues join me in this effort.

My decision to support the President on this veto is based upon several key objections which the President expressed regarding this legislation.

If this bill is allowed to become law, classified documents relating to our national defense and foreign relations would be subjected to an in camera judicial review.

In his veto message, the President stated that he was willing to accept the provision which would enable courts to inspect classified documents and review the justification for their classification. He made no decision whether a judge should be authorized to review in camera classified documents relating to
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the national defense and foreign relations. Instead, the issue is whether a standard should be established to guide the courts in determining whether a document is properly classified. In its present form, there are no guidelines for a judge to determine where there is a reasonable basis for the classification.

Mr. President, a judge should be authorized to disclose a classified document if he discovered that there was no reasonable basis for the classification. It should not be within the power of a judge to delay a decision on the basis where there is a reasonable basis for the classification.

Another objectionable area of H.R. 12471 deals with the compulsory disclosure of the confidential investigatory files of the Federal Bureau of Investigation and other law enforcement agencies.

Under this bill, Mr. President, these investigatory files would be exempt from disclosure only if the Government could prove that disclosure would cause harm to certain public or private interests. The President objected to this portion of H.R. 12471, since it would be almost impossible to establish with every instance that harm would result from a release of information.

I support the Freedom of Information Act amendments because I believe in the freest possible flow of information to the people about what their Government is doing, and why. The people must have access to the truth if they are to govern themselves intelligently and to prevent people in power from abusing the power.

Under the present law in the very bill, our courts, not our bureaucrats, will have the final say as to what information can be kept secret without violating the basic right of a democratic people to know what is going on in their Government.

What are some of the objections raised?

First, that a judge is not sufficiently knowledgeable to determine whether a document is classified properly. I maintain that a judge is at least as competent as some Pts or some low echelon civilian 'bureaucrat' who classified the document in the first place.

Presently, as I indicated, present evidence in thousands of cases, there is often no review by anyone higher of a classification made by a Pt or a very low echelon official. These classifications remain in effect for a minimum of 10 years.

I also maintain that the Pts and that bureaucrat will do a better job, and a more honest and thoughtful job, of classifying documents in the future if they know that their classifications remain in effect for a minimum of 10 years.

Second, some people object to giving so much discretion to a single judge. There is little reasonable ground for fear.

If the judge rules against the Government in a particular case and the Government feels strongly that the decision to disclose was unfair, the Government can, of course, appeal. Thus in actual practice, many of the top minds of our country—among the various appellate courts of our courts—would be fact in passing on the decision to disclose.

If we cannot trust their wisdom and good judgment, whose can we trust?

Third, some people say the time limits imposed on the amendments are too brief, that agencies need more time to determine whether a document, being sought, should be made public.

I say that the time limits are of the essence where public information is concerned. Speed of disclosure is the enemy of the coverup. Delay is its ally.

Fourth, finally, there are people who believe that the Freedom of Information Act amendments will make the Government less open in government and less emphasis on government secrecy.

Nothing is more important in a democratic society—nothing is more vital to the strength of a democratic society—than for a free people to be told by the government what that government is doing. And why.

Of course, we must have proper safeguards. Our amendments provide such safeguards.

But we have too many government-paid secretaries. Too many government-paid secretaries are being made behind closed doors by people with closed minds.

Our amendments provide a sensible, workable solution of how to protect legitimate secrets in an open society.

Turning to the courts as a disinterested third party to resolve disputes between individuals or between individuals and the government is in keeping with centuries of American tradition.

The President has shown full confidence in their continued competence, integrity, and patriotism. I strongly urge that we vote to override the President's injudicious veto of this legislation.

The PRESIDING OFFICER. The Senator from Nebraska has 13 minutes remaining under his control.

Mr. HRUSKA. Mr. President, at this time I have no further requests for time.

The PRESIDENT. The Senate will now proceed to the call of the quorum call. Mr. HRUSKA. Mr. President, I am ready for the quorum call.

The PRESIDING OFFICER. The Senator from Massachusetts has all of his time on the bill. There are 13 minutes remaining.

Mr. HRUSKA. Mr. President, I suggest the absence of a quorum.

The PRESIDENT. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. HRUSKA. 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. HRUSKA. Mr. President, I yield 4 minutes to the Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, I thank the able Senator for yielding.

When H.R. 12471, the Freedom of Information Act amendments, was passed by the Senate on May 18, 1976, I voted against the bill because I was concerned that passage of the bill would severely hamper law enforcement agencies in the gathering of information from confidential sources in the course of a criminal investigation.

The Senate-passed version of the bill contained an amendment which would have required disclosure of information from a law enforcement agency unless certain protections were established by the act. What particularly disturbed me was that while the identity of an informer would be protected, the confidential information which he had given the agency would not have been protected from disclosure. Another matter that disturbed me was the use of the word 'informer', since that could be construed to mean that only the identity of a paid 'informer' was to be protected and not the identity of an unpaid confidential source. I was deeply concerned that without such protection, law enforcement agencies would be faced with a "drying-up" of their sources of information and their criminal investigative work would be seriously impaired.

As the bill now presented to the Senate has been significantly changed by the conference on these critical issues. The language of section 2(b) has been modified so that the identity of a "confidential source," except that the identity of a person other than a paid in-
former may be protected. The language has also been broadened substantially to protect from disclosure all of the information contained in the files referred to as "Law Enforcement Activities." This exemption came to be interpreted as including such things as meal inspection reports, reports concerning correspondence between the National Highway Traffic Safety Administration and the state and local authorities concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds.

That is to say, Mr. President, that the 1966 act did not accomplish some significant breakthroughs. Recently, for example, a Freedom of Information Act request has been made by the Pentagon. As a result, the White House had instigated Internal Revenue Service investigations of social action groups on the left in the black community. Included among these "radical" groups was the Urban League. In the same vein, the Justice Department earlier this week released a report on the waterfront unit of the operation of the FBI. The initial aspects of this police state-type of operation were revealed by excerpts from the FBI's own files. One document is not properly classified and should be public, but that the Secretary of State acted reasonably in classifying the document as "secret." In other words, for a document to be released a judge must find that the Secretary of State acted unreasonably.

The conference changes from the language of the original bill satisfy my objections from the floor as they have overcome the substantive objections I had to the bill in its original form, and I shall now support the bill and vote to override the Presidential veto.

I again thank The Senator for yielding.

Mr. BAYE: Mr. President, the American system is built on the principle of the openness of public debate and the accountability of the Government to the people. The greatest danger to both these principles is the threat of excessive Government secrecy. As the power and size of the executive branch has grown in recent years, so has its ability to cloak its actions which broadly affect the American people and to conceal those who are responsible for them. It was 16 years ago that we in the Congress first recognized the dangers of bureaucratic secrecy when we enacted a one sentence amendment to a 1789 "housekeeping" law which gave Federal agencies the authority to regulate their business. It read:

This section does not authorize withholding information from the public or limiting the availability of records to the public. It quickly became clear, however, that the exemption was not broad enough, that it was unworkable, and that it was made subject to the new "Freedom of Information Act." But the bureaucracy was not to be so easily unveiled. There were many loopholes which legion of bureaucratic lawyers, with some help from the courts, managed to enlarge into gaping and blanket exemptions. For example, take the exemption contained in the law for "Law Enforcement Activities." This exemption came to be interpreted as including such things as meal inspection reports, reports concerning correspondence between the National Highway Traffic Safety Administration and the state and local authorities concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds.

The first exemption to the present Freedom of Information Act states that the act does not apply to matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." That is a requirement which was mandated by the Supreme Court to mean that Congress granted to the Executive, sole discretion to classify documents—Environmental Protection Agency v. FPC 421 U.S. 72 (1975). The Court went on to say that because of this statutory construction the courts could not review the decision of an executive branch employee to classify nor could the court even examine the document in camera. However, the court also indicated that there were no absolute, or even likely, infringement of citizens' rights if Congress had the power to change the law if it saw fit to do so. The proposed amendments before us today, if enacted, would give Congress the power to make the rules governing classification.

This bill merely makes it clear that the courts may determine whether those rules are being followed. The President wants documents that are claimed to fall within the national security exemption treated differently than documents that are excluded from within the other exemptions. He wants a court to ignore whether or not the classification decision was right or wrong and to determine whether or not the agency official acted reasonably or unreasonably. Under this approach a situation could arise where a document is not properly classified and should be released, but that the Secretary of State acted reasonably in classifying the document as "secret." In other words, for a document to be released a judge must find that the Secretary of State acted unreasonably.

The conference changes from the language of the original bill satisfy my objections from the floor as they have overcome the substantive objections I had to the bill in its original form, and I shall now support the bill and vote to override the Presidential veto.
leaders of the free and responsible press have joined the drive to make the freedom of information law a more workable tool for the Government information explosion, not because it means money in their pockets but because they truly believe in the ideals of a democratic society. They have joined in recognizing that freedom of information exists only if the public has access to the facts of government. Stories about Government problems do not sell newspapers, do not influence the public to watch television or listen to radio. The public will rather not listen to or read about the bad news which most Government stories report.

These dedicated newsmen fighting for the people's right to know are not fighting for their own special interest. This fact is emphasized by looking at the organizations and individuals supporting the drive to override President Ford's veto of the Freedom of Information Act amendments. The representatives of the news media—the American Society of Newspaper Editors—have gone on record in support of overriding President Ford's veto. The ASNE is interested in the people's right to know, not the publishers' desire to make a profit.

This point is emphasized in an editorial from the Denver Post. William Hornby, executive editor of the newspaper, also serves as chairman of the Freedom of Information committee of ASNE. He and other leaders of the Information industry have rallied the members of their profession to fight for the right of the people to know, not the right of the press to publish. I urge you to consider carefully the cogent points made in the recent editorial in Bill Hornby's newspaper.

Mr. President, I ask unanimous consent to have the editorial printed in the Record.

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

[From the Denver Post, Nov. 7, 1974]

CONGRESS MAY OVERRIDE VETO OF INFORMATION ACT CHANGES

When Congress reconvenes after the election recess, one of the first acts it will consider will be a decision whether and how to override President Ford's veto of essential amendments to the Freedom of Information Act.

The amendments, embodied in the bill H.R. 12471, seek to improve the seven-year-old FOI law by removing bureaucratic obstacles in the way of free public access to governmental documents.

Mr. Ford's veto of H.R. 12471 is in direct contradiction of his own statement of an "open administration" which demands more openness from Congress on FOI amendments.

Congress has gone more than halfway to meet administration objections to the original bill, yet the President has vetoed the amendments.

The House-Senate committee conference bill that emerged was a genuine compromise between congressional representatives and Justice Department experts.

Mr. Ford gets to veto the five changes he recommended to the committee. Yet he did not only disavow the bill, he adduced 10 amendments which he added to his original proposal.

In his veto message, President Ford complained that the FOI law as currently written does not give enough information to the requestor to judge the adequacy of the report. He also attacked the bill as being too weak and as disarming the courts in enforcing the law.

But the Senate and House have specifically provided in the act that courts will have the right to make the final decision on questions of response to citizens and the press. The presidents of both houses made it perfectly clear that the act did not abrogate the constitutional right of the press to have access to the executive branch of government.

Mr. Ford's veto also presents other impediments to the FOI law ranging from the setting of reasonable time limits for federal agencies to answer requests for public records to ensuring that an annual report on compliance of the law.

The amendments to strengthen the FOI law represent a true test of Congress. H.R. 12471 passed the House with only two dissenting votes and there was no opposition in the Senate.

If Mr. Ford will not follow through on his promise to Congress, he has no grounds for vetoing the bill.

Mr. MONTAGUE, Mr. President, over a century ago, two of America's greatest leaders—Mr. Lincoln and Mr. Grant—expressed their faith in the American people. Mr. Lincoln said:

A firm belief in the people, if given the truth, they can be depended upon to meet any national crisis. The great point is to bring the facts to the people.

Eight years ago, the Congress passed and President Lyndon Johnson signed the Freedom of Information Act, which was intended to aid the people in their search for the truth. The act was a recognition of the sad fact that all too often our Government's desire to cover up the truth took precedence over the need to bring this truth to the people.

The Freedom of Information Act held out great promise for the nation's every American citizen to gain the information they needed from the Federal Government. Information is often vital to their livelihood, their welfare, and even their freedoms. The act sought to place into law one more concrete manifestation of our society's respect for the truth and our willingness, if need be, to sacrifice convenience in order to uncover the facts.

Sadly, the years since 1966 have not produced the increase in Government responsiveness which we had hoped would follow enactment of the Freedom of Information Act. Indeed, secrecy has become even more of a hallmark of Government actions—recent years than ever before in our history. And for the first time in 200 years, a President was forced to resign because he refused to give the Nation the facts we deserved about Government wrongdoing at the highest level.

Every day, at lower levels of Government, Federal agencies have repeatedly lied and concealed the truth, also undermining the confidence of the American people in their Government. While the substantive provisions of the Freedom of Information Act have strengthened the test of time, the agencies whose job it is to comply with requests for information have defied the law and have not been subjected to the proper injunctive norms in using the procedural provisions of the act to frustrate the legislation's intent. Former Attorney General Elliot Richardson testified before the Senate Adminstration and Procedures Subcommittee, noted that—

[He said] informing the public more access to official information is not statutory but administrative . . . The real need is not to revise the act extensively but to improve compliance.

The Freedom of Information Act amendments of 1974 are an attempt to improve compliance with the act, which is needed to make it a better vehicle for learning the truth. Under the outstanding leadership of the distinguished Senator from Massachusetts (Mr. Kennedy), the Congress has moved to put into effect legislation which will remove the procedural loopholes through which the Government has shifted in the past, while at the same time affording adequate protection for vital government interests in sensitive or national security information areas.

I believe that the Congress has done this job well, and I was, therefore, distressed and disappointed that President Ford saw fit to veto this bill. Only 3 months ago, President Ford came into office on the heels of the most secretive and repressive administration in our history. His pledge was to open up Government and make it more responsive to the people. And yet the President, while espousing the rhetoric of openness has chosen to implement the policy of secrecy through his veto of this legislation.

I express the hope that this President and his principals might, in the articulation of the sections of the bill dealing with in camera inspection of classified documents and the disclosure of agency investigative files—undertake, in the spirit of compromise, which safeguards the legitimate interests of the Government while expanding the ability of citizens to obtain the information they need to maintain a vital and free society.

I am hopeful that the Senate will override this most unwise veto and in so doing will reaffirm our commitment to openness in government. The American people are tired of the politics of secrecy. They have been made painfully aware of the costs of dishonesty and openness. And enactment of the Freedom of Information Act amendments of 1974 will be an important step toward realizing the goals of a free people in their Government.

Mr. President, I ask unanimous consent that an excellent editorial from the Washington Post be printed in the Record. It discusses in detail the principal issues involved in this vote to override, be inserted in the Record at the conclusion of my remarks.
CONGRESSIONAL RECORD—SENATE

November 21, 1974

There being no objection, the editorial was carried to be printed in the Record, as follows:

[From the Minneapolis Tribune, Oct. 21, 1974.]

MR. FORD AND THE "SECRET To Know"

In 1968, when the first Freedom of Information Act was passed, Gerald Ford, then a congressman, opposed the bill on the ground that it would give the public access to too much secret information. He was concerned that it would disclose "sensitive and complex areas where they have no particular expertise."

I agree with him that it would be very difficult for the Government to prove to a court that disclosure of sensitive and complex areas where they have no particular expertise would be harmful. And I agree with him that "additional latitude must be provided Government agencies during the information release period."

However, in spite of my sympathy with the purpose of the veto, I am convinced that I must vote to override. The bill proposed 17 specific amendments to the Freedom of Information Act, 14 of which I consider an attempt to preserve the President's ability to make decisions based on unclassified information. The bill has been a step in the right direction. It has been improved since 1966 to facilitate public access to information.

In fairness to the President, and if the bill becomes law over his objections, Congress has the obligation not to lose sight of his objections in the interest of national welfare. Therefore, I have sub-jected the President's veto to the test of public scrutiny. It is not enough to call amendments "unconstitutional and unworkable.

The veto of the bill is a key provision empowering federal courts to go behind a government secrecy stamp and examine contested material is currently being proposed in the Senate. The bill expired a number of categories of material ranging from secret national security to trade secrets to law-enforcement investigatory records.

As a result, the President has chosen to assert the fact that federal judges already have the right to review classified information. A dissenting opinion, Mr. Ford objected. The provision, the veto message said, would mean that courts could make that amount to "the executive branch ineffective and complex areas where they have no expertise." It could adversely affect intelligence secrets and diplomatic relations.

I, too, have been a proponent of both parties in secrecy statutes. On balance, too much information is withheld from public scrutiny, and the trend must be reversed. The Congress has a duty to protect the public from unwarranted secrecy and to protect the Nation from losing its ability to make decisions.

MR. RICHCOFF. Mr. President, on October 17, President Ford vetoed the Freedom of Information Act Amendments, which were overwhelmingly approved in both Houses of Congress. Yesterday, by a vote of 371 to 31, the House of Representatives reaffirmed that mandate.

In his veto message, Mr. Ford's conviction was that the bill is unconstitutional and unworkable. The President's objections to the bill seem to be three:

The President's objections to the bill seem to be three: First, that our national security secrets and foreign relations could be endangered. Second, that a person's right to privacy would be threatened by provisions of the bill requiring disclosure of FBI files and investigatory law enforcement files. Third, that the 10-day deadline imposed upon Government agencies to request papers for documents and the 20 days afforded for determinations appeal are unrealistic.

A closer examination will show these fears are unfounded. The President contends that this bill will jeopardize our national security interests. The President said that he objected to forcing the courts to make initial classification decisions and complex areas where they have no particular expertise." The FOIA does not require the courts to render initial classification decisions. It allows the courts to inspect in camera classified records and review the classification to determine if the material sought is in fact properly classified.

The bill empowers the courts to de-
November 21, 1974

CONGRESSIONAL RECORD—SENATE

The President, the Senate...
would not decrease the basic improvements in freedom of information under this act but would prevent jeopardizing our national defense.

Mr. President, for these reasons, I believe the President's veto should be upheld and that the substitute bill which would include all the basic provisions and improvements in the freedom of information contained in this act should be passed, and I urge the Senate to adopt this substitute measure.

The PRESIDENT OF THE UNITED STATES: Who yields time?

Mr. HUSKOA. Mr. President, I suggest the absence of a quorum.

The PRESIDENT OF THE UNITED STATES: The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

The PRESIDENT OF THE UNITED STATES: Without objection, it is so ordered.

Under the previous order, the hour of 2 p.m. having arrived, the Senate will now proceed to vote on overriding the President's veto of H.R. 12471. The question is to pass, the objections of the President of the United States to the contrary notwithstanding.

The yeas and nays are required under the Constitution, 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 South Dakota (Mr. McGovern), and the Senator from Alabama (Mr. Sparkman) are necessarily absent.

I further announce that the Senator from Minnesota (Mr. Humphrey) is absent due to illness in the family.

I further announce that, if present and voting, the Senator from Minnesota (Mr. Humphrey) and the Senator from South Dakota (Mr. McGovern) would each vote "aye."