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our firm and clear policy toward that crime. By giving its advice and consent to my ratification of this convention, which I have done, the Senate of the United States will demonstrate that the United States is prepared to take effective steps to combat one of the gravest threats to the establishment of principles of law and justice.

Political as well as social interest groups have overwhelmingly supported this legislation. I commend to the administration and the United States information on the genocide convention, 166 organizations representing a quarter of a billion people all over the world, appealed to the United Nations to outlaw mass murder.

Likewise, in the United States, scores of American organizations have appealed to the Senate to ratify the Convention. Among these diverse organizations, are the APL-CIO, UAW, National Council of Churches, National Council for the Prevention of War, Colored People's Leadership Conference on Civil Rights, General Federation of Women's Clubs, and the American Association of University Women.

In the interest of the millions of Americans represented by this cross-section of organizations, as well as the hundreds of millions more around the world who support this treaty, and in the interest of overall human rights, I appeal to the Senate for ratification without delay of the Genocide Convention Accords of 1949.

THE PRESIDENT'S VETO OF THE FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. MUSKIE. Mr. President, this week, Congress will vote on one of the most important questions pending during this post-election session—the President's veto of the amendments to the Freedom of Information Act, H.R. 12471.

On the substance of the issue, there are a number of points of agreement between the President and the Congress. The President's veto message would have us believe that the only point of real concern is the legislative branch. But beneath all the rhetoric, there is only one issue at stake—and that is the effectiveness of this legislation.

The provision in question is section 2(a), providing for a process of judicial review in cases where classification of Government documents is challenged in the courts. In such cases, the legislation provides for in camera review of the documents. In effect, it would have a Federal judge determine whether or not the documents were, in fact, properly classified.

The President has called this provision unconstitutional.

As a lawyer who thinks he knows something about the law, I found this charge puzzling. Particularly since the President has not taken issue with the concept of judicial review, but only with the method to be used. To clarify the question, in my own mind, I sought the advice of one of the Nation's most respected constitutional experts, Prof. Philip Kurland, of the University of Chicago School of Law. I would like to share his response with my colleagues in Congress, for it may well lead us all to a more informed vote on this issue.

The President's charge that H.R. 12471 is unconstitutional is serious indeed. But Professor Kurland's lucid analysis has convinced me that it is a charge without foundation.

I ask unanimous consent that Professor Kurland's letter be printed in the Record, and I urge my colleagues' serious consideration of his arguments.

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

UNIVERSITY OF CHICAGO
Chicago, Ill., Nov. 15, 1974.

Senator Edmund S. Muskie, U.S. Senate, Committee on Government Operations, Washington, D.C.

Dear Senator: I have been asked, by Mr. Danielo, the Senate Committee, to give you an opinion on the constitutionality of the Presidential veto that was sent, in part, on a proposition of unconstitutionality. Before I do so, I should like to comment on the Vote Message of 17 October 1974 which has been somewhat distorted by later statements. In the Vote Message, I stated: Such a provision [referring to the provision for judicial review of the propriety of classification] of documents would violate constitutional principles. In this concluding paragraph, I reiterated that the bill as enrolled was unconstitutional. But only last night, I heard him say to the newspaper fraternity that was urging an override of his veto, that the provision "may be" unconstitutional.

Although President Ford states that the provision to which he takes exception is unconstitutional, not surprisingly, he refers neither to a provision of the Constitution nor to any judicial decision on which such a conclusion could rest. It is not surprising, because there is neither constitutional prohibition nor Supreme Court decision to support his position.

My considered opinion is that the issues between the Congress and the President in this regard are really issues of policy and not at all issues of constitutionality. To me, it is evident that the President vetoed the Constitution in any way.

The provision in question was described in the Conference Report to accompany H.R. 12471 in this way: NATIONAL DEFENSE AND FOREIGN POLICY EXEMPT

The House bill amended subsection (b) (1) of the Freedom of Information law to permit the withholding of information "authorized to be kept secret in the interest of national defense or foreign policy." The Senate amendment contained similar language but added "statute" to the exemption provision.

The Senate substitute combines language of both House and Senate bills to permit withholding of information where it is "specially designated as confidential pursuant to an Executive order to be kept secret in the interest of foreign policy," and in fact, properly classified pursuant to both procedural and substantive criteria established in such Executive order.

When linked with the authority conferred upon the President to designate such criteria for in camera examination of contested records as part of their de novo determination in the event of resort to the courts, this clarifies Congressional intent to override the Supreme Court's holding in the case of E.P.A. v. Mintek, et al., supra, with respect to in camera review of classified documents.

However, the conference recognizes that the Executive departments responsible for national defense and foreign policy matters have unique insights into what information effects might occur as a result of public disclosure of a specifically classified record. Accordingly, the conference expects that Federal courts, in making de novo determinations in the event of resort to the courts, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Restricted Data (49 U.S.C. 2528), communication information (18 U.S.C. 2510), and intelligence sources and methods (50 U.S.C. 401 (d) (3) and (4)), for example, may be classified and exempted under section 5(b) (1) of the Freedom of Information Act. When such information is subject to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law.

Presidential objection is to the standard for the making of such determinations. The President's objection, however, is a standard by which "There is a reasonable basis to support the classification pursuant to the de novo determination in the event of resort to the courts." The President is really asserting that the classification by the executive department is to be regarded as conclusive, as opposed to the view that the courts should be able to determine what his constitutional argument could be.

The difference between the President and the Congress does not go to the question whether the constitutional privilege to be accorded to classified documents. I have doubts that any such constitutional privilege exists. But the issue is framed in terms of differences between the Presidential and Congressional positions. For the question is not whether such materials are privileged; the statute in question recognizes such a privilege. The issue is how to determine whether the materials are privileged; the statute in question recognizes that the privilege, under either the President's or the Congression view, would extend only to materials that are, in fact, privileged. If the documents from falling into the privileged category, they are not entitled to protection from disclosure.

In other cases, the President's view that the courts cannot undertake the determination by in camera inspection of the questioned material, where necessary, lacks the bill and the President's suggestion that the President's presence, in camera determination of the materials, in order to determine whether such classification is proper. Congress has expressed similar recognition of the weight to be given to administrative action. As the quotation from the Conference Report above makes clear: ... the conference recognizes that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [are] possible might occur as a result of public disclosure of a specifically classified record. Accordingly, the conference expects that Federal courts, in making de novo determinations in the event of resort to the courts, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Under both the President's alternative and the bill as enacted, the President has been given authority to undertake in camera inspection, if necessary, to determine whether the materials are
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properly classified. And it should be clearly noted that the issue as posed by the bill is whether the classification is proper pursuant to the executive branch itself for such classification.

It seems clear to me that the provisions of the bill are entirely consistent with the Supreme Court decision that directed itself to the issue that purports to be made between the Congress and the Executive Branch as to whether, or not, the Court should be permitted to order the production of materials classified by the executive branch as national security secrets. The Court set forth the proper procedure for making that determination in the case of the Executive Branch.

Judicial experience with the privilege which protects military and state secrets has been well known to this Court. Experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. The privilege involved must be a formal claim of privilege, lodged by the head of the department which has control over the material in issue and consideration by that officer. The court itself cannot determine whether or not the documents in issue are privileged or come within the area of legitimate defense. If, in the light of the circumstances, the court is not satisfied it has that assurance, it should refuse to order disclosure.

The privilege against self-incrimination presented the courts in a similar sort of problem, too. In Cramer v. United States, 325 U.S. 1, 48 S.Ct. 241. 72 L.Ed. 480 (1928), the Court held that the privilege is not available to the witness, but to the Government only. It follows that the privilege is inapplicable in the case of a prosecution for further disclosure.

Regardless of how it is articulated, no indictment must be required. If the privilege is asserted, the claim must be made before a grand jury. At that stage, the privilege against self-incrimination is not available to the witness. The privilege is available only to the government itself. In Cramer v. United States, 325 U.S. 1, 48 S.Ct. 241, 72 L.Ed. 480 (1928), the Court held that the privilege is not available to the witness, but to the Government only. It follows that the privilege is inapplicable in the case of a prosecution for further disclosure.

REPORT BY THE COMMISSION ON UNITED STATES—LATIN AMERICAN RELATIONS

Mr. CHILES. Mr. President, since the spring a distinguished group of Americans with substantial interest in Latin America has been meeting regularly to consider improvements that might be made in U.S. policy toward Cuba. Nevertheless, I think that all of us would benefit from receiving this report and the recommendations it contains. The report can be a good new year's gift for Congress and the President.

The Commission's opening shot is simple and clear: "The United States should be much more forthcoming with basic information about Cuba and the Caribbean." The Commission is concerned that untold thousands of people are living in Cuba and the Caribbean where a totalitarian regime is entrenched. The Commission recommends that a thorough investigation be made of the political situation in Cuba and the Caribbean as a whole. The Commission is also concerned that it is our duty to inform the American people about what is happening in Cuba and the Caribbean. The Commission recommends that a thorough investigation be made of the political situation in Cuba and the Caribbean as a whole. The Commission is also concerned that it is our duty to inform the American people about what is happening in Cuba and the Caribbean.