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by the Secretary of an administrative head of an educational agency. Regulations established under this subsection shall include procedures for objection, verification, and protection of such data. No survey or data-gathering activities shall be conducted in violation of this section without the consent of the parents of students participating. If such consent is not obtained, the Head of an administrative head of an educational agency shall apply the provisions of this and related sections without the consent of the parents of students participating.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or, attending an institution of post-secondary education the further consent of the student shall be obtained.

No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students if they are eighteen years of age or older, and are attending an institution of post-secondary education, of the rights accorded them by this section.

1. The Secretary, or an administrative head of an educational agency, shall take appropriate actions to enforce provisions of this Act. No funds shall be made available, in violation of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds that there has been a failure to comply with the provision of this section, and that the Secretary has determined that compliance cannot be secured by voluntary means.

2. No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students if they are eighteen years of age or older, and are attending an institution of post-secondary education, of the rights accorded them by this section.

3. A conference substitute adopts the provisions of the House bill relating to protection of parental and pupil rights, with amendments. The conference substitute provides that all instructional material which will be used in connection with any research experiment program or project shall be available for inspection by parents or guardians.

4. In approving this provision concerning the privacy of information about students in the conference substitute, the Senate is very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out its evaluations, as is clear from the sections of the amendment which transfer to the Superintendent General and the Secretary of HEW access to otherwise private information about students. The need to protect students' rights must be balanced against legitimate Federal needs for information.

Under this amendment, an educational agency would have to administer a Federal test or project unless the anticipated invasion of privacy or potential harm was determined to be real and significant, as corroborated by a generally accepted body of opinion and medical and mental health professions. In short, the amendment is intended to protect the legitimate rights of private and protected persons from unwarranted intrusions; it is not intended to provide a blanket and automatic justification for a school system to administer achievement tests and related instruments necessary to the evaluation of an applicable program.

VEVO REVEALS WATERGATE BLIND SPOT

Mr. CRANSTON. Mr. President, President Ford's veto of new amendments to strengthen the Freedom of Information Act reveals a second blind spot in his failure to learn the basic lessons of Watergate. President Ford seemed to have missed the point of the Watergate trials when he pardoned former President Nixon before the legal process was allowed to run its full course. The president, however, is wrong.

That was an unpardonable pardon. Our laws must apply equally to each and all of us, including Presidents and former Presidents. No President can disregard the law of Watergate—the dangers of undue secrecy in Government.

The Watergate disclosure showed how
ANALYSIS OF THE PRESIDENT'S JUSTIFICATION OF HIS VETO OF THE FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. CHILES. Mr. President, at the request of the subcommittee on Administrative Practice and Procedure, U.S. Senate, the Committee on Governmental Responsibility at the Holland Hotel Center, Washington, D.C., has provided the subcommittee with an analysis of the President's justification of his veto of H.R. 12471, the Freedom of Information Act Amendments.

It is the center's conclusion based on their research that neither the constitution nor the administrative reasons—the only ones given in the President's veto message—can be sustained.

I ask unanimous consent that this analysis be printed in full in the Record and that the enclosed editorials which support an override, from Florida newspapers, be printed in full in the Record.

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

ANALYSIS OF PRESIDENT FORD'S VETO OF H.R. 12471

H.R. 12471, a bill to amend Section 552 of title 5, United States Code, known as the Freedom of Information Act, is designed to narrow the Act's ethical objectives and realities of current practices. However, ending the proposed changes "...constituting a species of unconstitutinal and unavoidable," President Ford has vetoed the bill. The President's position in the bill is not by his own implications, founded on philosophical disagreement with the substance of the Freedom of Information Act, but disapproval of the procedures selected to further the bill's objectives.

The President's objections to H.R. 12471 principally stem from provisions in the bill dealing with the three areas: 1) Judicial review of classification, 2) time limits for review of FOIA requests and costs for obtaining information, and 3) Investigatory files.

1. REVIEW OF CLASSIFIED DOCUMENTS

A. Provisions under the current legislation.

The present language of exemption (b)(1) states that the provisions of the FOIA do not apply to matters that are "specifically required to be kept secret in the interests of national security or foreign policy." The FOIA grants jurisdiction to district courts in each State to consider United States claims to the production of agency records improperly withheld. According to the Act, the courts shall decide under the circumstances as to whether the government's interest is sufficient to warrant the denial of access. The burden is on the agency to sustain its actions.

The import of the term de novo has been the focal point of concern over the application of exemption (b)(1) since the passage of the Act in 1966. The plain meaning of the term de novo would seem to be a grant of authority for a court to consider a claim made under the FOIA from the beginning and in its entirety. This plain meaning is interpreted as requiring the court to reach a conclusion when an attempt was made to apply it to a situation where the government was claiming that the records were classified pursuant to exemption (b)(1). The question arises whether the de novo provision, as applied to materials claimed to have been classified pursuant to an executive order, permitted a court to review the documents in question and determine whether their disclosure would create the de novo determination in fact come within the scope of the alleged executive privilege. The Supreme Court found in cameras inspection case of "unlawful future Security Agency v. Minn. 410 U.S. 74 (1971)

The substance of the Court's consideration of the language of the Act and its legislative history is that Congress did not intend for the Act to subject the executive security classification decision to judicial review.

This restriction on the review procedures applicable to exemption (b)(1) has been one of the principal criticisms of the President and his advisors. In essence, the objection to the restricted judicial review of (b)(1) exemption claims is that such restricted review amounts to no review at all. According to EPA v. Minn. The Government sustains the withholding of requested materials by merely offering affidavits that the materials sought have been classified pursuant to an Executive order. There is no further check on either the sincerity, or, assuming a good faith, on the accuracy of the classification itself.

There is good reason for concern over the lack of review afforded these two factors. Classification abuse, chiefly through overclassification, is known to be common. It is a practice of the Department of Defense which has led to the separation of power doctrine. Subsequent to his veto, the President forwarded his amendments to H.R. 12471 to Congress. His proposals, aimed at curbing the discretion he believes he is exercising, are not an attempt to modify the President's decision made in a secret, unreviewable manner.

The nature of the President's constitutional objections presumably relate to the separation of power doctrine. The veto message makes no reference to the exact nature of the constitutional infraction. Presumably, the constitutional principle referred to is the separation of power doctrine.

B. What H.R. 12471 would do

The provisions of H.R. 12471 relating to review applicable to exemption (b)(1) are designed to tighten the presently existing loopholes created by EPA v. Minn. H.R. 12471 would alter two provisions of the Act: In order to restitute the procedure dealing with judicial review, would be amended to specifically grant the court discretion to "examine the contents of agency records in camera to determine whether such records or any part thereof is within any of the exemptions..." Exemption (b)(1) would be amended so as to create a two-way exemption. (b)(1) exemption matters "specifically required by Executive order to be kept secret in the interest of national security or foreign policy." H.R. 12471 would include the phrase "and are in fact properly classified pursuant to an executive order."

The Committee's assistance in demanding adherence to procedural as well as substantive requirements of the order. The combined effect of these changes is to bring discretion in camera review of classified materials within the ambit of the Court's de novo determination.

C. The President's objections

The President voices two major objections to H.R. 12471: provisions for dealing with review of classified documents. According to the veto message of October 4, 1973, it is the President's opinion that the bill's procedures would jeopardize military and intelligence secrets and violate constitutional principles as well. The concern for the bill's effects on diplomatic relations and the freedom of the press has been made in a secret, unreviewable manner.

The nature of the President's constitutional objections presumably relate to the separation of power doctrine. The veto message makes no reference to the exact nature of the constitutional infraction. Presumably, the constitutional principle referred to is the separation of power doctrine.

The President's proposals, aimed at curbing the discretion he believes he is exercising, are not an attempt to modify the President's decision made in a secret, unreviewable manner. In effect, the President's procedures would make the Executive branch the sole arbiter of the validity of the government's claim of nondisclosure.

2. COURT EXEMPTIVE PROVISIONS

The President evidenced, in his veto message, a skepticism of the capability of courts to deal with such matters as national security and diplomatic relations stating that the courts "have no particular expertise" in these fields. The President has correctly identified the difficulties and sensitive areas managed to dispose of cases involving a thorough analysis of classified documents. For example, in certain tax cases, the district courts have delved into such difficult tax issues involving the nondisclosure of confidential information, and have been affirmed by the circuit courts. The courts have also demonstrated a tendency to provide relief to citizens under the provisions of the Freedom of Information Act.

"In my opinion, citizens urgently need relief from the tyranny of classified secrecy as part of the American way of life. The judiciary could give us that relief if I am confident that a Federal court would extend such relief in cases where they believe the government's decision to withhold the requested documents is an abuse of the defense requirements in any given case. I would assume that the judge could balance any national security considerations against the need for the freedom of information."


The district court in Oklahoma Gas and Electric Co. v. United States, 267 F. Supp. 98 (W.D. Okla. 1967), and the district court in United States v. Grant, 464 F. 2d 118 (10th Cir. 1972), stated that "the power of the government is the same for tax inequities the statute of limitations if controlling, would serve no interest in either the collection or the discussion. Double escape from taxation at the unjust hardship of benefit of either taxpayer or the government."

The Internal Revenue Code usually apply under unusual circumstances, and only after a 50-year period. It has been met. See AGO v. Commissioner of Internal Revenue, 351 F. 2d 480, 489 (2nd Cir. 1965). The Internal Revenue Code is a limited code, as to demand adherence to procedural as well as substantive requirements of the order. The combined effect of these changes is to bring discretion in camera review of classified materials within the ambit of the Court's de novo determination.
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the ability to deal with complex issues in the volatile area of patents and copyrights. See, e.g., Kennett Oil Co. v. Floros Corp., 94 S. Ct. 1675 (1974) (patent protection does not constitute a right of privacy covered by the Constitution), or in the area of sensitive issues and materials in the Watergate case and the handling of the White House tapes. The President's power is misplaced in this situation since federal judges, on the district court level, have dismissed cases and motions for summary judgment, as well as motions to compel discovery, because of the inherent relationship between the litigation and the operation of the government. It is the government's position, however, that the court is bound by the Constitution, and that the courts have no power to compel the release of the government's confidential and sensitive information without a showing of irreparable harm.

II. The doctrine of separation of powers

The President makes no direct identification of the constitutional principle he claims to be violated by the procedures outlined in H.R. 12471, but it is apparent the separation of powers doctrine. The President, however, offers a hypothetical example illustrating that he believes to be the unconstitutional test of federal decision-making. The President's hypothetical involves a situation where the Executive Office of the President has determined the agency that was responsible for investigating the Watergate case. The President's hypothetical involves a situation where the White House tapes are involved. The President asserts that the court's refusal to grant protective orders in this situation would violate the Constitution.

III. The President's objections

The President's objections to the procedures outlined in H.R. 12471 are based on a constitutional test of separation of powers. The President asserts that the court's refusal to grant protective orders in this situation would violate the Constitution.

IV. The President's position

The President's position is that the court's refusal to grant protective orders in this situation would violate the Constitution.

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on review of exemption (b) (1) provides a loophole for the avoidance of the statute's requirements. The substantial evidence approach that the President prescribes prohibits undue delay and allows the abuses of overclassification to continue.

This lack of any meaningful check on administrative action places the Executive rather than Congress in jeopardy of violating the law. The executive department's deviation from legal preclusion of judicial review makes the Executive the sole judge of its actions. This is particularly true in the Subversive Activities Court, of any claim of absolute privilege. Whether or not the Executive has a legitimate privilege granting it immunity from compliance with the demands of the other branches of Government is something that only the courts can determine. What is called for is a decision whether, and to what degree, a matter has been covered by the Constitution to another branch of government. This decision "is itself a delicate exercise in constitutional interrelation, and is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution." Taylor v. U.S., 369 U.S. 317, 321 (1962). Any other conclusion would be contrary to the basic concept of separation of powers and to the other checks and balances as a scheme of a tripartite government." United States v. Nixon, 444 U.S. 15, 44-45 (1979). In a context of separation of powers, the provisions of H.R. 13471 place in the President's hands the responsibility of the Executive's privilege against disclosure where it properly resides—with the courts.

The US District Court for the District of Columbia has articulated the essence of the issue with particular clarity and reason:

"The claim of absolute privilege was recognized, its mere invocation by the President or any agency or any access to all documents in all the Executive departments to all citizens and their representatives, including the Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act would become nothing more than a legislative statement of the nonenforceable rights. Support for this kind of mischief simply presupposes from Inception of the doctrine or separation of powers. Nixon v. U.S. 509, 452, 763, 715 (1973)."

II. TIME LIMITS AND COSTS

President Ford's second objection to the FOIA amendments as unacceptable is that the time limits placed on an agency's time to respond to initial requests for information and administrative appeals from initial denial. The President's suggestion of a substitute of the initial 10 day period by a 30 day limitation, and a substitute of the 10-day administrative extension period for unusual circumstances by a 15 day period. Along with these substitutions the President suggests that an agency be able to petition the D.C. Circuit Court for the District of Columbia for an even further extension of these time periods if compliance is essentially impossible. This extension application must occur prior to the expiration of the periods specified in his substitution.

Obviously, the President recognizes the need for specific guidelines on periods for agency responses—the need for which is clarion in the record. Perhaps the greatest abuse of the Freedom of Information Act has been the low priority accorded by many agencies on the part of the President's representatives. Hearings on H.R. 5455 and 4960 Before the Foreign Operations and Government Information Administration, on Government Operations, 92d Cong., 1st Sess., 284 (1971). One study has shown that six month delays in processing an initial request, not even mentioned once that it remained unde-terred for more than one year. Sub- comm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary, President of the Senate, 82d Cong., 2d Sess., 90, 94 (1974).

Such delays, whether intentional or not, can often amount to a de facto denial of a request. Specific, enforceable time limitations would therefore be an important step, especially in light of section 6 of the previous amendment. This amendment permits a request for information to be considered as exhausted if the time limitations are not complied with, allowing suit to be filed if district courts.

President Ford's modifications of the time limits do not provide an improvement over the amendment as to warrant sustaining a veto. It is true that if one takes the total time periods mentioned in the two proposals the President presents a total of 80 working days as compared to 40 working days. A maximum of 60 working days is not an enforceable time limit. There is no executives in the Subversive Activities Court, of any claim of absolute privilege. Whether or not the Executive has a legitimate privilege granting it immunity from compliance with the demands of the other branches of Government is something that only the courts can determine. What is called for is a decision whether, and to what degree, a matter has been covered by the Constitution to another branch of government. This decision "is itself a delicate exercise in constitutional interrelation, and is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution." Taylor v. U.S., 369 U.S. 317, 321 (1962). Any other conclusion would be contrary to the basic concept of separation of powers and to the other checks and balances as a scheme of a tripartite government." United States v. Nixon, 444 U.S. 15, 44-45 (1979). In a context of separation of powers, the provisions of H.R. 13471 place in the President's hands the responsibility of the Executive's privilege against disclosure where it properly resides—with the courts.

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time limit seems justified and an extension does not warrant the veto.

III. INVESTIGATORY FILES

The President's objections identify investigatory files as a separate problem from purported constitutional and time limitation issues and focus on the necessity of reviewing large files on a paragraph by paragraph basis to sever the disconnectability from the subject of investigative files.

The President's message singles out investigatory files which he believes should not be included. The President's command that "any reasonably segregable portion of a record should be provided..." after deletion of the personal and private matters allows the agency to classify a file as a unit without close analysis of the content. Time limits are too stringent to allow such intensive analysis.

If investigatory files are so unique in terms of length and complexity, an agency's logistical difficulty in conducting a thorough analysis would certainly strongly influence a court in determining the time for agency extensions as is authorized by the bill. Therefore, a procedure is already available to provide for accurate and complete analysis without impairing the ability of the agencies to make a decision. The issue here is whether the bill is constitutional in the manner in which it requires the agencies to classify the files, or whether the bill fully addresses the need to segregate and classify all of the information.

CONCLUSION

None of the objections raised by the President or Senator Hart appear to be valid. The bill is constitutional in the amendment requirements to the Freedom of Information Act which he vetoed Oct. 17 is, if anything, wronger than the bill as a whole. As Justice Rehn suggests in an adjoining column, the existing information act is "largely toothless" legislation which does not encourage bureaucrats to clump up when they suit the public's fancy. If it created a situation, he goes on, "a man driving a drunked driver to administer his own sobriety test".

Mr. Ford's veto for the amended act, which passed the Senate and the House 96 to 8, grants wide latitude and lots of lead time to those who may wish to prevent the public from learning about its own business.

For instance, the vetoed bill would give agencies 80 days to comply plus another 15 days in some cases and the right to seek a longer delay from the court in exceptional circumstances. In other words, plenty of time to bury the bones or forget all about it.

U.S. government files are crammed with tons of material affecting and perhaps covering up decisions made in the name of the public but with little if any knowledge. Some of this material goes back half a century and more.

Washington is an echo chamber for petty politics and social gossip but many of its halls are tightly shut to public information—and much of which has no link to official secrecy. At the very least Congress should pass the amended Freedom of Information Act over President Ford's veto which we fear was derived from bad advice.

[From the Miami Herald, Oct. 29, 1974]

TO LEY THE SUNSHINE OUT

In a joke making the rounds a few weeks back, a prominent White House voice ø signing a raiding "The President is a Fool" and is promptly arrested for revealing top secret information.

The anecdote makes a point. Although governmental secrecy has some legitimate uses, it is as often the refuge of fools and scoundrels who cover up their indiscretions with the public's right to know the public access to vital information.

It does not have to be that way. In Florida, for instance, the new "sunshine laws" is a model for other states.

At the federal level, Florida's Sen. Lawton Chiles has been a leader in the media and several prominent persons in government and the media have been pushing for a national "sunshine bill" with a few changes to take into account military secrecy and foreign affairs that are not problems in Florida. After months of work, congressmen thought they had hammered out an acceptable compromise to guarantee public access to public records and the public's business.

The measure, watered down somewhat to meet President Ford's stated objections, passed the House 339-8 and the Senate 94-17. The chief author of the compromise, Rep. William Moorhead of Pennsylvania, noted that the bill would "provide the openness in government that President Ford has promoted" and predicted it would be signed into law.

But Gerald Ford had a secret. He vetoed the bill. He vetoed the bill because of action that Washington observers blamed on the President's listening to the Pentagon's security team.

Mr. Ford's stated reason for his veto were totally unconvincing. We trust that when Congress returns following the election recess, it will act promptly to enact the Freedom of Information Act to start letting a little sunshine illuminate the activities of the federal government.