our firm and clear policy toward that crime. By giving its advice and consent to my ratification of this convention, which I urge, the Senate of the United States will demonstrate that the United States is prepared to take effective action on its part to contribute to the establishment of principles of law and justice.

Political as well as social interest groups have overwhelmingly supported the legislation. Prior to the adoption of 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 AFL-CIO, UAW, National Council of Churches, National Catholic Conference for Interracial Justice, Synagogue Council of America, American Civil Liberties Union, National Association for the Advancement of Colored People, 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 my colleagues 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 surface of the issue, there are a number of points on which the President and the Congress are at odds. The President's veto message would have us believe that all these points were of equal concern to the executive branch.

But beneath all the rhetoric, there is only one issue at stake—and that issue goes to the very heart of what this legislation is all about.

The provision of H.R. 12471 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 question by a Federal judge to 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 Constitution, I found this charge puzzling, particularly since the President has not taken issue with the concept of judicial review, but only with the standard 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 now, for it should be helpful to us all in weighing our 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 its 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 P. MUSKIE,
U.S. Senate, Committee on Government Operations, Washington, D.C.

DEAR SENATOR: I have been asked, by Mr. Davidson, the Counsel to your subcommittee, to give you an opinion on the constitutionality of H.R. 12471, in light of the President's veto that rested, in part, on a proposition of unconstitutionality. Before I do so, I would note that the certainty of the Veto Message of 17 October 1974 has been somewhat diluted by later statements. In the Veto Message, the President said: "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, he reiterated "that the bill as enrolled is unconstitutional." But only last night, I heard him say to the newspaper fraternity that was urging an override of his veto, that the provisions "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 provision 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 clear that the bill does not offend 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 EXEMPTION (B) (1)

The House bill amended subsection (b) (1) of the Freedom of Information law to permit the withholding of information "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy."

The Senate amendment contained similar language but added "statute" to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit the withholding of information where it is "specially authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact, properly classified" pursuant to both procedural and substantive criteria contained in such Executive order.

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al.*, supra, with respect to *in camera* review of classified documents.

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403 (d)(3) and (g)), for example, may be classified and exempted under section 552 (b)(3) of the Freedom of Information Act. When such information is subjected 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 to be used by the courts in determining the propriety of a claimed exemption from the duty to produce the information required. The bill requires that the Court determine that the material sought is "in fact, properly classified." The President would propose a standard be whether "there is a reasonable basis to support the classification pursuant to the Executive order." Unless the President is really asserting that the classification by the executive department is to be treated as conclusive, I am at a loss to understand what his constitutional argument could be.

The difference between the President and the Congress does not go to the question whether there is a constitutional privilege to be afforded to classified documents. I have doubts that any such constitutional privilege exists. But that is irrelevant to the differences between the Presidential and Congressional positions. For the question is not whether such materials as come in question are privileged; the statute in question recognizes such a privilege. The issue is how to determine whether the materials in issue are entitled to the privilege. Such privilege, under either the Presidential or the Congressional view, would extend only to materials that are, indeed, in the category of "military" or "state" secrets. If the materials do not fall into the privileged category, they are not entitled to protection from disclosure.

Nor does the President contend that the courts cannot undertake the determination by *in camera* inspection of the questioned material, where necessary. Both the bill and the President's suggested alternative would leave that power with the courts. The President would provide: "The court may examine such records *in camera* only if it is necessary, after consideration by the court of all other attendant material, 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 set out above makes clear: "... the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, 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 written, the courts are authorized to undertake *in camera* inspection, if necessary to determine whether the materials are

properly classified. And it should be clearly noted that the issue as posed by the bill is whether the classification is proper pursuant to standards established by the executive branch itself for such classification.

It seems clear to me that the provisions of the bill are fully in accord with the only Supreme Court decision that directed itself to the issue that purports to be made between the President and the Congress. I refer to the Supreme Court decision in *United States* v. *Reynolds*, 345 U.S. 1 (1953). There the question was whether a federal court could order the production of materials classified by the executive branch as military secrets. The Court set forth the proper procedure for making that determination in these words:

Judicial experience with the privilege which protects military and state secrets has been limited in this country. English 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. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.

The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the *Burr* trial. There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U.S. 479, 486–487. If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

There is nothing in *E.P.A.* v. *Mink*, 410 U.S. 73 (1973), inconsistent with the provisions of amendatory law that the President has vetoed. The vetoed bill is in fact a response to the deficiencies of the Freedom of Information Act as applied in the *Mink* case. The sole question resolved there was the meaning of the statute as it was then framed, and as Mr. Justice Stewart said in his concurring opinion:

"This case presents no constitutional claims, and no issues regarding the nature or scope of "Executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U.S.C. § 552.

"My Brother Douglas says that the Court makes a 'shambles' of the announced purpose of that Act. But it is Congress, not the Court, that in § 552(b)(1) has ordained unquestioning deference to the Executive's use of the 'secret' stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly witholds from disclosure matters 'specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.' In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

"One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

"But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother Douglas discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however synical, myopic, or even corrupt that decision might have been."

Indeed, the Court, in its opinion, makes it clear that the question was within Congressional control and all but invited the legislation that is in issue between the President and the Congress here: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters 'specifically required by Executive order to be kept secret.' Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1)." 410 U.S. at 83. It is obvious from the bill that Congress is no longer willing to accept an executive classification as final and determinative.

I would repeat that the issue between Congress and the President here is not whether there is or should be a privilege for military and state secrets. Both are in agreement that there should be such a privilege. Nor is the issue between the President and the Congress the question whether the federal courts should have the power of *in camera* inspection in order to determine whether the materials that are classified should retain their privilege. Both are in agreement that *in camera* inspection is appropriate. The controversy is solely over the question of the standard to be applied by the courts in making determinations of availability. Congress says that the materials in question must in fact have been properly classified in accordance with the Executive's own standards for classification. The President wants the secrecy maintained if the court finds a "reasonable," if erroneous, basis for the classification. The distinction cannot, in fact, be important except in a very small number of cases, indeed. In any event, I do not see how it is possible to say that the Presidential position is constitutional but the Congressional position unconstitutional.

Having said this, I would remind you that, if what is sought is not a statement about the meaning of the Constitution as applied to this question but a prediction of what the Supreme Court will do if faced with the question, I must say that the Court is a most unpredictable body in areas such as this. In the *Nixon* case, the Court assumed, without reason or proof, the existence of a constitutional basis for the so-called executive privilege, although it compelled the production of the materials there sought for *in camera* examination and judgment by the trial court. The only way to secure the Supreme Court's opinion on this matter is to enact the law and await that singular case in which the Presidential standard would bring about a different result from the Congressional standard. I can guess but I cannot warrant that the Court would there sustain the validity of the law.

With all good wishes.

Respectfully yours,

PHILIP B. KURLAND.

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 Latin America and relations within the hemisphere. During October this Commission on United States-Latin American relations, chaired by Sol Linowitz, fomer Ambassador to the OAS, issued a 54-page report with some 33 recommendations.

In the brief time I have had to peruse the Commission's report, I am impressed by the breadth of its content and its recommendations. Of course, none of us in this body will agree with all the recommendations in any commission report. I do not agree, for example, with the Commission recommendations on U.S. policy toward Cuba. Nevertheless, I think that all of us would benefit from giving this report and the recommendations some considerable thought. The report can be a good stimulus for debate and discussion within the Congress. It is with this in mind that I shall ask unanimous consent to have printed at the end of these remarks the conclusion of the Commission report.

The Commission's opening shot is simple and clear: "The United States should change its basic approach to Latin America and the Caribbean." The Commission reminds us that tremendous changes are occurring in world and hemispheric relations and that "unchanging policies