G. SENATE ACTION AND VOTE ON PRESIDENTIAL VETO, NOVEMBER 21, 1974; PP. S19806–S19823

FREEDOM OF INFORMATION ACT—VETO

The PRESIDING OFFICER. Under the previous unanimous consent agreement, the hour of 1 o'clock having arrived, the Senate will now proceed to the consideration of the veto message on H.R. 12471.

The PRESIDING OFFICER (Mr. Talmadge) laid before the Senate a message from the House of Representatives, which was read, as follows:

"The House of Representatives having proceeded to reconsider the bill (H.R. 12471) entitled 'An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act,' returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

The PRESIDING OFFICER. The question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

The time for debate will be limited to 1 hour, to be equally divided between and controlled by the majority leader and the minority leader or their designees.

Who yields time?

Mr. ROBERT C. BYRD. I yield myself 1 minute.

Mr. President, on behalf of the distinguished majority leader, I take this time merely to express appreciation to Mr. Stafford, Mr. Randolph, and Mr. Cranston, for their consideration of the time element that developed as a result of the desire on the part of various Senators to speak earlier this morning on another subject. These Senators—Mr. Stafford, Mr. Randolph, and Mr. Cranston—certainly deprived themselves of time which they had hoped to use in their discussions of the necessity of overriding the President's veto.

I want to express appreciation on behalf of the leadership for their understanding and their splendid cooperation.

Mr. President, how much time does the distinguished Senator from Massachusetts desire?

Mr. KENNEDY. Is the minority leader going to control the time?

Mr. ROBERT C. BYRD. Mr. President, on behalf of the majority leader, I yield the time to the distinguished Senator from Massachusetts (Mr. Kennedy) for his control on this side of the aisle.

Mr. KENNEDY. I thank the Senator from West Virginia.

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 the privilege of the floor: Bert Wise, James Davidson, Al From, Jan Alberghini, and Mr. Sussman.

Mr. HRUSKA. 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," and are focusing our attention and 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, Mr. President, that we can tell them about how Congress stood up against a hostile bureaucracy and passed, over a Presidential 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 pressures of his bureaucracy to keep the doors shut tight against public access in many areas.

I do not believe that President Ford personally harbors any desire 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. terHorst, stated the problem most clearly in the Star-News earlier this month when he wrote:

> The Nixon holdovers in the Administration have sandbagged the new President's pledge of new openness in government. . . . The lesson for Ford is that there still remains an excessive amount of anti-media zeal among the Nixonites 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 antimedia, 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 debacle we are in, we should first strike at secrecy in government whenever it exists, because it is the incubator for corruption.

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 construction of some loosely drafted provisions 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 readjusted. 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 bodies again overwhelmingly. This legislation, Mr. President, was given close attention at each stage of the legislative process.

President Ford objects to the legislation. Last week before a journalists' group he called his objections "minor differences" that could be ironed out if Congress would go along. He intimated that his proposed changes were fresh and new and that Congress should look at them carefully, as if for the first time.

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 bureaucrat's perennial lament of overwork have been emblazoned with a Presidential seal.

These proposals would give us more of precisely what our bill was carefully designed to avoid—more secrecy, more footdragging, 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 conversation of April 17, 1973, has the President summing up the Watergate coverup thusly.

It is national security—national security area—and that is a national security problem.

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 too, 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 to 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 should rightfully be open to scholars, journalists, and the interested public.

Yet the administration proposes to limit review of classification decisions, 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 the 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 presumption in favor of secrecy. That is what our system of checks and balances is all about.

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

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

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 managers makes clear that we expect an agency head's affidavit to be given considerable weight in judicial determinations on classified material. But if the agency cannot produce enough evidence to justify keeping a document secret, then that document should be released. 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, 20 working days on appeal, and an additional 10 working days where unusual circumstances are present. That gives the agency 40 working days, or almost two 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 exceptional circumstances, then we have another escape valve in the bill—added

by specific request of the administration during our conference. The agency may ask for, and the court is authorized to grant, additional time pending completion of such review.

The President has asked Congress 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 the bill was before the Judiciary Committee. And it is certainly longer than any journalist or member of the public should have to wait to get information from 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 handling 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 Unitarian Society, and the John Birch Society. I should note for the record that even after a year, it took a law suit to disgorge the requested records.

The administration also wants us 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 suggestion may not only be unconstitutional—since it puts the Government in Federal court where no "case or controversy" exists—but it is assuredly unconscionable. 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's proposal would give us.

The third issue relates to the cost of Freedom of Information Act implementation. Extensive testimony during our hearings made clear that fees and charges have been imposed by agencies as "toll gates on public access," and H.R. 12471 attempts to remedy this problem. Yet the administration would allow 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 may 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 stage. For we had heard no 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 reopen 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 7 years. In fact, the evidence points in just the opposite direction—that agencies have been overcharging and using fees to block release of public records. We continue specific authorization for agencies to charge for search and copying, and these, with the require-

ment that records be reasonably described in the request, should serve as an adequate deterrent to any idle request by the curious busybody 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.

Speculation on future costs cannot justify our taking the chance or 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 impractical and concludes that they probably contain only investigatory records. This is but another attempt, hardly disguised, to shut the door to access to FBI files, and Congress should reject it resoundingly.

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 interests to the utmost in the bill we passed. The objection in this area is stated solely in terms of administrative burden, an agrument we have heard before—first when Congress passed the Administrative Procedure Act in 1945, and again in 1966 when we enacted the Freedom of Information Act. That argument is even less sound today, where we have such a recent history of documented abuses of investigatory processes of Government.

Two cases clearly illustrate why even some administrative burden is worth the cost, where it results in greater public disclosure. In the case where NBC newsman Carl Stern took the FBI to court to obtain documents relating to counterintelligence programs, the Bureau took the position that those documents were "investigatory files." The FBI argued this point strongly, but a Federal judge even more forcefully found it lacking in substance. The judge responded:

> The government has not demonstrated that the requested documents, which are couched in broad generalities, relate to any ongoing investigation or that disclosure would jeopardize any future law enforcement proceedings.

No doubt this is just the kind of document—revealing a program that earlier this week the Justice Department itself characterized as involving "practices that can only be considered abhorrent in a free society"—that the FBI would find impractical to review and unlikely to be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about.

Then there is the case of Congressman Koch and two of his colleagues who requested access in their own FBI files. The FBI first denied it had such files. Only after suit was filed did the Bureau turn over some correspondence and newspaper clippings from those so-called "investigatory" files. Only court action in this instance forced the FBI to even admit that it had the requested files.

As these cases illustrate, not even the FBI should be placed beyond the law, the freedom of information law. Watergate has shown us that unreviewability and unaccountability in Government agencies breeds irresponsibility of Government officials. In this light, Mr. President,

I would think the FBI would welcome the reviewability and accountability which the Freedom of Information Act amendments carry with them.

Mr. President, the list of groups and individuals urging Congress to override the veto of the Freedom of Information Act amendments is lengthy. Some of the media, consumer, and public interest groups, and labor organizations, which have taken a special interest in seeing this legislation enacted over the President's veto include the National Newspaper Association, the Radio-Television News Directors Association, the American Society of Newspaper Editors, the Consumer Federation of America, the American Civil Liberties Union, Common Cause, Public Citizen, the United Auto Workers, and AFL–CIO.

Hundreds of editorials across the Nation supporting override attest to the interest of the American press in this vital legislation. I ask unanimous consent that following my remarks a list of newspapers giving editorial support to this legislation be printed in the RECORD, along with a sampling of some of the columns that have recently appeared.

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

[See exhibit 1.]

Mr. KENNEDY. Mr. President, this is far from special-interest legislation. Mr. President, its beneficiaries will include every American who wants to keep his Government accountable, his society open, and his Nation free. I urge my colleagues today to vote to override the President's veto of the Freedom of Information Act amendments.

EXHIBIT 1

[From the Arizona Daily Star, Oct. 27, 1974]

THE INFORMATION VETO

The President has vetoed proposed amendments to the Freedom of Information Act that would have gone far in holding accountable the headless mass of federal bureaucracy. His veto must be overridden.

The amendments would have required agencies to keep an index of the tons of information they record each year for use by the consumer-taxpayer. It would have required agencies to produce information on request by general subject matter rather than much less-accessible file numbers. It would have provided for court review of each refusal of information.

Bureaucrats would be required to report annually to Congress the number of times information was withheld, by whom and why, whether appeals were made under the act and the outcomes of those appeals. The law was specifically applied to the executive department, the Pentagon, government corporations, government-controlled corporations and independent regulatory agencies. Those individuals who withheld information without firm basis would be subject to civil service discipline.

But President Ford was persuaded by the FBI, the CIA and others that such law would dangerously inhibit them in their work. They want to be totally exempted.

In fact, the amendments provide numerous safeguards to the conduct of active police investigations, foreign intelligence and counter-intelligence. Specially exempted was information classified for national defense, information that would foul a criminal case, deprive a defendant of fair trial, constitute an unwarranted invasion of privacy, disclose the identity of a confidential source, disclose unusual procedures and techniques or endanger the life of an officer.

If all that failed there would be the courts to make the determination behind closed doors.

The American system of government can afford no isolated enclaves of non-responsiveness—certainly not after the revelations of the past two years that the FBI and CIA have been employed for extensive political services.

The conduct of criminal law enforcement and legitimate foreign intelligence would not be hampered by the amendments. It would make agencies like the FBI and CIA, not used to being held accountable, accountable, and that is their real objection.

[From the Des Moines (Iowa) Register, Oct. 22, 1974]

Endorsing Coverup

The Freedom of Information Act adopted by Congress in 1966 listed among the documents that could be kept from the public those "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy."

President Ford's veto last week of amendments to the Freedom of Information Act is an indefensible effort to preserve this massive loophole.

The U.S. Supreme Court ruled in 1973 that not even the courts could question the validity of the secrecy stamps placed on government documents.

The high court agreed that the purpose of the Freedom of Information Act is to provide greater public access to government information, but it said the legislative history prevented the courts from reviewing the classifications given to documents. The court made clear that Congress could change the law and authorize judicial review.

This Congress has now done, by overwhelming margins in both houses. 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.

In vetoing the measure, President Ford was critical chiefly of the court review provision. 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 rule on the validity of the arguments. The courts do this on a vast array of complex issues. Judges are no less capable of ruling on the validity of security classification decisions than on other decisions by government officials.

It is essential that government officials not be vested with unreviewable power to hide information. Justice Potter Stewart declared in the 1973 opinion that Congress:

". . . has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been. . . . Without 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."

Government officials notoriously overclassify documents and misuse secrecy stamps to hide their mistakes. "National security" has become almost a catch-all phrase to justify keeping Congress and the public in the dark about matters they have a right to know.

The Watergate scandal revealed how government officials used "national security" to justify illegal wiretaps and a host of other improper activities. It is distressing to find President Ford ignoring this recent history and invoking "national security" to defend the same old secrecy practices which enabled the White House "horrors" to occur.

He is the man who 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 it has had enough of cover-up by secrecy stamp.

[From the Kansas City Star, Oct. 21, 1974]

An Unfortunate Ford Veto on Information Freedom

President Ford's veto of a good bill to strengthen the Freedom of Information Act of 1966 is puzzling. We can only assume that he got some bad advice from the executive agencies for which most routine disclosures of business would be inconvenient or embarrassing or both.

The proposed amendments to the 1966 act were entirely in order, and language was changed in the conference committee a few days ago to take account of the President's reservations. Nevertheless the veto has fallen, and it has wiped out a lot of good work. If the veto stands or unless Congress can come back with a good bill that can survive, the people will continue to remain in the 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 political overseers and vested bureaucrats from hiding information from the public under the guise of "national security" or classifications with even less to recommend them. A 1973 Supreme Court decision had said in effect, that if a document is stamped "classified," a citizen can do little but accept the label. The document is exempt from the law.

That gets to the heart of the question. Proponents of a more open policy are not trying to pry top secret material from the Pentagon or the Department of State. If they were, they hardly would pursue such a public route to covert knowledge. They are trying, instead, to find examples of the bureaucratic waste and political excess that abound in both the military and civilian sectors of the great Washington scene. They are, in fact, trying to get at the very information that is conveniently stamped "classified" and hidden away from the public.

It is difficult to imagine that Mr. Ford really was cognizant of the bill or what was involved beyond bureaucratic discomfiture. The language in the message does not sound like his. There is talk of a "federal district judge" being able to "overturn a determination by the secretary of defense that disclosure of a document would endanger our national security." Of course, this is nonsense. The proposal would allow a judge to examine contested materials privately (*in camera*) to determine if they were properly *exempted* under any legal category. It ought to be assumed that our federal judges can be trusted not to betray the security of the country.

And if, indeed, any document is sheltered by the secretary of defense, it is hard to believe that a federal judge would not be reasonable. The act is not intended to put the secretary of defense in an untenable position regarding state secrets. It is intended to nail the petty (and sometimes not so petty) brass that may be trying to hide behind the authority of the secretary of defense.

But it is in the civil sector that the act could take on its greatest significance. The nation has just gone through a tumultuous era in which a President was overthrown because information was hidden and lied about. There was a concerted effort to pass off the Watergate break-in as an operation of the Central Intelligence Agency and thereby foist 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 malfeasance was 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 great brick wall of government reticence and concealment unless he is able to spend a fortune on lawyers.

President Ford has vetoed a good bill and has not given good reasons for his most disappointing action.

[From the Louisville (Ky.) Times, Oct. 24, 1974]

A Ford Veto That Congress Should Upset

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 convince them of the importance of overriding President Ford's veto of important amendments to the Freedom of Information Act.

The bill, which would strengthen the basic law passed in 1966, was passed by majorities of more than two thirds in both the House and the Senate. Members of both houses should stick to their guns when they act on the veto during the lame-duck session in November and December.

It was to combat the federal bureaucracy's inclination toward secrecy that Congress passed the original act. The purpose of the law 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 investigatory files.

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

The high cost of 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 problems. One of the more controversial amendments, and one to which the President objected in his veto message, 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 right to know with the need to keep certain national defense and diplomatic matters secret. Mr. Ford said that federal judges lack the expertise to make such decisions. But as Sen. Sam Ervin has pointed out, if a federal judge can't recognize a national secret after hearing arguments for and against the release of a document, then he has no business being a judge.

Other important provisions would require government officials to reply to a request for information within 10 days, provide for disciplinary action against federal employees who arbitrarily withhold information, and require the government to pay the legal fees of citizens who successfully challenge bureaucratic secrecy in court.

It is indeed unfortunate that a government established to work for the people should have to be forced to let the people know what it is doing. But the obstacles encountered by citizens who ask for information, particularly information that might cast the agency involved in a disadvantageous light, convinced Congress of the need for a freedom of information law. The proposed amendments should make the law work better and would give the citizen new tools for extracting the material he needs from an often unwilling bureaucracy. Congress would be derelict if it did not override Mr. Ford's totally unjustified veto.

[From the Detroit (Mich.) Free Press, Oct. 26, 1974]

Ford Lapses on Promise to Open Up Government

In light of the new era 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 to make it easier, not harder, for the public to know what its government was doing. The law, however, contained numerous loopholes which have allowed insensitive federal agencies to continue the aura of secrecy which for far too long has permeated government thinking.

The new amendments to the act were designed to eliminate some of the key loopholes, and were passed overwhelmingly by both houses of Congress.

The amendments would put a time limit of 10 working days on a federal agency to decide whether it would honor a request to make information public, and 20 working days to decide appeals when access to information 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. Another amendment called for judicial review of classified national security information, if its release is sought, before it could be withheld.

Within the government, opposition to the amendments has come mainly from officials connected with foreign policy and national defense policy. It was on their objections that President Ford apparently acted in announcing his veto.

The president said he would submit proposals of his own to Congress. We hope he will do so, and soon, for there are good reasons otherwise why Congress should try to override this veto. While it is true that newsmen and newswomen are among those who have been pressing for passage of the amendments, all of the public has a stake in them.

Over the last decade, we have seen the fruits of government secrecy—in the conduct of the war in Vietnam, the decisions that led to and increased American involvement there, in the secret decisions to bomb Cambodia, and in the aftermath of the Watergate scandals. What all of these events have shown is that government governs worst when it does not trust the people, and is unwilling to tell the people what it is doing. That is why the public should support efforts to strengthen the Freedom of Information Act, and why President Ford is wrong to veto such efforts.

[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 tiger. Bureaucrats sometimes react similarly when someone threatens to take away their precious "top secret" classification stamps. In their efforts to keep information from the people, they now have received a boost from President Ford.

Aware when he assumed office that people were sick and tired of secrecy, of being lied to, and of 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 invoked so many times 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." He also said it would give the courts power in an area they were unfamiliar with and complained that it would require too much bureaucratic work which would be required to go through those mountains of classified documents in complying with requests for information.

The intent of the amendments was to strengthen the bill, particularly by putting the burden not on the citizen seeking information but the bureaucrat withholding it. When the act passed in 1966, it was hailed as a breakthrough for citizens and newsmen anxious to know what their government was up to. But the act has not lived up to its billing, and part of the reason is that bureaucrats are able to frustrate requests for information through administrative hurdles and the courts.

The bill would have changed this by cutting the time limit for agency responses to requests for information, setting administrative penalties for arbitrary refusal and permitting recovery of legal fees by successful petitioners. The courts would have been allowed to review classified documents and classification procedures. And bureaucrats would have been criminally liable if the court found he "arbitrarily or capriciously" withheld desired information. In short, the act would have some teeth.

Attorney General William Saxbe also recently moved to put shrouds around government information. He in effect has reversed a 15-month old decision by his predecessor, Elliot Richardson, which gave authorized scholars access to investigatory files more than 15 years old. A scholar writing a book on the Algar Hiss case obtained FBI files that had numerous deletions, apparently made because of the scholar's request. Mr. Saxbe backed up the FBI on this, thereby violating the spirit if not the letter of Mr. Richardson's policy.

For weeks now, we have been hearing about the "lessons of Watergate," and we will undoubtedly hear more as moralists of every type look for Watergate lessons like shamans examining entrails for signs. But there is one lesson that must be obvious to all: Secrecy creates the environment for a Watergate, a Vietnam, a Bay of Pigs. The power of a bureaucrat or Administration official to cover his mistakes with a classification stamp is inherently anti-democratic. President Ford could not see that. Congress should override his veto of the Freedom of Information bill when it returns in November.

[From the Chicago Daily News, Oct. 24, 1974]

Pushing Secrecy Too Far

One of Congress' first actions when it reconvenes should be to override President Ford's veto of legislation amending the Freedom of Information Act. An override shouldn't be difficult in this case: The House passed the bill 349 to 2, and the Senate approved it by voice vote without a roll-call.

The amendments were designed to make the Freedom of Information Act work. The reason it hasn't worked properly is that government departments and agencies have never allowed it to work. Since its passage in 1966, over bureaucratic opposition, the welders of the "classified" stamps have blocked access to public records at every turn. Congress worked long and hard to devise amendments that would overcome these barriers, only to encounter the Ford veto.

There are some government documents and records, obviously, that ought to be held close to the vest. When it comes to foreign policy and national security in particular, a certain amount of secrecy over a period of time is doubtless in the best interests of the nation. But the law allows for such exceptions. It also recognizes that trade secrets filed with the government deserve protection, and such things as individual personnel files and medical records ought not to be laid out for everyone to see.

Many kinds of records that should be public property, however, are being hidden without cause or reason, and it was this super-secrecy that the bill sought to overcome. It is disappointing to find President Ford, who has pledged a candid and open Administration, going along with the crowd that prefers to squirrel away the government records where no one can see them.

His principal objection, apparently, was to a provision that would allow courts to determine whether a "secret" or "top secret" classification was justified. The courts already have this power when the documents pertain to criminal trials, however, and the Supreme Court held last year that Congress could broaden that authority to cover other cases if it chose to do so.

The fact that Congress did so choose, and that President Ford chose to use a veto on a bill passed so overwhelmingly, creates a needless confrontation at a time when the legislative and executive branches should be striving to work in harmony. But since the President has posed the challenge, it is up to Congress to reply. Its response should be another overwhelming vote to pierce the veil of secrecy. The events of the past provide ample reason for doing so.

[From the Washington Post, Nov. 20, 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. Those amendments, intended to make it easier for citizens and the press to learn what is going on within government, could have played an important role in bringing about that promised openness. Congress was willing; the amendments passed both houses by substantial margins. But Mr. Ford chose instead to accept the counsel of the bureaucracy that these changes in the law somehow menaced the operation of government.

The section that caused the President to bring down the weight of his veto power provides that documents that are stamped "secret" must be proved to contain valid secrets if a citizen or a reporter seeks to inspect them. An orderly mechanism was provided for seeing this purpose through. The legislation required that, when a dispute arose over such a document, a federal district court judge would inspect the document in private and determine whether it was in the public interest for the document to be released.

There were other provisions of the act, all of them of paramount importance in the effort to make the government more accountable to those it seeks to serve. The new legislation would have reduced the number of days within which an agency would be required to say whether it intended to provide the public with a previously withheld document. The FBI and other investigative agencies would no longer have been able to withhold material unless they could justify doing so on the grounds that a current investigation or a defendant's rights would be compromised. And, perhaps most important of all from the bureaucrat's vantage-point, if an official withheld a document and the court decided the document should not have been withheld, the official might be required by the Civil Service Commission to give an account of his actions.

All of these provisions were in the spirit of the kind of relationship between government and the public that Mr. Ford assured the Congress he wanted when he made his first appearance before a joint session only days after taking office. Now he has vetoed a piece of legislation that sought to overhaul a well-intentioned law that has languished ineffectively for nearly a decade. In so doing, the President has put it up to both houses of Congress to muster the votes to make the Freedom of Information Act a more effective servant of the public's right to know.

[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.

Congress approved a number of amendments to the Freedom of Information Act which would have made it much easier for the citizens and representatives of the media to find out what the government is doing, both good and bad.

The Freedom of Information Act, although it embodies a sound idea, is too cumbersome to be effective. There are major gaps in the law through which agencies are able to justify unnecessary delays, to place unreasonable obstacles in the way of public access and to withhold information which should be released to the public.

For example, the Tennessee Valley Authority came up with an innovative wrinkle under the act. It charged a citizen $6.75 an hour for every hour a clerk had to spend checking the files for data the citizen requested.

The TVA levied the $6.75-an-hour charge against reporter James Branscome of the Mountain Eagle, a weekly in Letcher County, Ky., a paper which could ill afford to pay the tariff for information about the TVA operation.

In 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 sensible way of keeping track of what the government agency is doing.

A government agency then would have 30 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 could be held to answer for their actions before the U.S. Civil Service Commission.

Confidential sources and investigative information involving current prosecutions would be protected, but 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 Congress will override the veto in the name of the people's freedom to know more about their government.

Mr. Kennedy. Mr. President, I yield 5 minutes to the Senator from Maine.

Mr. Muskie. Mr. President, first, I express my appreciation to the distinguished Senator from Massachusetts for taking the leadership with respect to this issue and this piece of legislation. I wish to express the satisfaction I have had in working with him in advancing this measure and now defending it and urging the override of the President's veto.

Mr. President, the vote before us this afternoon is, in my opinion, one of the most important we will consider during this postelection session.

Throughout the campaign period this fall flowed an increasingly visible undercurrent of voter frustration with government and politics as usual. Among many signals transmitted by the voting public on November 5 was that government has become too big, too unresponsive, and too closed to the people it is supposed to serve.

Candidates across the Nation were confronted with demands for openness and candor to a degree unparalleled in recent years. To many observers, these demands reflect the voters' cynical belief that most of the public's business is conducted far from the public's eye.

If this 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 scrutiny. The legislation before us now—the

amendments to the Freedom of Information Act of 1966—is intended to do just that.

During joint hearings on the Freedom of Information Act held last year by Senators Ervin and Kennedy and myself, it became evident that loopholes in the original 1966 act 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 both the patience and endurance of the citizen making the request.

And, as demonstrated in the case of Environmental Protection Agency against Patsy Mink, 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 requests for information. And most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classification by an impartial outside party.

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 Information in the House. And they were sent to the President with the overwhelming support of both Houses of Congress.

Unfortunately, the same President who began 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, I offered a change which would authorize the courts to conduct in camera a review of documents classified by the Government to determine if the public interest 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 national security reasons were deliberately used to block investigations 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 does object to is the standard to be used in reviewing such documents. And on this point his proposals would deal another setback to the public's right to know.

The legislation passed by Congress would call for a determination by the judge reviewing the documents in question that the documents were properly classified, in accordance with rules and guidelines for classification set out by the executive branch itself.

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

The President's counterproposal 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 that the stamp of secrecy is challengable only in the most blatant cases of misuse.

The conflict on this particular point boils down to one basic concern—trust in the judicial system to handle highly sensitive material. The administration seems to feel that only the agency dealing with specific information is capable of passing judgment on the legitimacy of classification, except in cases where that judgment has been found to be grossly inappropriate.

The bill passed by Congress recognizes that special weight should be given agency judgments where highly sensitive material is concerned.

But that bill also expresses confidence in the Federal judiciary to decide whether the greater public interest rests with public disclosure or continued protection.

I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy.

As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we construct the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

A final point that needs to be made about the President's opposition to this legislation concerns his claim that the bill is unconstitutional.

On Tuesday I placed in the Record an opinion I solicited from Prof. Philip Kurland on this question. I would like to quote from Professor Kurland's letter again, because he has so succinctly and finally laid the President's claim to rest.

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. . . . I do not see how it is possible to say that the Presidential position is constitutional, but the congressional position unconstitutional.

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.

The PRESIDING OFFICER (Mr. Biden). Who yields time?

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

The 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 that the position of the 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. Language was incorporated in the conference report to insure against that possibility. Now the objection with respect to the investigative files is that there is an administrative burden too great to be imposed.

Mr. President, I suggest that the burden is substantially less than we would be led to believe by the President's message, but I conclude on the point, Mr. President, that the price of some administrative inconvenience is not too much to pay to increase public confidence in and 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 a fresh wind was 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 made by the conferees from the House and Senate in the conference.

One of the reasons given by the President for his veto is that the investigatory 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 investigatory 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) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life of physical safety of law enforcement per 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 supplied by a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informer's identity; all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt. In fact, this protection was introduced by the conferees in response to the specific request of the President in a letter to Senator Kennedy during the conference. All of the conferees endorsed the Hart amendment as modified.

Now the administration has shifted its ground and argues that compliance with the amendment will be too burdensome. Specifically the President's message singles out investigatory 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 Presidential 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 safeguards above. It is precisely this opportunity to exempt whole files which gives an agency incentive to commingle various information into one enormous investigatory file and then claim it is too difficult to sift through and effectively classify all of that information.

This "contamination 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.

It is important 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 restrictions which often seem arbitrary and unnecessary and heavy costs of time and money have been imposed on the persons requesting access. One example will suffice:

Prof. Sander Gilman, chairman of the Department of German Literature at Cornell University, is preparing a biography of the German playwright and peot, 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 Brecht's heirs granting their approval" 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 Brecht 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. Included within the 30 pages—3 percent of the entire file, for which Gilman paid $40, were 8–10 magazine and newspaper clippings on Brecht's well-publicized travels in the United States.

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 "[t]he FOIA was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest," *Wellford* v. *Hardin*, 444 F. 2d 21, 24 (1971) disclosure of severable portions of investigatory documents does not appear to create an unreasonable 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 find plenty of scope in these excuses for nondisclosure to keep them from being overburdened by public requests for access to their files;

Third. The fact that 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 ambiguous and doubtlessly will be subject to litigation. If the requests prove unnecessarily burdensome, I suspect that the agencies will find a sympathetic ear in the courts when the time comes for interpreting those sections.

If the agencies can show after 6 months or so that the cost threshold is inadequate and that the benefits from disclosure are outweighted by their cost, I would support supplemental appropriations for the additional staff and if necessary an amendment to the act to permit the agency more discretion in assessing fees for extraordinary requests.

Finally, we must keep our sense of proportion in considering the President's objections to the Freedom of Information Act amendments. No one suggests that our citizens' right to know about their Government can be protected without some cost. It is my conviction that, in the aftermath of Watergate and the recent disclosures about the FBI's counter-intelligence activities, the price of some administrative inconvenience is not too much to pay to increase public confidence in—and the accountability of—Government.

This conviction has been bolstered by recent disclosures that the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. As the Washington Post noted,

> The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS.

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 released a report on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act.

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

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. Mr. President. I yield myself 4 minutes.

Mr. President, I supported the freedom of information bill as it was reported out of the Senate Judiciary Committee. It 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 just what is and what is not the issue here. The issue is not whether a judge should be authorized to review classified documents in camera. As reported by

a unanimous Judiciary Committee, the bill contained a provision which enabled the courts to inspect classified documents and review the justification for their classification. And the President, in his veto message, stated that he was prepared to accept such a provision.

No, the issue is not whether a court should be able to question an agency's decision to affix a classification stamp to a document. Instead, the issue is whether this judicial scrutiny should be unchecked. It is one thing to empower a court to review a document to determine whether the executive's decision to classify was arbitrary or clearly unreasonable. It is patently different to authorize a court to determine in the first instance whether a document should be classified or released to the public. The courts have the facilities and expertise to review executive determinations but they do not have the facilities or expertise to make executive determinations. That is the sole province of the executive branch.

The vetoed bill does not check judicial authority. There are no standards, such as guarding against the arbitrary and capricious, or requiring a reasonable basis, to guide the judge's decision. The judge can disclose a document even where he finds the classification to be reasonable if he also finds that the plaintiff's case for disclosure is equally reasonable. This is not the general rule in cases of court review of any regulatory body or executive agency.

It is clear that the President has a "constitutionally based" power to withhold information the disclosure of which could impair the President's conduct of our foreign relations or maintenance of our national defense. As Justice Stewart observed in *New York Times* v. *United States*, 403 U.S. 713, 729–30 (1971):

> It is clear to me that it is the constitutional duty of the Executive—as 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, (1948), the Supreme Court stated that the:

> President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.

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, 94 S.Ct. 3090, 3108 (1974), the Supreme Court expressly recognized that the President has a "constitutionally based" power to withhold information the disclosure of which could impair the effective discharge of a President's responsibility. As the Court stated:

> As to these areas of Art. II duties (military or diplomatic secrets) the courts have traditionally shown the utmost defence to presidential responsibilities . . . Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

Another recent court decision, *United States* v. *Marchetti*, 466 F.2d 1309 (4 Cir., 1972) is particularly noteworthy. The Court summarized the law in this area as follows:

> Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the *President's constitutional responsibilities for the security of the Nation* as the Chief Executive and as Commander in Chief of our Armed forces. Const., art. II, § 2. Citizens have the right to criticize 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.) 466 F. 2d at 1315.

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 insure that information the disclosure of which would jeopardize the maintenance of our national or the conduct of our foreign relations is not disclosed to all the world.

From these two points, it should also be clear that an attempt to empower a judge to determine, on his own, whether this same type of information should be disclosed to the public infringes on the constitutional power of the President to maintain our national defense and conduct our foreign relations. To authorize a court to make its own decision whether a document should be classified is 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 "Developments Under the Freedom of Information Act—1973," states that the amendment of the Senator from Maine [Senator Muskie] unduly 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 impowered 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. *A more satisfactory legislative solution would be a judicial procedure which would not unduly restrict the Executive's prerogative to determine what should remain secret in the national interest but which would simultaneously provide a limited judicial check on arbitrary and capricious executive determinations.* An acceptable compromise of these competing interests might be a procedure whereby the agency asserting the privilege would separately classify each document and portions thereof and prepare a detailed itemization and index of this classification scheme for the court. *Thus, the court could adequately ascertain whether the claim of privilege was based upon a reasoned determination rather than an arbitrary classification without subjecting the material to in camera scrutiny. Such a procedure would prevent indiscriminate and arbitrary classification yet not unduly infringe upon the privilege of the Executive to protect national secrets.* (Emphasis supplied.) 74 Duke L.J. 258–259.

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

> *To advocate some form of judicial scrutiny is not to say that power should be unchecked. 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 disclosure non-classified information solely because of its physical nexus with a classified document. To assign to the judiciary the function of

winnowing the state secret from the spuriously classified document does violence neither to the language of the Act as an integrated statute, nor to the declaration of policy implicit in the first exemption. Even conceding that excising interspersed but non-secret from secret matter necessarily implies the exercise of some substantive judgment, this does not amount to a de facto power of declassification. *Only materials that would not have been independently classified as secret should be deleted and disclosed on the court's initiative. In close cases, the court, cognizant of the "delicate character of the responsibility of the President in the conduct of foreign affairs," should defer to the executive determination of secrecy.* (Emphasis supplied.) 74 Col. L. Rev. 935.

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

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

And concludes that—

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

Mr. President, every practitioner in administrative law knows that judicial review of agency decisions is not unlimited. The courts review agency decisions to determine whether they are reasonably based or whether they are arbitrary or capricious. This enrolled bill would establish a different type of review, however. It would empower a court to substitute 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 documents.

By conferring on the courts unchecked powers to declassify documents, the enrolled bill is not only unwise but apparently also unconstitutional.

II. LAW ENFORCEMENT INVESTIGATORY INFORMATION

The second issue relates to the criminal and civil files of law enforcement agencies. The confidentiality of countless law enforcement files containing information of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law enforcement but the individual's right to privacy assurance of personal security, and to be secure in the knowledge that information he furnishes to a law enforcement agency will not be disclosed to anyone who requests it.

The enrolled bill requires the FBI and other law enforcement agencies to respond to any person's request for investigative information by sifting through pages and pages of files within strict limits. If the agency believes that information must be withheld from the public, it must prove to a court line-by-line that disclosure would disclose the identity of a source or confidential information furnished by him, would impair the investigation or would constitute an invasion of personal privacy.

Mr. President, it is extremely difficult if not impossible to prove that information, if disclosed, would invade a person's privacy or would impair the investigation. The magnitude of such a task and the standards of harm that are defined in the amendment create serious doubt as to whether such a provision is workable aside from its

questionable wisdom. Where the rights of privacy and personal security are at stake, measures should not be adopted that even tend indirectly to undermine these fundamental rights.

Mr. President, the issue here does not involve a denial or rejection of "freedom of information." This concept has the active 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 outset, I believe that amendments to the Freedom of Information Act are necessary. Freedom of information is basic to the democratic process. It is elementary that the right of the citizen to be informed about the actions of his Government must remain viable if a government of the people is to exist in practice as well as theory.

Yet, it is also elementary that the welfare of our Nation and that of its citizens may require that same information in the possession of the Government be held in the strictest confidence. The right to know must be balanced against the right of the individual to privacy. Likewise the right to know must be balanced against the interest of our Nation to conduct successful foreign relations and to maintain our military secrets in confidence.

I cannot support the enrolled bill because it emphasizes the right to know to the detriment of the right of privacy and security and the interests of us all in a responsive government. These interests must be accommodated. One cannot be elevated above the others because all of these interests are so important.

The enrolled bill does not balance and protect all of these interests. Therefore, I urge my colleagues to vote 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 interests while insuring the fullest responsible disclosure of Government records. Such a bill is S. 4172, introduced by the Senator from Pennsylvania (Mr. Scott) and now pending.

Its provisions will improve the present statute on making Government held information available, without violating the Constitution, and yet in a fashion that will not result in interrupting orderly and effective conduct of the Nation's business. It will protect the privacy and personal security of those who cooperate with the State and Justice Departments by furnishing necessary, vitally needed information. It will enable law enforcement to proceed without impairment in that it will instill in informants the necessary confidence that they will not be endangered by disclosure. S. 4172 should be enacted.

The veto should be sustained.

The PRESIDING OFFICER. Who yields time?

Mr. HRUSKA. I yield 4 minutes to the Senator from Ohio.

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

Mr. President, I intend to vote to sustain the veto of the President. In casting this vote, I want to make it clear that I am not less committed to the right of the public to know the actions of their Govern-

ment than any other advocate of democratic government. In this regard, I voted for final passage of the bill during Senate floor consideration although I urged my colleagues to approve it without amendment in accordance with the Judiciary Committee's recommendations.

Freedom of information is the hallmark of a democratic society. It is elementary that the people cannot govern themselves—that this cannot be a Government of the people—if 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 investigations must be protected from disclosure. Information bearing on our Nation's endeavors to pursue peace through negotiations with foreign nations must also be held in confidence if the discussions are to be frank and complete. And, of course, our military secrets must be safeguarded.

In this respect, the President objects to, and I voted against, the floor amendment offered by Senator Muskie on May 30, 1974, which granted a court the authority to disclose a classified document even where there is a reasonable basis for the classification. Most courts are not knowledgeable in sensitive foreign policy and national defense considerations that must be weighed in determining whether material deserves, or indeed, requires classification.

I am sure those of us in the Senate who take a part in the naming and selection of those who are to serve in judicial capacities in the courts around the country do not select those men for their knowledge of military matters and national security, or even foreign affairs. We choose them for their legal expertise to judge, in accordance with standards established by law, as to just what the application of the law ought to be to situations; but not to give judgment themselves, to make the decisions, in areas properly reserved by the Constitution to the other branches of the Government.

Notwithstanding this fact, the bill, as passed, calls for a de novo weighing of all these factors by the court which creates confusion and vagueness and, in my view, will not serve the interests of clear legislation or assist in the process of making available sensitive classified materal.

I preferred the Judiciary Committee's approach to this problem which compelled a court to determine if there is a reasonable basis for the agency classification. If there is a reasonable basis, then the document would not be disclosed. Certainly the standard "reasonable basis" is not vague, it having been applied in our judicial system for centuries. This standard and procedure correctly accord foreign policy and national defense considerations special recognition and provides the executive branch with sufficient flexibility in dealing with these sensitive matters.

Mr. President, we must recognize the competing interests in disclosure and confidentiality. While a judge should be able to review classified documents to determine whether there is a reasonable basis for the classification, he should not be empowered to second-guess

foreign policy and national defense experts. While a law enforcement agency should not be authorized to hide all types of information, it should be given the tools to protect information the disclosure of which could likely invade a person's privacy, or impair the investigation.

I believe that the competing interests in disclosure and confidentiality are accommodated only if the enrolled bill is amended with the changes proposed by the President.

The Senate and the House of Representatives should have no trouble in doing that. It is, therefore, my hope that the veto of the enrolled bill is sustained so that we can reenact this legislation with necessary amendments.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Massachusetts controls 13 minutes.

Mr. KENNEDY. I yield myself 3 minutes.

I ask unanimous consent that Dorothy Parker of Senator Fong's staff be accorded the privilege of the floor during the consideration of this matter.

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

Mr. KENNEDY. Mr. President, the Senator from Michigan has correctly stated the situation which occurred with respect to his amendment to this legislation which was adopted on the floor. His amendment initially protected against the disclosure of the identity of an informer. We decided in conference, however, as a result of a specific request from the President, to change that to protect confidential sources, which broadened it and provided a wider degree of protection.

Then we also provided that there be no requirement to reveal not only the identity of a confidential source, but also any information obtained from him in a criminal investigation. The only source information that would be available would be that compiled in civil investigations. The arguments made about this particular issue today sounded like arguments directed more toward the initial amendment of the distinguished Senator from Michigan rather than actually to the resulting language that emerged from the conference.

I might add parenthetically, Mr. President, that this was actually language suggested by the distinguished Senator from Nebraska in behalf of the administration. So it really could not be all that bad.

On the second question, Mr. President, which the Senator from Ohio mentioned, and which has been discussed here with respect to the examination in camera of certain information, the Senator from Maine, I think, has provided a rather complete response in his statement which makes the record complete. But it is important to note that today judges are examining extremely sensitive information and carrying out that judicial review responsibility very well. We can think of recent cases—the *Pentagon Papers* case, the *Ellsberg* case, the *Watergate* case, the *Keith* case where the key issue involved national security wiretaps, the *Knopf* case involving CIA material in a book written by a former CIA official—where courts have met these responsibilities, and have been extremely sensitive to the whole question of national defense and national security.

I mention at this point here what the Supreme Court said in the *Keith* case. The Court said:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

This is important:

> If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Mr. President, on both of these matters I want the record to be extremely clear that, in our Administrative Practice Subcommittee, the full Judiciary Committee, and on the Senate floor, they were considered in great detail. They were the principal matters discussed in the course of the conference.

We have been extremely sensitive to these objections raised by the administration and, it seems to me, the bill we are considering is a reasonable accommodation of the views of the administration. However, it also carries forward the central thrust of the legislation passed by the Senate. I would hope those arguments which have been made in opposition to those provisions would be rejected.

If I may, I would like to yield 3 minutes to the Senator from Tennessee and then to the Senator from North Carolina.

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

Mr. President, events of the past 3 years have dealt harshly with the concept of "secrecy" in Government. We have witnessed two national tragedies—Watergate and the Vietnam war—which might not have occurred, and surely would have suffered an earlier demise had not the President and his advisers 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 my support for H.R. 12471, the Freedom 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 proposal that judicial review of classified documents should uphold the classification if there is a reasonable basis to support it.

During my tenure as a member of the Senate Select Committee on Presidential Campaign Activities, I reviewed literally hundreds of Watergate-related documents that had been classified "secret" or "top secret" or the like. It is my opinion that at least 95 percent of these documents should not have been classified in the first place and that the Nation's security and foreign policy would not be damaged in any way by public disclosure of these documents. Yet, despite several formal requests by the Senate Watergate Committee, the Central Intelligence Agency, in particular, has declassified these documents and evinces no intent of so doing.

In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating; and I believe that this

trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recommended by the President. De novo judicial determination based on in camera inspection of classified documents—as provided by the Freedom of Information Act amendments passed by the Congress—insures confidentiality for genuine military, intelligence, and foreign policy information 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 information against the potential for mischief and criminal activity 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. ERVIN. Mr. President, the executive agencies of the U.S. Government remind me of a young lawyer in Charlotte, N.C. Years ago he brought suit for damages against Western Union Telegraph Co. Mr. C. W. Tillotson, a very eminent lawyer, represented the 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 suggested to him that he go ahead 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:

> If Mr. Tillotson is going to want me to tell him what this lawsuit is all about he is just a damn fool.

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

For some reason that begs understanding, 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 observe 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 in his veto message was considered at length by the Senate committee during the original hearings on the bill. They were considered minutely and carefully by the conference committee. Every one of those 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 alteration of the bill.

I ask unanimous consent that a copy of the letter written on October 31, 1974, by the distinguished Senator from Maryland (Mr. Mathias), the distinguished Senator from New Jersey (Mr. Case), the distinguished Senator from New York (Mr. Javits), the distinguished Senator from Tennessee (Mr. Baker), the distinguished Senator from Massachusetts (Mr. Kennedy), the distinguished Senator from Maine (Mr. Muskie), 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 COLLEAGUE: We are enlisting your support to override President Ford's veto of the Freedom of Information Act Amendments (H.R. 12471) when the Congress returns from the current recess. We believe that this veto is unjustified and urge that the legislation be enacted as previously approved by Congress.

The 1966 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 responding to requests for government information. The Freedom of Information Act Amendments will facilitate public access to information, while preserving confidentiality where appropriate.

The President has proposed 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 court review of executive classification decisions. 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 secrecy stamp should be that determinative.

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 due process and the tradition of checks and balances. We are confident that the legislation poses no threat to this nation's security interests.

The President has also decried the possibility of an administrative burden placed on law enforcement and other agencies by the new amendments, although we are pleased to note that he did *not* object to the opening of some new investigatory materials to the public. We believe, however, that the additional delays, charges, and exclusions requested by the President do more than alleviate administrative burden—they would effectively bar access to some records by the press, the nonaffluent, and the scholar.

Freedom of Information is too precious a right to be sacrificed to false economy. Like due process, it may carry some cost; but that is a cost to be borne by all Americans who would keep our government open and accountable and responsible.

Government agencies universally opposed 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, with our heavy workload for the remainder of this session and continuing agency hostility to any strengthening of the Information Act, failure to override the President's veto next month will result in postponement of any improvements to the Act for a substantial period of time.

We have too recently seen the insidious effects of government secrecy run rampant. Enactment of H.R. 12471 can do much to open the public's business to public scrutiny, while providing appropriate safeguards for materials that should remain secret. We therefore urge you to join us when Congress returns in voting to enact the Freedom of Information Act Amendments over the President's veto.

Sincerely,

CHARLES MCC. MATHIAS, JR., CLIFFORD P. CASE, JACOB K. JAVITS, HOWARD H. BAKER, JR., EDWARD M. KENNEDY, EDMUND S. MUSKIE, PHILIP A. HART, SAM J. ERVIN, JR.

Mr. ERVIN. Mr. President, I ask unanimous consent that an editorial from the Washington Post dated November 20, 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 FILES: 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 and purpose but poor in practical terms. The Freedom of Information Act had been enacted in 1966 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 proved very difficult.

This year, after long hearings, much haggling between House and Senate and two resounding votes, a series of amendments was ready for presidential signature. They 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 keep information secret that should 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, sadly, Mr. Ford yielded to the arguments of the bureaucracy and vetoed the legislation.

Since then, a number of journalists' and citizens' groups have criticized that action by the President and urged Congress to override the veto. Today in the House and tomorrow in the Senate, those votes are scheduled to take place. We would urge a strong vote in support of the legislation, particularly in light of two recent disclosures made possible by the Freedom of Information Act.

Recently, a Ralph Nader-supported group on tax reform turned up the fact the Nixon White House instigated Internal Revenue Service investigations of social action groups on the left and in the black community. The absurdity of the exercise is illustrated by the fact that the Urban League was among the targets, lumped in as "radical" along with several social organizations that hardly merit either the label or the attention they were given by IRS. As we have had occasion to say in the past, the tax laws were not intended to be used for political harassment. The interesting point about these latest disclosures is that they were made possible by the utilization of the Freedom of Information Act.

In the same vein, the Justice Department released a report earlier this week on the operations of the counter intelligence operations of the FBI. Much of this information about the use of dirty tricks against the far left and the far right had been revealed earlier this year, again because of action taken under the Freedom of Information Act. Attorney General William Saxbe felt compelled, on the basis of what the Justice Department had been forced to release about the program, to order a study of what the FBI had done. Mr. Saxbe found aspects of the program abhorrent. But FBI director Clarence M. Kelley actually defended the practices of his predecessor, J. Edgar Hoover. This is a good example of how important it is that this country have a strong Freedom of Information law that will make it possible for the public to learn of such activities—and such attitudes on the part of officials in sensitive and powerful jobs—and to learn of them as quickly as possible.

The Freedom of Information Act is not a law to make the task of journalists easier or the profits of news organizations greater. It is, in other words, not special interest legislation in the sense that the term is ordinarily used. It is special interest legislation in that it is intended to assist the very special interest of the American people in being better informed about the processes and practices of

their government. This is a point President Ford's advisers missed badly at the time of the veto. One of them is alleged to have said that if the President vetoed the bill, "who gives a damn besides The Washington Post and the New York Times?" The truth of the matter is that this legislation goes to the heart of what a free society is about. When agencies of government such as the FBI and IRS can engage in the kind of activity just revealed, it is serious business. That's why we should all give a damn—especially those who are to cast their votes today and tomorrow.

SPEECH BY SENATOR ERVIN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The PRESIDING OFFICER, Who yields time?

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

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

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

Mr. ERVIN. I should think so.

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

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

Mr. HRUSKA. I did not hear the Senator.

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

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

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

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

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

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

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

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

The PRESIDING OFFICER. The Senator's 3 minutes have expired.

Mr. HRUSKA. 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.

However, the issue is not whether a judge should be authorized to review in camera classified documents relating to the national defense and foreign relations. Instead, the issue is whether a standard should be established to guide the judge in making a decision as to whether a document is properly classified. In its present form, there are no guidelines for a judge to determine if a document is classified in a proper manner.

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 reveal a classified document 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 the release 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 for the Government to establish in every instance that harm would result from a release of information.

Instead, the President suggested that investigatory records of the Federal Bureau of Investigation and other law enforcement agencies should be exempt from the act if there is a "substantial possibility" of harm to any public or private interest.

This is an area in which the rights of privacy and personal security are hanging in the balance, and no measures should be enacted to erode these basic and fundamental rights.

Due to these objections which have been raised, I agree with the President's decision to veto this bill, and I call upon my colleagues in the Senate to vote to sustain this veto.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield 4 minutes to the Senator from California.

Mr. CRANSTON. Mr. President, I thank the Senator for yielding and for the great work in committee that has led to this very important legislation which is before us.

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 amendments in the vetoed bill, our courts, not our bureaucrats, will have the final say as to what information can legitimately 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 should be kept secret or not.

I maintain that a judge is at least as competent as some Pfc or some low echelon civilian bureaucrat who classified the document in the first place.

Presently, and this is incredible, presently in tens of thousands of cases, there is often no review by anyone higher of a classification made by a Pfc or a very low echelon bureaucrat, and these classifications remain in effect for a minimum of 10 years.

I also maintain that the Pfc and that bureaucrat will do a better job, and a more honest and thoughtful job, of classifying documents in the future if they know their decision may be reviewed by an independent judiciary.

Second. Some people object to giving so much discretion to a single judge.

There is little reasonable ground for fear.

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

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

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

I say that reasonable speed is of the essence where public information is concerned. Speed of disclosure is the enemy of the coverup. Delay is its ally.

Concern over too much speed is hardly a compelling matter when you consider that under present procedures, for example, it took 13 months—yes, 13 months—before the Tax Reform Research Group was able to get released to the public earlier this week 41 documents showing how the Internal Revenue Service's special services staff investigated dissident groups.

Fourth. Finally, some people fear that increased emphasis on freedom of information, on the people's right to know, may harm the national interest in some instances.

I, myself, believe the national interest demands more emphasis on openness 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 its government what that government is doing. And why.

Of course, we must have proper safeguards to protect our legitimate secrets. Our amendments provide such safeguards.

But we have too many governmental secrets; too many governmental decisions are being made behind closed doors by people with closed minds.

Our amendments provide a sensible, workable solution to the problem 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 courts have served us well. I have 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. There is one other possibility. I would be willing to call for a brief quorum call on equal time, if that is agreeable with the Senator from Massachusetts.

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

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

The PRESIDING OFFICER. 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 16, 1974, 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 information was specifically exempted 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.

The bill in the form now presented to the Senate has been significantly changed by the conference on these critical issues. The language of section 552(b)(7) has been changed from protecting from disclosure the identity of an "informer" to protecting the identity of a "confidential source" to assure that the identity of a person other than a paid informer may be protected. The language has also been broadened substantially to protect from disclosure all of the information furnished by a confidential source to a criminal law enforcement agency if the information was compiled in the course of a criminal investigation. Thus, not only is the identity of a confidential source protected but also protected from disclosure is all the information furnished by that source to a law enforcement agency in the course of a criminal investigation.

There are two other substantive changes in the bill now before the Senate as compared with the bill originally passed by the Senate. First, the bill now provides an exemption from disclosure of investigative records which would "endanger the life or physical safety of law enforcement personnel." The bill as originally passed by the Senate contained no such exemption.

Second, the original bill included an exemption from disclosure for investigatory records which constituted a "clearly unwarranted invasion of personal privacy." The bill as it is now before the Senate strikes the word "clearly" and exempts from disclosure investigatory records which constitute an "unwarranted invasion of personal privacy." Thus, the agency could withhold investigatory records which would constitute an unwarranted invasion or privacy rather than be forced to show that the material was a "clearly" unwarranted invasion of privacy.

The conference changes from the language of the original bill satisfy my objections to the bill, 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. BAYH. 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 fundamental principles lies in 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 this rather broad language was not sufficient. Therefore in 1966, after more than a decade of hearings, investigations, and studies, we enacted much more comprehensive legislation which we termed the "Freedom of Information Act." But the bureaucracy was not to be so easily unveiled. There were many loopholes which legions 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 1966 act for "Law Enforcement Activities." This exemption came to be interpreted as including such things as meat inspection reports, reports concerning safety in factories, correspondence between the National Highway Traffic Safety Administration and the automobile manufacturers concerning safety defects, and reports on safety and medical care in nursing homes receiving federal funds.

That is not to say, Mr. President, that the 1966 act did not accomplish some significant breakthroughs. Recently, for example a Freedom of Information Act suit uncovered the fact that the Nixon White House had instigated Internal Revenue Service investigations of social action groups on the left and 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 counterintelligence operations of the FBI. The initial aspects of this police state-type of operation were revealed by a Freedom of Information Act lawsuit. But the loopholes remain.

Congress then responded this year with a bill to provide for some 17 amendments to the 1966 law. Lengthy and full hearings were held in both Houses. All of the competing interests were heard. Once the legislation reached the Senate-House conference committee, of which I was a member, significant concessions were made to the administration's objections. Yet almost inexplicably President Ford heeded the advice of the self-interested bureaucracy, who had likewise opposed the first legislation in 1966, and he vetoed the bill. In doing so, he dealt another crushing blow to his self-professed image of openness and candor in Government.

Let me examine, briefly, the stated reasons for the President's veto. They are basically two. First, that the bill would have unconstitutionally compromised our military or intelligence secrets and diplomatic relations by allowing a U.S. district court to review classified documents. Second, that the bill would have placed unrealistic burdens on agencies by requiring them to respond within a finite period of time to requests for information. To me it is abundantly clear, after carefully examining all of the arguments, that these concerns are completely misplaced and without merit.

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 section has been interpreted by the Supreme Court to mean that Congress granted to the Executive sole discretion to classify documents—*Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973). 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 constitutional barriers to full court review, and that Congress had the power to change the law if it saw fit to do so. The proposed amendments before us today provide for full court review of classification decisions made pursuant to Executive order. The executive branch still would have the power to make the rules and decision 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 claimed to fall within the other exemptions. He wants a court to ignore whether or not the classification decision was right or wrong and only determine whether the agency official acted reasonably or unreasonably. Under this approach a situation could arise where a judge determines that a document is not properly classified and should be public, but that the Secretary of State acted reasonably in classifying the document and therefore it remains secret. In other words, for a document to be released a judge must find that the Secretary of State acted unreasonably. There is no constitutional basis to support this result, and it is contrary to the spirit of the Freedom of Information Act.

Second, President Ford objects to the finite time limits provided for by the bill and seeks to have them relaxed, especially as they apply to law enforcement agencies. The time limits would allow 10 working days, 2 weeks, for an initial response and 20 working days, 4 weeks, to respond to administrative appeals. In addition an agency can extend the time for up to 10 working days, 2 weeks. This adds up to 2 months time in which an agency has to respond to a request for information. The President calls this "simply unrealistic." Two months is more than adequate. To allow more time would be to allow agencies to continue their current practice of using delay to discourage requests for information. Moreover, the bill permits a court in exceptional circumstances to delay its review of a case until an agency has had sufficient time to review its records. In other words, after the 2 months of administrative deadlines have lapsed and after a complaint has been filed with the court, the court still has the discretion to grant the agency more time if exceptional circumstances warrant. These provisions more than adequately satisfy the President's concern for flexibility.

In short, Mr. President, a close examination of the administration's objections to this bill reveal their insubstantiality. If we have learned anything from the political events of the past 2 years, it should be that openness and accountability in Government are crucial to the preservation of our democracy. Yesterday the other body acted overwhelmingly to reassert this principle by overriding this ill-advised veto. I urge my colleagues to do likewise.

Mr. METCALF. Mr. President, the leaders of the free and responsible press have joined the drive to make the freedom of information law a more workable tool to dig out Government information, not because it means money in their pockets but because they truly believe in the ideals of a democratic society. They know that democracy can survive 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 radios. The public would rather not listen to or read about the bad news which most Government stories report.

Those 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 amendments which would make the freedom of information law a more effective tool. The representatives of the business side of the news industry—the American Newspaper Publishers Association—do not want us to override President Ford's veto of the freedom of information law amendments. The representatives of the news side of the information business—the American Society of Newspaper Editors—have gone all-out to urge overriding of 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 MUST OVERRIDE VETO OF INFORMATION ACT CHANGES

When Congress reconvenes after the election recess, it ought to act promptly—and decisively—to override President Ford's veto of essential amendments to the Freedom of Information Act.

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

Mr. Ford's veto of H.R. 12471 is in direct contradiction of his avowal of an "open administration." Further, his demands for more concessions from Congress on FOI amendments raise additional questions about the credibility of his openness pledge.

Congress has gone more than halfway to meet administration objections to the original FOI changes considered on Capitol Hill.

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

Mr. Ford got four out of the five changes he recommended to the committee. Yet not only did Mr. Ford veto the final bill, but he added a new demand to his original proposals.

In his veto message, President Ford contended for the first time that lengthy investigatory records should not be disclosed on the grounds that law enforcement agencies do not have enough competent officers to study the records. He also restated his earlier demand that Congress should not give the courts as much power as the bill provides to decide on whether documents should be withheld for reasons of national security.

Mr. Ford's veto also prevented other improvements in the FOI law ranging from the setting of reasonable time limits for federal agencies to answer requests for public records to requiring agencies to file annual reports on compliance of the law.

The amendments to strengthen the FOI law represent a true consensus 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 open administration pledge, then Congress ought to do it for him by overriding his veto.

Mr. MONDALE. Mr. President, over a century ago, one of the greatest leaders our Nation ever produced, Abraham Lincoln, expressed his faith in the American people. Lincoln said:

> I am a firm believer in the people, if given the truth, they can be depended upon to meet any national crisis. The great point is to bring them the real facts.

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 from public view 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 media and for every American citizen to gain the information they needed from the Federal Government, information which 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 in 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 regrettably undertaken coverups which have also undermined the confidence of the American people in their Government. While the substantive provisions of the Freedom of Information Act have stood the test of time, the agencies whose job it is to comply with requests for information under the act have demonstrated their ingenuity in using the procedural provisions of the act to frustrate the legislation's intent. Former Attorney General Elliot Richardson, testifying before the Senate Administrative Practice and Procedure Subcommittee, noted that—

> The problem in affording 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 made every attempt to fashion legislation which will remove the procedural loopholes through which Federal agencies avoided compliance in the past, while at the same time affording adequate protection for vital governmental interests in sensitive or national security information.

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. His principal objections—to those sections of the bill dealing with in camera inspection of classified documents and the disclosure of agency investigative files—are, I believe, without justification. In fact, the Congress has made every attempt to overcome any legitimate objections based on national security or law enforcement grounds, and has accepted many modifications in language designed to accomplish these ends. The legislation on which we will shortly be voting is a balanced 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 unfortunate veto, and in so doing will reaffirm our commitment to openness in government. The American people are tired of the politics of secrecy. They are demanding a politics of honesty and openness. And enactment of the Freedom of Information Act amendments of 1974 will be an important step toward restoring the faith of a free people in their Government.

Mr. President, I ask unanimous consent that an excellent editorial from the Minneapolis Tribune, outlining some of the principal issues involved in this vote to override, be inserted in the Record at the conclusion of my remarks.

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

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

MR. FORD AND THE "RIGHT TO KNOW"

In 1966, when the first Freedom of Information Act was passed, Gerald Ford, then a congressman, voted in favor, along with 306 other House members, despite the opposition of many federal agencies. Passage put Lyndon Johnson on the spot, but he took the heat and signed the bill.

Now President Ford is on a similar spot. Early this month Congress passed a bill to close major loopholes in the 1966 "right-to-know" act and make it a sharper tool for citizens to dig out government secrets. As in 1966, the bill was opposed by virtually all government agencies, but had the support of many House Republicans, including Minnesota Reps. Quie and Franzel (Nelsen and Zwach did not vote). On Thursday, Mr. Ford vetoed the bill as "unconstitutional and unworkable."

The bill's key provision empowers federal courts to go behind a government secrecy stamp and examine contested material *in camera* to see if it has been appropriately classified. The bill exempted nine categories of material ranging from secret national-security information to trade secrets and law-enforcement investigatory records.

Despite the exemptions—and despite the fact that federal judges already have the right to review classified information in criminal cases—Mr. Ford objected. The provision, his veto message said, would mean that courts could make what amounted to "the initial classification decision in sensitive and complex areas where they have no expertise." It could adversely affect intelligence secrets and diplomatic relations. "Confidentiality would not be maintained if many millions of pages of FBI and other investigatory law-enforcement files" were not protected.

The veto has met with strong congressional criticism. Sen. Kennedy, one of the bill's major backers, called it "a distressing new example of the Watergate mentality that still pervades the White House." Rep. Moss, an author of the 1966 act, said there is "no validity to the fears expressed by the president . . . He is buying the old line of the intelligence and defense community that all information they have is sacrosanct."

Coming from a president who has promised "open" government, the veto surprised those who had expected him to sign, especially since Congress had already incorporated in the bill modifications he suggested last summer. But, according to reports from Washington, Mr. Ford finally bent to the wishes of the National Security Council, which led the federal agencies' opposition. Mr. Ford says he will submit new proposals next session, but it is unlikely that they will do as much for the public's "right to know" as the vetoed bill.

There is a good chance Congress will override the veto. It has the votes. We hope it uses them.

Mr. HUGH SCOTT. Mr. President, just prior to the recess, President Ford vetoed the Freedom of Information Act amendments. In his veto message, the President cited several objections, including adverse impact on military or intelligence secrets and diplomatic relations, loss of confidentiality in law enforcement matters, and inflexibility with regard to procedures associated with the release of information to the public.

I am sympathetic with the President's objections. I agree with him the "the courts should not be forced to make what amounts to the initial classification decision in 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 detailed law enforcement investigatory files 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 these

pick up the slack that has developed since 1966 to facilitate public access to information. The balance of the bill tilts in a responsible direction, and the good provisions should not be discarded because there are a few bad provisions.

In fairness to the President, and if the bill becomes law over his objections, Congress has an obligation not to lose sight of his objections in the interest of national welfare. Therefore, I have submitted a new bill, which is drafted to reflect the changes proposed by the President. If, after a trial period, the law proves defective as the President insisted that it would, Congress must respond quickly and in a responsible way.

I have been in Congress a long time. I have seen Presidents of both political parties misuse secrecy stamps. On balance, too much information is withheld from public scrutiny, and the trend must be reversed. The President and the Congress have a duty to protect the public from unwarranted secrecy and to protect the Nation from losing its ability to protect itself.

Mr. RIBICOFF. 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: First, that our military 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 reply to requests 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 the amendments will jeopardize our national security interests. The President said that he objected to forcing the courts to make initial classification decisions "in sensitive and complex areas where they have no particular expertise." The FOIAA does not require the courts to render initial classification decisions. The act 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 declassify such records if they determine that an agency acted arbitrarily. The bill places faith in the ability of the judiciary to promote both the national interest and the public's right to information, while also encouraging the Federal courts in making de novo determinations to "accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record."

Presently, the executive branch alone retains the power to declassify documents. It appears that Mr. Ford regards such in camera inspection of classified documents as a usurpation of his constitutional authority to be final arbiter.

The Supreme Court, however, has suggested in the case of EPA against Mink that Congress has the constitutional power to grant in camera authority to the courts when questions arise concerning

the classification of documents. In the Mink case, the Court held that the judiciary lacks the power to review classified documents. However, the majority opinion suggested that Congress could legislate this power to grant such authority to the courts. Mr. Justice Stewart, in a concurring opinion in the Mink case, noted that under the Freedom of Information Act, a court has no power to disclose information "specifically required by Executive order to be kept secret in the interest of national defense of foreign policy." Mr. Stewart continues:

> It is Congress, not the Court, that . . . has ordained unrequestioning deference to the Executive's use of the "secret" stamp . . . 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.

The House-Senate conferees have clarified the intent of Congress for in camera examination of contested records in FOI cases. The vetoed bill, in fact, answers the present weaknesses of the FOIA, as evidenced in the Mink case, Congress and the courts have voiced the belief that the President's sole power to classify documents is not absolute.

A second objective offered by the President is that FBI files and other law enforcement agency files would be open to inspection on demand. Both the FOIAA and existing statutes provide adequate guidelines to insure that an individual's right to privacy will not be endangered. The FOIAA's exempt from the rule of mandatory disclosure the files of law enforcement and investigatory agencies if their production interferes with enforcement proceedings, deprives a person of his right to a fair trial, constitutes an unwarranted invasion of privacy, endangers law enforcement personnel or discloses the identity of a confidential source. It also safeguards information involving current prosecutions.

The President's third objection is that it sets an unrealistic time limit for an agency to reply to a request for information. The time limit prohibits an agency's use of delaying tactics. Just this week, the Tax Reform Research Group listed 99 organizations which were IRS targets for harrassment. This information was obtained under the FOA 13 months after it was first requested. There is no excuse for such unnecessary bureaucratic delays when abuses such as this are occurring in our government.

I believe the President's veto of the Freedom of Information Act Amendments is unfortunate. Unfortunate at a time when confidence in our Government has dramatically declined and the principles of openness and honesty are urgently needed. I will vote to override this veto.

Mr. CLARK. Mr. President, the Senate is about to vote on one of the most important issues we have considered all year: the Freedom of Information Act amendments. This bill corrects some of the deficiencies in the current law to insure that the public and the news media have access to the information the public is entitled to know. For example, it cuts down the length of time a citizen will have to wait for the Government to release a requested document. It also eliminates some of the more questionable restrictions on what information is available to the public. Finally, it rightfully provides for penalties against the people who withhold requested information which should be in the public domain.

As we consider this legislation, I am reminded of a remarkable definition of democracy which I once read. It originated within an agency of the U.S. Government and went as follows:

> Democracy: A government of the masses. Authority derived through mass meeting or any other form of direct expression. Results in mobocracy. Attitude toward property is communistic . . . negating property rights. Attitude toward law is that the will of the majority shall regulate, whether it is based on deliberation or governed by passion, prejudice, and impulse, without restraint or regard to consequences. Result is demagogism, license, agitation, discontent, anarchy.

The definition is from a U.S. Army Training Manual No. 20005–25 in use from 1928–32. The manual was published 38 years before the Freedom of Information Act became law.

But it is interesting to note that the manual was withdrawn almost immediately after a newspaper story on the manual because of the public furor, and it is just this kind of public accountability that is the central purpose of the Freedom of Information Act.

Mr. President, the strength of a democracy is derived directly from the ability of the entire populace to make its own judgments about the Government's policy decisions and the leaders selected to make and implement them. If those judgments are to be sound, it is essential that people have access to the information it takes to evaluate Government performance. Openness, candor, and access to information are not luxuries; they are vital to the democratic process.

Mr. President, the recognition of this essential principle led to the initial passage of the Freedom of Information Act. For too long the Government had been publishing—and acting upon—questionable documents, as in that Army Training Manual I referred to earlier. For too long, Government has classified and reclassified reams of information, much of it needlessly and succeeded in hiding embarrassing information from the public. For far too long, Government agencies have been impervious to the needs and requests of the people they supposedly are serving, and Congress passed the original Freedom of Information Act in an effort to solve those problems.

Since its passage in 1966, many of these unnecessary barriers to gaining information have been eliminated. The act has played a vital role in protecting some fundamental rights. For example, it was the Freedom of Information Act which recently led to the disclosure of the Internal Revenue Service investigation of political and social groups in the country in direct violation of their constitutional rights. By the same token, the Freedom of Information also has been cited as the primary vehicle for revealing the improper counter-intelligence operations of the FBI. Finally, the act opened the door for every American citizen to a wide range of information that the public is entitled to receive.

The act was not perfect. It did not completely eliminate all of the barriers which had been erected over a period of decades. For example, agencies often were reluctant to provide indexes of relevant information so the public could ascertain what was available, and they were reluctant to establish reasonable procedures to help identify and obtain pertinent records. Many Federal agencies engaged in delaying tactics in response to legitimate requests for information by the public, placing an unfair financial burden on the individuals requesting the information as well as an unnecessary burden on the courts to resolve the dispute. In addition, the Watergate scandal revealed numerous

instances of the misuse of the law's various exemptions—such as the national security exemption—and it highlighted the need for an independent review of such exemptions to prevent agencies from making unilateral and arbitrary classification to violate the intent of the law.

With these deficiencies in mind, Congress has attempted to improve the law. On March 14, the House approved the 1974 amendments by a resounding vote of 382 to 8. The Senate followed shortly thereafter and voted overwhelmingly in favor of the new amendments, 64 to 17. Given that congressional mandate, as well as President Ford's repeated assertions of his commitment to openness and candor, many people were stunned by the President's veto of this legislation. While the President's public position is that the new amendments are unconstitutional, it is clear that such a position is untenable in light of the facts, and that he has bowed to the wishes of the bureaucracy at the expense of the public. The constitutional issue is no issue at all. As the eminent law professor, Philip Kurland of the University of Chicago, recently observed in a letter to Senator Muskie:

> Although President Ford states that the provision to which he takes exception is unconstitutional, not surprisingly, he refers neither to 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 contitutionality. To me, it is clear that the bill does not offend the Constitution in any way.

Mr. President, we needed the Freedom of Information Act back in 1928 when the Army Training Manual was first printed. It became even more imperative as more and more information became harder and harder to get as the bureaucracy grew. Certainly now, after the abuses of the past administration and the misuse of so many agencies at the expense of the public, it has become essential to the very future of democracy that we guarantee every citizen maximum access to information.

I urge my colleagues to follow the action of the House yesterday and override this dangerous veto.

Mr. DOLE. Mr. President, I would like to take this opportunity to express my concern that the President's veto of the Freedom of Information Act should be upheld.

I have consistently supported the intent of the Freedom of Information Act and have worked to achieve passage of the bill. However, amendments were added in the Senate which are objectionable. I voted against the amendment concerning investigatory records when it came before the Senate and had hoped that this amendment would be dropped in the joint Conference Committee. It was not, and because of the serious harm it could cause to the crime fighting agencies in this country, I am compelled to uphold the President's veto.

REASONABLE CHANGES

I have read the President's veto message carefully and feel that his obligations and suggested changes are reasonable. This is why I have cosponsored the substitute Freedom of Information Act introduced by the senior Senator from Pennsylvania (Mr. Hugh Scott).

The changes suggested by the President are relatively minor and would not derogate from the benefits provided by the act. I support the substitute bill which contains these amendments.

Considering that crime is rising in this country, it is important that we should not jeopardize the ability of the FBI and other crime fighting organizations to control crime. The substitute bill would prevent a derogation of the FBI's ability to combat crime while not restricting the basic improvements in the freedom of information provided under the bill.

Similar questions have been raised about the detrimental impact this measure could have on our national security. Freedom of information is a basic right in this country; however, national defense does clearly require some security precautions. National security remains a vital national requirement in the tense and adversary-oriented environment existing in the world. The changes suggested by the President in this respect 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 PRESIDING OFFICER. Who yields time?

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

The PRESIDING OFFICER. 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 PRESIDING OFFICER (Mr. HELMS). 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, Shall the bill 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 on official business.

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 "yea".

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. Bennett) is necessarily absent.

I also announce that the Senator from New York (Mr. Buckley) and the Senator from Maryland (Mr. Mathias) are absent on official business.

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

I further announce that, if present and voting, the Senator from Oregon (Mr. Hatfield) and the Senator from Maryland (Mr. Mathias) would each vote "yea".

The yeas and nays resulted—yeas 65, nays 27, as follows:

[No. 494 Leg.]

YEAS—65

Abourezk	Fong	Muskie
Allen	Gravel	Nelson
Baker	Hart	Packwood
Bayh	Hartke	Pastore
Beall	Haskell	Pearson
Bentsen	Hathaway	Pell
Bible	Huddleston	Percy
Biden	Hughes	Proxmire
Brock	Inouye	Randolph
Brooke	Jackson	Ribicoff
Burdick	Javits	Roth
Byrd, Harry F., Jr.	Johnston	Schweiker
Byrd, Robert C.	Kennedy	Scott, Hugh
Cannon	Magnuson	Stafford
Case	Mansfield	Stevens
Chiles	McGee	Stevenson
Church	McIntyre	Symington
Clark	Metcalf	Tunney
Cranston	Metzenbaum	Weicker
Domenici	Mondale	Williams
Eagleton	Montoya	Young
Ervin	Moss	

NAYS—27

Aiken	Fannin	McClellan
Bartlett	Goldwater	McClure
Bellmon	Griffin	Nunn
Cook	Gurney	Scott, William L.
Cotton	Hansen	Stennis
Curtis	Helms	Taft
Dole	Hollings	Talmadge
Dominick	Hruska	Thurmond
Eastland	Long	Tower

NOT VOTING—8

Bennett	Hatfield	McGovern
Buckley	Humphrey	Sparkman
Fulbright	Mathias	

The PRESIDING OFFICER. On this vote the yeas are 65 and the nays, 27. Two-thirds of the Senators present and voting having voted in the affirmative, the bill, on reconsideration, is passed, the objections of the President of the United States to the contrary notwithstanding