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COURT REVIEW CLASSIFIED MATERIAL UNDER PROPOSED FREEDOM OF INFORMATION ACT AMENDMENTS

Problem: Aide-Memoire

Proposed Solution Amendments

(Proposed Solution Ramseyer Format)

Excerpt House Report on H. R. 12471

Excerpt Senate Report on S. 2543 (Committee Print)

CRC, 2/25/2003

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AIDE-MEMOIRE

Amendments to Proposed Freedom of Information Act Amendments

S. 2543 (Committee Print)

1. (Section (b)(2) of the 25 March committee print S. 2543) would overrule the decision of the Supreme Court in the Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), by authorizing court review of the contents of records withheld by a Federal agency under the nine specific exemptions set forth in Title 5 U. S. C. 552(b). The purpose of such review would be to determine if the information withheld meets the criteria of the exemption involved.

2. Matters specifically exempted from public inspection by section 552(b) of the Freedom of Information Act include those "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy" [552(b)(1)]. It was this exemption which was at issue in the Mink case. A separate exemption from public inspection is afforded matters "specifically exempted from disclosure by statute" [552(b)(3)].

3. There is an important distinction between these two exemptions. The former refers to classification of information under Executive Order, which specifies criteria for evaluating and classifying governmental documents. The latter exemption, based upon express statutory authority, involves an act of Congress approved by the President which directs the proper handling of especially sensitive information. Three such categories of information are: "Restricted Data" [42 U. S. C. 2162], relating to atomic energy matters; Communication Intelligence [18 U. S. C. 798]; and Intelligence Sources and Methods [50 U. S. C. 403(d)(3) and g]. To make it abundantly clear that it is not the intent of Congress to encourage or authorize court review of information which has been specifically designated in an act of Congress as deserving of statutory protection it is recommended that the potential conflict in laws be resolved by the attached amendment. (See Tab A)

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4. It is noted that the House report on H. R. 12471 (H. Rept. 93-876, Page 7), a similar bill, makes two points about the proposed court review amendment abundantly clear: the first is that it is aimed at the exemption provision involving information classified under Executive Order, which was at issue in the Mink case; the second point is that it is not intended to reach information "specifically exempted from disclosure by statute." In this connection the House report makes specific reference to the Atomic Energy Act of 1954. (Tab B.)

5. S. 2543 provides no criteria for the in camera court review of exempted material. In effect, the court would substitute its own judgment for that of an agency head. Recognizing that reasonable men do differ in their judgments as to those matters which require protection in the national interest, a court should not overrule the determination of an agency head unless it can be shown that the determination was clearly unwarranted. A proper court test would be whether or not the agency head acted "arbitrary and capricious." Accordingly, it is recommended that S. 2543 be amended as set forth in Tab C.

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TAB A

AMENDMENT TO S. 2543 (Committee Print)

At line 16, page 3, insert after the word "with" the following:

", except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64."

NOTE: See next page for amendment in Ramseyer form.

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PROPOSED AMENDMENT TO
S. 2543 (Committee Print) UNDERSCORED

"In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

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TAB B

House Report 93-876

Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data.

The *in camera* provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities.

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TAB C

AMENDMENT TO S. 2543 (Committee Print)

At line 21, page 3, insert after the word "action." the following:

"The court shall not invalidate a determination by a department or agency that records are to be withheld under the exemption set forth in subsection (b)(1) unless the court determines that the determination was arbitrary and capricious."

NOTE: See next page for amendment in Ramseyer form.

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PROPOSED AMENDMENTS TO
TO S. 2543 (Committee Print) UNDERSCORED

"with such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. The court shall not invalidate a determination by a department or agency that records are to be withheld under the exemption set forth in subsection (b)(1) unless the court determines that the determination was arbitrary and capricious."

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In Camera Inspection and De Novo Review

Presently when most Freedom of Information Act cases reach the federal district courts, the judge has authority to examine the requested documents in order to ascertain the propriety of agency withholding. This procedure has not, however, been held to apply to records withheld under the first exemption of the Act—subsection 552(b)(1). In *Environmental Protection Agency* v. *Mink* (410 U.S. 73 (1973)) Congresswoman Patsy Mink attempted to obtain documents relating to the projected effect of the underground atomic test at Amchitka from the Environmental Protection Agency. The Supreme Court held that in all cases *except* those dealing with information which is claimed to be specifically required by executive order to be kept secret in the interest of national defense and foreign policy, de novo review by the district court—as provided for in the FOIA—allows an incamera inspection of the records requested. The Court ruled that in that inspection, the court is to determine whether claimed exemptions apply in fact and whether non-exempt materials can be severed from exempt materials and be released.

While legislative proposals have been made to require automatic in camera examination of disputed records in every case, the Supreme Court observed:

> Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed

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> affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material [not exempt from disclosure]. The burden is, of course, on the agency resisting disclosure, 5 USC § 552(a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. (410 U.S. at 93.)

Thus to the extent that a judge can rule on the government's claim that material requested is exempt from disclosure under the FOIA *without* an in camera inspection of that material, such as examination is not mandated. This approach was preferred by the Attorney General in his testimony. (*Hearings*, vol. II at 218.)

There is, of course, an inherent disadvantage placed upon the complainant when material is submitted for in camera examination, since the court's decision will not be the product of an adversary process. Private attorneys with experience in litigating FOIA suits have emphasized this disadvantage. One testified that in one case an agreement was reached where he was permitted full access to Treasury Department files under an agreement that only information ultimately ordered disclosed by the court would be publicly revealed. (*Hearings*, vol. II at 117.) Another indicated that in every FOIA case he filed he requested the court to require the government to file a memorandum explaining why withheld materials were exempt, so that he could respond to the explanation. (*Hearings*, vol. II at 100.) These types of procedures providing for the utilization of the adversary process is in camera proceedings are to be encouraged whenever possible. (See *Hearings*, vol. II at 127, 142.)

On August 20, 1973, the D.C. Circuit Court of Appeals observed that in cases in which in camera examination is warranted:

> It is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought. . . . In a very real sense, only one side of the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information. . . .
>
> The present method of resolving FOIA disputes actually encourages the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed. (*Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., Aug. 20, 1973). Slip op. at 8.)

The court ordered that, in those situations calling for in camera inspection, the government must provide a detailed analysis of the withheld information and the justifications for withholding them, and must formulate a system of itemizing and indexing those documents that would correlate statements by the government with the actual portions of each document. The committee supports this approach which, with the use of a special master where voluminous material is involved, was intended by the court to "sharply stimulate what must be in the final analysis the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and

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to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt." (*Vaughn* v. *Rosen*, No. 73–1039 (D.C. Cir., Aug. 20, 1973), slip op. at 17.)

One proposal considered by the committee (in S. 1142) would have *required* in camera inspection of records in FOIA cases. While the court should be able to require submission of documents for in camera inspection when it determines such procedure to be desirable and appropriate, the court should also, in the testimony of the American Bar Association spokesman John Miller, "be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in any manner that it chooses, including through the use of affidavits or oral testimony." (*Hearings*, vol. II at 156.)

The Supreme Court in *Mink* held that the FOIA does not permit an attack on the merits of an executive decision to classify information. Since the fact of classification was not in issue, in camera examination could serve no purpose. The practical result of this decision is that in camera inspection of documents withheld under exemption (b) (1) will generally be precluded in cases brought under the FOIA.

S. 2543 would amend the Act to permit such examination, and a fuller discussion of this issue appears below in this Report (page —). On at least two occasions, however, the government has taken the position that the seventh exemption (subsection (b) (7)) relating to disclosure of investigatory files also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. (*Stern* v. *Richardson*, No. 179–73, D.C. Cir., Sept. 25, 1973; *Weisberg* v. *Department of Justice*, No. 71–1026, D.C. Cir., reargued en banc.) By expressly providing for in camera inspection regardless of the exemption invoked by the government, S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

S. 2543 also indicates that the court shall make its determination whether the requested records "or any part thereof may be withheld under any of the exemptions." The spokesman for the American Bar Association suggested in the hearings that "it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information." The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. (See also page — below, concerning the government's responsibility to release documents after deletion of segregable exempt portions.)

Assessment of Attorneys' Fees and Costs

S. 2543 would permit the courts to assess reasonable attorneys' fees and other litigation costs against the United States in cases where the complainant has substantially prevailed. Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average

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AIDE-MEMOIRE

H. R. 12471--Freedom of Information Act Amendments

1. The Director of Central Intelligence, by the National Security Act of 1947, is charged with responsibility to protect intelligence sources and methods from unauthorized disclosure (50 U. S. C. 403).

2. There is no specific legislation implementing this authority to strengthen the Director's ability to carry out his responsibilities under law.

3. If the veto of H. R. 12471 is not sustained, the result will be that sensitive intelligence sources and methods critically affecting the national security will be subject to detailed examination in our court system as a result of a suit to publish such information which can be brought by any person regardless of citizenship.

4. The President has already stated his concern that the legislation could adversely affect our military or intelligence secrets, and that diplomatic relations also could be adversely affected. The President has pointed out that the court should be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise. The result would be that a determination by the Director of Central Intelligence that a disclosure of a document would endanger intelligence sources and methods could be overturned by a district judge who thought that the plaintiff's position was reasonable. This would give less weight before the courts to an Executive determination involving the protection of our most vital secrets and interests than is accorded determinations involving routine regulatory matters under standard administration law concepts.

5. The President's counterproposal for legislation would permit the courts to review classification under the Freedom of Information Act, but to uphold the classification if there is a reasonable basis to support it. Under the President's proposal the courts could consider all attendant evidence in camera and an in camera examination of the documents.

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FOR IMMEDIATE RELEASE October 17, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. Although I am gratified by the Congressional response in amending several of these provisions, significant problems have not been resolved.

First, I remain concerned that our military or intelligence secrets and diplomatic relations could be adversely affected by this bill. This provision remains unaltered following my earlier letter.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. However, 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. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles, and give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.

I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

Second, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure would cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

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Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

Finally, the ten days afforded an agency to determine whether to furnish a requested document and the twenty days afforded for determinations on appeal are, despite the provision concerning unusual circumstances, simply unrealistic in some cases. It is essential that additional latitude be provided.

I shall submit shortly language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation, which has come so far toward realizing its laudable goals, will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

GERALD R. FORD

THE WHITE HOUSE,

October 17, 1974.

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unanimous consent that Howard Paster of my staff be granted the privilege of the floor during the debate.

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

Mr. BAYH. Will the Senator permit me 1 minute under the bill?

Mr. KENNEDY. Mr. President, I yield to the Senator from Indiana.

Mr. BAYH. Mr. President, I will yield to the Senator from Mississippi shortly. I simply want to say that I find great comfort in the position of the Senator from Maine.

It seems to me that in a free society, certainly in the light of everything that we have seen occur over the past few months and years, we ought to revise the present position which seems to be that there is a right to mark something classified until it is proved not to be in the public interest. In a free society information ought to be regarded as a matter of public interest and public knowledge unless it can be proven that it should be secret.

Mr. MUSKIE. Mr. President, I thank the Senator from Indiana. In proposing this amendment, I am not asking the courts to disregard the expertise of the Pentagon, the CIA, or the State Department.

Rather, I am saying that I would assume and wish that the judges give such expert testimony considerable weight. However, in addition, I would also want the judges to be free to consult such experts in military affairs as the Senator from Mississippi (Mr. STENNIS), or experts on international relations, such as the Senator from Arkansas (Mr. FULBRIGHT), or other experts, and give their testimony equal weight. Their expertise should also be given considerable weight.

I do not see why the head of a department should be able to walk into a judge's chamber, knowing that his testimony is against that of any other expert and weighs more than any other on a one-for-one basis. He has the additional weight that the exclusive judgment is given to him. He has all of that behind him.

Why should he be given a statutory presumption in addition if he cannot make his case on its merits. He is in a better position to do that than anyone else.

Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.

We ought not to classify information by presumptions, but only on the basis of merit. And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it and not find it possible to get sustained only through the support of a statutory presumption.

Mr. HRUSKA. Mr. President, I yield 5 minutes in opposition to the amendment to the Senator from Mississippi.

Mr. STENNIS. Mr. President, I certainly thank the Senator from Nebraska.

I have just gone into this matter within the last hour, Mr. President, but I am greatly concerned with the Senator's amendment, the amendment of the Senator from Maine, and that is not discounting his very fine work on the subject.

I think the bill itself, as worked out by the committee, has struck a fair balance that meets the requirements of law and, at the same time, gives a reasonable amount of protection.

The Senator from Maine raised a point of why give a little more weight here to the head of an agency with reference to these matters. It is for the very reason that we have placed that person in charge of that agency and given him all responsibility and power that goes with that entire office. He is the only one who is permitted to file such an affidavit here, as I understand.

I want to focus now primarily on the CIA. I start with the proposition that we have to have a CIA in world affairs; we just must have one, and time has proven its value.

So in the matter of certain information being classified, the average judge—and with all due deference to them personally—and I had the honor at one time of being a judge of a trial court myself—is just short of knowledge and information on a lot of different subject matters, just as a Senator is on a great deal of subject matters that come before him.

So I imagine that the average judge would want to hear and would want to give consideration to the head of this agency and, in matters of great concern, would really have no objection to this amendment. It is a kind of warning to the judge. The head of the agency is the only person who can file an affidavit with a court within a vast worldwide operation such as the CIA. It has to be the head of the agency. If he files an affidavit, if he takes a position on the classification of a document, that is certainly not just another piece of paper.

That is something with the man's honor and official responsibility tied with it. This provision here is one where the judge is still the master of the situation; he is still running his own court, as we use that term. He is still free to reach a conclusion of his own. But this is a mild guideline, as the Senator from Massachusetts suggests. It is not a violent presumption. It is not a wall built around this head of agency and his testimony. It is a mild presumption in favor of his testimony. The judge can still weigh it all, and unless there is found a reason that satisfies the judge—and you have got to satisfy this judge—he is not going to stop and back off because it might have satisfied the head of the agency. The judge has all of this other testimony before him, and he is going to have to be convinced himself in view of all other testimony or he is going to rule in favor of reviewing the classified documents now.

I tell you this is a serious matter, Members of the Senate. I do not lean toward trying to protect everything. I want matters to be classified the same as the rest of you do. But I have been at this thing long enough and on enough subject matters to know that we are flirting here with things that can be deadly and dangerous to our welfare, our national welfare, and we ought not to just throw the gates wide open and say, "All this is to be testimony along with all the other testimony," some of which is usually from biased sources, sources of interest, and not give any consideration here any more than just ordinary consideration to the official certification under oath of the head of the agency.

So I have to rest this thing with the Senate. The committee has worked on it and has come up with something that, I take it, is practical to live with and, at the same time largely gives to the complainants what they might wish in this case.

So until we just strike down this matter that the committee has worked so hard on and has balanced off, let us take a second thought, and I believe we will——

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. STENNIS. I thought he had yielded to me and I will then finish. I thank the Senator. I have not made any remarks here yet about the Department of Defense.

There are matters, and there are many of them, that are of equal importance as those of the CIA. When I leave this floor I am going down here now for a hearing with respect to a gentleman who is nominated to be the Chief of Naval Operations, the highest ranking officer in the Navy. Next week we are going to have a hearing for the Chairman of the Joint Chiefs, the highest ranking officer, military officer, in the whole Government. In addition to that we have the civilian officers over there, men of great esteem, of great competence.

These caliber men do not carelessly file affidavits, that is my point, and committee proposal would put their honor and their official conduct at stake and at issue. Those things are not carelessly done.

So instead of just brushing them aside here in a moment, let us stay or remain with the law of reason as this committee has worked it out.

I thank the Senator again for yielding to me.

Mr. MUSKIE. Mr. President, just a minute or two of response.

May I say to the distinguished Senator from Mississippi that I hardly regard my amendment as throwing the doors wide open to irresponsible disclosure of Government secrets. But on the question as to whether or not the weight of the bureaucracy of Government is on the side of secrecy or openness, let me give you a few statistics. At the CIA there are only five full-time secrecy reviewers for 1,878 authorized classifiers.

In the third quarter of 1973 in the CIA, 1,350 documents were classified top secret, and that has climbed until, during the first quarter of this year, the number has risen to 3,115. So the enormous weight of the bureaucracy is on the side of secrecy. We have all that here, and now we want to add to that weight a presumption. Arrayed on the other side is a district court judge who treats

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this issue as a part-time responsibility, who does not have this background, and is asked to give that weight, that bureaucratic weight, a presumption over anything else he hears, over any other testimony he hears. That is what we are trying to overcome. I do not regard that as throwing the door wide open.

I am happy to yield to the Senator from New York.

Mr. JAVITS. Mr. President, I have joined Senator MUSKIE and his other colleagues in his amendment for the following basic reasons:

I believe that, one, there is no question about the fact that the whole movement of Government, especially in view of Government's experience in Vietnam, Watergate, and many other directions, is toward more openness, so that the bias, in my judgment, in the Senate, should be toward more openness rather than being toward more closed.

Second, we have finally come abreast of the fact of life that it is not providence on Mount Sinai that stamps a document secret or top secret, but a lot of boys and girls just like us who have all their own hangups and who decide in individual cases what the document should be classified as, and very serious consequences flow to individuals as a result of that classification, very serious consequences in the denial of the basic information upon which the judge releases it to the public. So the bias ought to be for openness not for closeness.

Now, one would say this is a close question normally because of this tension as between the right of the public to know and the necessity of Government in given cases to have secrecy. But the basic question has been decided by the committee, as by us, who are the movers of the amendment, that is, that a judge in camera should have the right to inspect this material. Having done that, and that is the basic question, why put a ball and chain on the ankle of the deciding authority? I cannot see that the balance of wisdom in government should move in that direction, having decided that the judge may see it. We should give him the freedom to determine whether, under all the circumstances, as the umpire between the right of the public to know and the necessity for secrecy—claimed necessity for secrecy—the umpire should not be restricted by ground rules, except ground rules dealing with basic justice and the balance of responsibility and the balance of the national interest as it relates to a given item of information.

It is for those reasons, Mr. President, because I think, having made that basic decision which now has been made by the sponsors of the bill, by the sponsors of the amendment, and by the sponsors of the House bill, I see no case for further restricting that authority and hamstringing it, once it has been given.

I find special support for that proposition in the fact that the committee itself—incidentally, I personally think they are promising a lot more than they can deliver in terms of decisions of the courts, but the committee itself says that this standard of review does not allow the court to substitute its judgment for that of the agency as under a de novo review, and neither to require the court to review discretion of the agency even if it finds the determination thereof arbitrary or capricious. I respectfully submit it is promising a lot more than it will deliver, because I doubt that judges will do any differently—except judges who want to do differently—they are human like the classifiers in reading the information in camera—than they would without the provision.

In those circumstances, why put it in? Why not put responsibility on the shoulders of the judges, whom we trust enough to allow to see the material anyhow?

For all these reasons, Mr. President, the motion to strike is eminently warranted, and I hope that the Senate will support it.

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

The PRESIDING OFFICER (Mr. HELMS). The Senator from Nebraska is recognized for 5 minutes.

Mr. HRUSKA. I rise in opposition to the amendment proposed by the senior Senator from Maine (Mr. MUSKIE). The Freedom of Information Act was enacted at the expense of a lot of time and effort. It took several years to process to the point of balancing the several interests contained in it and a sincere balanced result has been attained.

There is the right to know on the part of the public, but there is also the right and duty on the part of the Government to survive and to take such steps as may be necessary to preserve the national integrity and security.

This amendment would substantially alter that balance which is presently contained in the Freedom of Information Act. It would endanger the passage and approval of the instant bill into law, in my considered judgment. It should be acted on, if we act on it at all, not in connection with a bill where virtual unanimity was reached in the Judiciary Committee and reported unanimously without any objection to the Senate.

Mr. President, I oppose the amendment offered by the Senator from Maine. I believe that the amendment is unworkable and certainly is unwise.

At the outset, it is imperative to realize what is and what is not at issue here. Is the crux of the issue whether the courts should be able to review classified documents in camera? No. Under both the bill and the amendment, the judge can review the documents in camera. Thus, S. 2543, as unanimously recommended by the Judiciary Committee, establishes a means to question an executive decision to stamp a classification on the document.

What is at stake, Mr. President, is the sole question of whether there should be a special standard to guide the judge's decision in this matter pertaining to the first exemption. S. 2543 provides such a standard.

Under the bill, a judge shall sustain the agency's decision to keep the document in confidence unless he finds the withholding is "without a reasonable basis." We could turn that around, Mr. President, and we could ask whether it would be proper for a judge to go ahead and disclose a document even if he finds that a reasonable basis for declassification exists. That is the other end of the dilemma.

In other words, if the court finds a reasonable basis for the classification, it shall not disclose the document.

The amendment of the senior Senator from Maine would eliminate this "reasonable basis" standard and put nothing in its place. It does not substitute any standard in its place. How is the judge to be guided in his decision whether a document is properly classified? In the absence of a specified standard, I must assume that the standard that obtains is the one that applies to all the other exemptions.

Let me take the sixth exemption as an example. That exemption allows an agency to withhold records if it determines that disclosure would constitute an unwarranted invasion of privacy. In determining whether the invasion is unwarranted, the court attempts to ascertain the extent of the invasion and then balances that against the requester's and the public's need for that information. The burden of proving that the extent of the invasion outweighs the countervailing interests is on the Government.

How would this standard then apply with respect to exemption 1—the exemption that allows the Government to miantain classified documents in confidence. It would allow the judge to balance what he perceives to be the public interest in disclosing the information against Government's, which is to say the people's, judgment that disclosure will jeopardize our foreign relations and national defense. Stated quite simply, the amendment before us purports to allow a judge to release a classified document if he believes that the document should be in the public domain even if there exists a reasonable basis for the classification.

I realize that standards of proof are difficult concepts to understand and apply even for the lawyer. So, let me pose an example. Suppose that the Freedom of Information Act, together with this amendment, was on the books in the 1940's. And further suppose that someone wrote the Government requesting information about the Manhattan project. Now, under this amendment, a judge would be able to examine the project's documents in camera and decide for himself whether the classification was proper. He would realize that the disclosure of documents could jeopardize national defense but, on the other hand, he could also reason that the public should have some information so that it would know how much all this research was costing and what its objectives were. The judge could go on to reason that the public should be informed of the cataclysmic damage that could be done by an atomic weapon upon delivery so that the public could make a moral judgment as to whether such a weapon should ever be used. Balancing these concerns, as the Muskie amendment would call for, the judge could find the public interest in disclosure to outweigh the national defense implications.

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classifying the document affecting the 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.

Mr. HRUSKA. Mr. President, I yield myself 2 minutes to read from the Supreme Court case of C. & S. Airlines versus Waterman Corp., 333 U.S. 103 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for 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.

Mr. President, I think that is pretty plain language. I stand by it.

In this connection, as I understand Senator MUSKIE's amendment, the burden of proof is upon the Government to demonstrate what harm would befall the United States if such information would be made public and the court is to weigh such factors against the benefit accruing to the public from such information were it released. However, no standards for guiding the court's judgment are included.

It seems obvious to me that in an area where the courts have themselves admitted their inadequacies in dealing with these issues, Congress should endeavor to provide the proper guidance. The reported version of this bill does so. It provides that only in the event a court determines the classification of a document to be without a reasonable basis according to criteria established by an Executive order or statute may it order the document's release.

Therefore, I respectfully submit that Senator MUSKIE's proposed amendment does not adequately come to grips with the various competing concerns involved in this issue.

Mr. MUSKIE. Mr. President, how much time have I remaining?

The PRESIDING OFFICER. The Senator from Maine has 21 minutes remaining.

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

Mr. President, I have listened to the distinguished Senator from Nebraska expound at length on what he believes to be the facts and say that the judges are not qualified to make evaluations of classification decisions.

If he believes what he says he believes, he has got to be opposed to the committee bill because the committee bill establishes a procedure for judicial review. If he believes judges to be as unqualified as he describes them, eloquently and vigorously, on the floor of the Senate, he has to be against the bill to which he has given his name and support, because that bill rests on the process of judicial review.

The second point that I wish to make is, of course, that judges can be unreasonable, as my good friend the Senator from North Carolina has pointed out. But what about the executives? Let me read, from the committee report, the language of Justice Potter Stewart in concurring with the majority opinion of the Supreme Court in the Mink case that we seek in this bill to alter.

Justice Stewart stated:

> Congress has built into the Freedom of Information Act an exemption that provides no means of questioning an executive decision that determine a document is secret, however, cynical, myopic, or even corrupt that decision might have been.

Now that is the opinion of a justice who concurred in the decision in the Mink case which denied judges in camera review of executive decisions to classify in the national security field, clearly urging the Congress, in my judgment, to do something about it, and that is what we seek to do.

I simply cannot understand the position of the Senator from Nebraska (Mr. HRUSKA) in supporting, on the one hand, a judicial review process designed to open the door to examination of executive decision, and then on the other hand closing that door part way back again, because that is the clear purpose of the presumption written into the act.

So I hope, Mr. President, that, having taken this step, that we will not take part of it back, and I urge the support of my amendment for the reasons that I have amply discussed this afternoon.

I am ready for a vote at any time, but I will withhold the remainder of my time until it is clear that the Senate is ready for the vote.

Mr. TAFT. Mr. President, the Judiciary Committee deserve our appreciation for the significant work that is embodied in the bill before us today.

These amendments to the Freedom of Information Act will accomplish the committee objective of providing more open access to Government activities. The fresh air that open access will bring can only strengthen our form of Government. Informed citizens and responsive Government agencies will go a long way toward restoring the faith and confidence that the American people must have in our institutions.

The amendment offered to S. 2543 by the Senator from Maine which deals with classified information relating to national defense or foreign policy will not serve the interests of clear legislation or assist in the delicate process of making available such sensitive classified material.

It seems to me that the committee version of S. 2543 offers a definite procedure and a definite standard by which national defense or foreign policy classified information may be examined in a court proceeding. The court is not required to conduct a de novo review, most courts are not knowledgeable in the sensitive foreign policy factors that must be weighed in determining whether material deserves or in fact demands classification. Under the committee version a court needs to determine if there is a reasonable basis for the agency classification. The standard "reasonable basis" is not vague. The standard of reasonableness has been applied in our judicial system for centuries.

The proposed amendment would call for a de novo weighing of all of the factors and leave the determination to the court according to a weighing of all the information which is much more vague than that standard promulgated by the committee.

The executive branch has especially significant responsibilities in foreign policy and national defense. The recently conducted Middle East negotiations by our Secretary of State had to be conducted in secret and we are now enjoying fruit of the successful culmination of these negotiations.

I believe foreign policy considerations and national defense considerations deserve special attention and the committee version of S. 2543 accords them such special attention.

It does not seem worthwhile to confuse the standard that the committee has set nor does it seem useful to diminish the executive branch's flexibility in dealing with sensitive foreign policy matters.

I intend to support S. 2543 and urge my colleagues to approve it without amendment.

Mr. KENNEDY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

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Mr. DOLE. Mr. President, I think the litigation in this case of Washington Research Project, Inc., against Department of Health, Education and Welfare clearly demonstrates the need for congressional action to insure that research ideas are indeed accorded the confidential status which they deserve. It is for that sole reason that I drafted the said amendment, in anticipation of proposing its adoption.

While it is not our business to preempt the courts in matters of judicial concern, it is our affirmative legislative duty to lay down proper statutory guidelines. Regardless of the outcome in the cited case, therefore, we still have the obligation to protect against any future unnecessary, unwise, and unfair premature disclosure requirements in the specific area of scientific experimentation.

Certainly, the whole idea of "disclosure" and the public's "right to know" is of paramount importance at this time in our Nation's history. And I have no desire or intention of placing undue restrictions on those fundamental concepts. But I feel very strongly that, in the area of research grants, nondisclosure entitlement is justified—and completely within the spirit of the Freedom of Information Act itself.

It is my sincere hope that my colleagues will agree, and join me at the appropriate time in moving to identify such matters as specifically excepted from categories of information which should be disseminated to the public. I urge this problem to be the subject of special hearings at the earliest opportunity, and that it be resolved coincident with future health legislation, as the distinguished floor manager of the present bill (Mr. KENNEDY) has suggested.

The PRESIDING OFFICER. The question is on agreeing to committee amendment in the nature of a substitute, as amended.

The amendment was agreed to.

The PRESIDING OFFICER. The question is on the third reading of the bill.

The bill (S. 2543) was ordered to a third reading and read the third time.

Mr. KENNEDY. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on H.R. 12471.

The PRESIDING OFFICER laid before the Senate H.R. 12471, to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

The PRESIDING OFFICER. The bill will be considered as having been read twice by title, and without objection the Senate will proceed to its consideration.

Mr. KENNEDY. Mr. President, I move to strike all after the enacting clause of H.R. 12471 and insert in lieu thereof the language of S. 2543 as amended.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Massachusetts to insert the Senate language as a substitute for the House bill.

The motion was agreed to.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays on final passage.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill (H.R. 12471) was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

Mr. GRIFFIN. Mr. President, is the Senator from Nebraska entitled to recognition?

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. HRUSKA. Mr. President, I shall take not more than 3 or 4 minutes to recapitulate what has transpired today on this bill.

First, I point out that this bill was reported unanimously and without objection from the Judiciary Committee to accomplish certain procedural changes in the Freedom of Information Act, which was enacted in 1966.

Some substantive changes were offered in committee. They were turned down. The purpose was to make it an effective and an efficient implement and in a very vital field; namely, the right of the public to know, on the one hand, and, on the other hand, to conserve the confidentiality of Federal Government departments and documents and to enable them to function properly and effectively.

Mr. President, it is to be regretted that some major, substantive changes were effected by amendments on the floor of the Senate today.

It is my intention—and I shall do so—to vote against the bill because of the agreement to those amendments. It was my prior intention to vote for the bill, but it is my present intention to call to the attention of the President the very undesirable features of the two amendments.

In my judgment, there has been a disastrous effect upon law enforcement, particularly by the Federal Bureau of Investigation and the law enforcement agencies of our national Government. The amendments will have an effect also on the local law enforcement agencies as well.

I shall urge the President as strongly as I can to veto this measure. It is my belief that it is sufficiently disadvantageous and detrimental that it requires a veto. It is to be regretted, Mr. President, because we had a good bill. We should go forward and make the Freedom of Information Act as effective as possible. I think a fine balance had been worked out with the many interests competing for information that either should be disclosed or should be held confidential, and with other interests such as permitting the courts to review classified documents in camera.

Mr. President, I make this as a statement in connection with the future proceedings on the bill.

Mr. President, I ask unanimous consent that a brief statement summarizing those points be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT

Mr. President, my points of summary are as follows. First as to the Muskie amendment, I fear that we are giving undue latitude to the courts in dealing with a very important national issue. The amendment asks the courts to review documents to determine their effect on the national defense and foreign policy of the United States. Yet the amendment offers the courts no guidance in performing this task. It asks the court to make political judgments.

Indeed, this is a task for which the courts themselves have found that they lack the aptitude, facilities, and responsibility. This is not my own flat statement. These are the words the Supreme Court used in *C. & S. Air Lines* v. *Waterman*:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for 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.

Likewise, a Harvard Law Review Developments Note reached 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." 86 Harvard Law Review 1130, 1225–26 (1972).

Furthermore, the Attorney General in a letter which I earlier introduced in the Record expressed the opinion that grave constitutional questions arise in the adoption of this amendment. As the Attorney General concluded, "the conduct of defense and foreign policy is specially entrusted to the Executive by the Constitution, and this responsibility includes the protection of information necessary to the successful conduct of these activities. For this reason, the constitutionality of the proposed amendment is in serious question."

Second, I believe that the amendment to exemption 7 could lead to a disastrous erosion of the FBI's capability for law enforcement notwithstanding the safeguards and standards contained in that amendment. To be sure, the standards contained in the amendment look well on paper. However, based on the experience that the FBI has accumulated to date under standards similar to these, it is clear that they are difficult if not impossible to administer.

Here are some of the effects which adoption of the Hart amendment could have.

1. It could distort the purpose of agencies such as the FBI, imposing on them the added burden of serving as a research source for every writer, busybody, or curious person.

2. It could impose upon these agencies the tremendous task of reviewing each page of each document contained in any of their many investigatory files to make an independent judgment as to whether or not any part thereof should be released.

3. It could detrimentally affect the confidence of the American people in its Federal investigative agencies since it will be apparent these agencies no longer can assure that their identities and the information they furnish in confidence for law enforcement purposes will not some day be disclosed to [illegible] compensation.

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Fourth, and finally, it could set the stage for severe problems regarding the privacy of individuals.

Mr. President, in my view, nothing would be lost by deferring action on this amendment because the FBI is now operating under standards virtually similar to those contained in the amendment. It would be well to allow a suitable interval of experience to be accumulated under these regulations in order to ascertain the wisdom or lack thereof in putting these standards in statutory form.

Mr. President, the highly detrimental and far-reaching impact that these two amendments taken together pose is so grave and sweeping that it is my intention to address a letter to the President urging as strong as I can that he veto this measure if it passes in this form.

Mr. McCLELLAN. Mr. President, will the Senator yield?

Mr. HRUSKA. Mr. President, I gladly yield to the distinguished Senator from Arkansas.

Mr. McCLELLAN. Mr. President, I wish to associate myself with the views expressed by the distinguished Senator from Nebraska. I fully intended to support the measure as it came to the floor of the Senate. However, in view of the amendments that have been agreed to today, which destroys the purpose of the bill, in my judgment, and violate the Nation's security on documents and records, I cannot support the measure. I shall now have to vote against the bill.

Mr. KENNEDY. Mr. President, I yield myself 2 minutes.

The Freedom of Information Act was passed in 1966. This legislation we are considering today is really a response by Congress to the past experience we have found with the failure of Government agencies to respond to the public's legitimate interest in what had been taking place inside their walls. It is precisely the extreme and unreasonable secrecy of the past that this bill addresses, and I think the overwhelming support by the press and across the country for some legislative response to this secrecy can be answered by this bill.

I should say that the amendments that have been agreed to by a strong vote in the Senate today in no way infringe upon national security or upon the law enforcement agencies and their responsibilities in this country. I think this is the most important legislative action that can be taken to open up the Government to the American people, who require it, who demand it, who are begging and pleading for it.

I want to acknowledge the constructive and supportive efforts of Senator HRUSKA and his staff in developing this legislation for floor action. I am disappointed that he does not feel that he can support this bill as amended on the floor.

The bill provides ample protection for the legitimate interests of Government agencies. It also insures that they will be open and responsive to the American people.

I hope that the bill will be passed.

I am ready to yield back the remainder of my time.

Mr. HRUSKA. Mr. President, may I ask of my colleagues if there are any requests for time? Apparently there are none, so I yield back the remainder of my time.

Mr. KENNEDY. Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The bill having been read the third time, the question is, Shall it pass? On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The second assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from California (Mr. CRANSTON), the Senator from Arkansas (Mr. FULBRIGHT), the Senator from Alaska (Mr. GRAVEL), the Senator from Indiana (Mr. HARTKE), the Senator from South Carolina (Mr. HOLLINGS), the Senator from Iowa (Mr. HUGHES), the Senator from Hawaii (Mr. INOUYE), the Senator from South Dakota (Mr. McGOVERN), the Senator from New Mexico (Mr. MONTOYA), the Senator from Rhode Island (Mr. PASTORE), the Senator from Rhode Island (Mr. PELL), and the Senator from Alabama (Mr. SPARKMAN) are necessarily absent.

I further announce that, if present and voting, the Senator from Alaska (Mr. GRAVEL), the Senator from South Dakota (Mr. McGOVERN), the Senator from Rhode Island (Mr. PASTORE), the Senator from Rhode Island (Mr. PELL), and the Senator from California (Mr. CRANSTON) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Utah (Mr. BENNETT), the Senator from New York (Mr. BUCKLEY), and the Senator from Idaho (Mr. McCLURE) are necessarily absent.

I also announce that the Senator from Colorado (Mr. DOMINICK), the Senator from Arizona (Mr. FANNIN), the Senator from Arizona (Mr. GOLDWATER), and the Senator from South Carolina (Mr. THURMOND) are absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. THURMOND) would vote "nay."

The result was announced—yeas 64, nays 17, as follows:

[No. 221 Leg.]

YEAS—64

Abourezk	Domenici	Mondale
Aiken	Eagleton	Moss
Baker	Ervin	Muskie
Bartlett	Fong	Nelson
Bayh	Gurney	Packwood
Beall	Hart	Pearson
Bellmon	Haskell	Percy
Bentsen	Hatfield	Proxmire
Bible	Hathaway	Ribicoff
Biden	Huddleston	Roth
Brock	Humphrey	Schweiker
Brooke	Jackson	Scott, Hugh
Burdick	Javits	Stafford
Byrd, Harry F., Jr.	Johnston	Stevens
	Kennedy	Stevenson
Cannon	Magnuson	Symington
Case	Mansfield	Taft
Chiles	Mathias	Tunney
Church	McGee	Weicker
Clark	McIntyre	Williams
Cook	Metcalf	Young
Dole	Metzenbaum	

NAYS—17

Allen	Hansen	Randolph
Byrd, Robert C.	Helms	Scott, William L.
Cotton	Hruska	
Curtis	Long	Stennis
Eastland	McClellan	Talmadge
Griffin	Nunn	Tower

NOT VOTING—19

Bennett	Gravel	Montoya
Buckley	Hartke	Pastore
Cranston	Hollings	Pell
Dominick	Hughes	Sparkman
Fannin	Inouye	Thurmond
Fulbright	McClure	
Goldwater	McGovern	

So the bill (H.R. 12471) was passed.

Mr. KENNEDY. Mr. President, I move that the vote by which the bill was passed be reconsidered.

Mr. MOSS. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. KENNEDY. Mr. President, I move that S. 2543 be indefinitely postponed.

The motion was agreed to.

HEALTH SERVICES RESEARCH, HEALTH STATISTICS, AND MEDICAL LIBRARIES ACT OF 1974

Mr. KENNEDY. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on H.R. 11385.

The PRESIDING OFFICER (Mr. NUNN) laid before the Senate a message from the House of Representatives announcing its disagreement to the amendment of the Senate to the bill (H.R. 11385) to amend the Public Health Service Act to revise the programs of health services research and to extend the program of assistance for medical libraries, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.

Mr. KENNEDY. I move that the Senate insist upon its amendment and agree to the request of the House for a conference on the disagreeing votes of the two Houses thereon, and that the Chair be authorized to appoint the conferees on the part of the Senate.

The motion was agreed to, and the Presiding Officer appointed Mr. KENNEDY, Mr. WILLIAMS, Mr. NELSON, Mr. EAGLETON, Mr. CRANSTON, Mr. HUGHES, Mr. PELL, Mr. MONDALE, Mr. HATHAWAY, Mr. SCHWEIKER, Mr. JAVITS, Mr. DOMINICK, Mr. BEALL, Mr. TAFT, Mr. STAFFORD conferees on the part of the Senate.

ENERGY TRANSPORTATION SECURITY OR INSECURITY—AT WHAT COST?

Mr. COTTON. Mr. President, I ask unanimous consent to insert in the RECORD a statement which I made today before the Subcommittee on Merchant Marine of our Committee on Commerce, opposing the bills, H.R. 8193 and S. 2089.

The bill, H.R. 8193, carries the short title, "The Energy Transportation Security Act of 1974," and would require an increasing percentage of imported petroleum and petroleum products to be transported on higher-costing U.S.-flag tanker vessels.

If enacted, this legislation could have a profound, and probably adverse, effect upon the cost of meeting our current, pressing energy resource needs. I seriously question whether, as reflected in the short title "The Energy Transporta-

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Troublesome Proposed Amendments to the Freedom of Information Act - S. 2543

I. De Novo Review of Classified Records By the Courts

A. Concern:

The proposed amendment would encourage judges to "second guess" the validity of classified documents by the agencies responsible for the national security or foreign relations programs involved. Courts are ill equipped to perform this task because of a lack of background in the technical subject matter and inadequate resources to develop the necessary expertise. Although there may be unusual circumstances in which a judge has sufficient grounds for going behind an affidavit from the head of the agency supporting the validity of the classification, the statute should recognize the presumptive validity of the affidavit and establish a standard for in camera review to test the validity of the affidavit.

B. Suggested Amendment:

Add at the end of section 552(a)(4)(B) the following:

In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, a court may review the contested document in camera only

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if it is unable to resolve the matter on the basis of affidavits and other information submitted by the government. In conjunction with its in camera examination the court may consider further argument or an ex parte showing by the government in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency stating that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive Order referred to in Exemption (1), the court shall sustain such withholding unless it finds the withholding was without a reasonable basis under such criteria. On appeal the appellate court shall consider the matter de novo.

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II. Suspension of Employees:

A. Concern:

Authority in the district court to direct the imposition of a 10 to 60 day suspension from employment for those officers or employees responsible for an unreasonable withholding of an agency record will cause employees to avoid making decisions on Freedom of Information Act requests at the working level. They will fear that some court, some where, some time, may cite their denial of a record as "unreasonable." Thus, highlevel officials will be flooded with Freedom of Information Act decision requirements which will crowd out other important work. Comparability with penalities imposed on employees for security violations requires a system of administrative agency penalties.

B. Suggested Amendment:

Substitute for section 552 (A)(4)(F) the following:

Whenever records are ordered by the court to be made available under this section, the court shall on motion by the Complainant find whether the withholding of such records was taken in a good faith belief that the withholding had a reasonable basis in law. If a lack of good faith in withholding is found, the court shall advise the agency, which shall determine the officer or employee responsible for the denial

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and the extent to which disciplinary action against him is appropriate in accordance with agency procedures established by regulation.

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III. Rigid Time Limits for All Requests

A. Concern:

The 15 working-day time limitation for responding to all Freedom of Information Act initial requests and appeals is so inflexible as to be unworkable. In cases which are not routine officials with technical expertise or with high-level responsibility must make the judgment of whether the requested record falls within one of the broad exemptions of the Act and whether discretionary release can be made even when the record comes within an exemption. This time-consuming function in difficult cases will require priority attention by these individuals who frequently will be obliged to set aside other tasks which by any reasonable standard would be considered more significant to the national interest. Such priority attention will be required of any request under the Freedom of Information Act from any person for whatever reason, frivolous or substantial.

B. Suggested Amendment:

Substitute for the second paragraph of section 552(a)(6) the following:

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(6) Each agency upon any request for records made under paragraph (1), (3), and (3), of this subsection shall

* * * *

Any person making a request to an agency for records under paragraph (1), (2), and (3), of this subsection shall be entitled to seek a final agency determination of his request if the agency fails to comply with subparagraph (A) of this paragraph and shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (B) of this paragraph. The time limit set forth in subparagraph (A) shall, however, be extended for an additional period not exceeding 30 days (excepting Saturdays, Sundays, and legal public holidays) upon notification to the requester by the agency that further time is required because the agency has been unable to locate or collect the records or because the requested records are voluminous, and extensive effort is required to segregate available from unavailable records. The time limit set forth in subparagraph (B) shall, however, be extended for an additional period not exceeding 15 days (excepting Saturdays, Sundays, and legal public holidays) upon notification to the requester by

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the agency that further time is required because either the agency has determined that further review may result in the discretionary release of requested records coming within one of the exemptions of subsection (b), or the applicability of an exemption requires interagency consultation, or a personal review of the requested record by the head of the agency or his designee. Any notification of denial of any request for records under this subsection shall set forth the name and title or position of the officer or employee responsible for the agency's decision to deny such request.

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IV. Responding to Freedom of Information Suits in 20 Days

A. Concern:

The requirement to file an answer to a complaint in Freedom of Information Act litigation within 20 days rather than within the normal 60-day period available to the Government, offers the agency insufficient time to prepare the necessary litigation report. Although the reason for a final administrative denial of a request under the Act will usually form the substantive basis for the answer to the complaint, the preparation of that answer requires the careful preparation of an affidavit that outlines and indexes in accordance with Vaughn v. Rosen, the relationship of that exemption to the specific pages and paragraphs of the requrested document. This is particularly difficult when lengthy and technical classified documents are involved. Such a time-consuming task cannot be conscientiously performed within an abbreviated period greatly reduced by the time required for the complaint to reach the policy official who must supply the expertise for the affidavit and other aspects of the litigation report. Often a significant portion of the available time is exhausted through the mails in cases filed in United States District Courts located many miles distant from the responsible officials and records.

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B. Suggested Amendment:

Substitute for section 552(a)(4)(C) the following:

In any suit under this section, the plaintiff may file with his complaint a motion to reduce the time prescribed for the Government to answer complaints in civil actions to a period of not less than 20 days. The court shall dispose of any such motion as soon as possible, and it shall order such reduction in the time to answer as may be warranted in the light of the plaintiff's showing that such reduction will serve the public interest or avoid undue hardship, and as may appear consistent with the orderly and efficient conduct of the case.

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25X1 9. [redacted] - GLC) Met with Ed Braswell, Chief Counsel, Senate Armed Services Committee, and briefed him on the Director's concern about responding to the inquiry from Norvill Jones, of the Muskie Surveillance Subcommittee. I left with Braswell a copy of the reply which we had planned to send to the Subcommittee and told Braswell we were delaying our response until I discussed the matter with Jones.

I also told Braswell we are pulling together several lists of items of "good things" Senator Stennis might discuss on the floor if it became necessary and that I would get these to him early next week.

I mentioned the routine request we had received from the Committee for comments on Senator Mondale's proposal, S. Res. 404, and asked Braswell if he wanted a speedy response. Braswell said they plan no action on the Resolution and not to rush our reply.

25X1 10. [redacted] - GLC) Dropped by to see John Goldsmith, Senate Armed Services Committee staff, who gave me a package of material on the Phoenix Program that the Director had submitted to the Committee in his confirmation hearings and which he wished to have returned. In the course of our conversation, Goldsmith said it might be helpful to the Agency if we prepared some sort of unclassified justification for our covert activities which people like he and others might use in contacts with various members of the news media. I told him I appreciated his thoughtfulness and would get some material to him.

25X1 11. [redacted] - GLC) Met with Norvill Jones, Muskie Surveillance Subcommittee staff of Senate Foreign Relations, and talked with him at considerable length about his questions on Agency use of electronic surveillance. See Memo for Record.

25X1 12. [redacted] - JGO) After talking to Frank Slatinshek, Chief Counsel, House Armed Services Committee, I talked to Robert Wichser, Administrative Assistant to Representative Paul Findley (R., Ill.), and scheduled a meeting for
25X1A 2:00 p.m., Monday, 30 September, for a briefing on Soviet facilities in South Yemen--the Port of Aden. [redacted] OCI, has been advised.

25X1 13. [redacted] JGO) Talked to Scott Cohen, Executive Assistant to Senator Charles H. Percy (R., Ill.), who told me they have no one associated with their office by the name of Glenn Reed. This related to a phone call earlier in the week from Glenn Reed who identified himself as a member of Senator Percy's office. No further action is indicated.

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25X1 14. [redacted] - JGO) Talked to Werner W. Brandt, Legislative Assistant to Representative Thomas S. Foley (D., Wash.), who told me that the Representative is Chairman of the Subcommittee on Livestock and Grains, House Committee on Agriculture, and as a result, would like a breakfast briefing on Soviet and Chinese feedgrains and wheat and climatology. 25X1A Mr. Brandt will discuss a time for the briefing with Chairman Foley and call us during the day on Monday, 30 September. [redacted] OCI, has been advised.

25X1A [redacted]

25X1 16. [redacted] - LLM) Called Jack Maury, Assistant Secretary of Defense for Legislative Affairs, to inquire as to the position of the Department with respect to the Freedom of Information Act amendments (H. R. 12471). He said David O. Cooke, Deputy Secretary for Administration in the Comptroller Organization, Department of Defense, or Marty Hoffman were handling the problem and that he would look into it. I pointed out that NSA no doubt would have the same problems we envisaged and that we were a bit puzzled by their silence.

I asked for Mr. Maury's reaction to printing up for Agency circulation copies of his article in "Studies in Intelligence" on Congressional relations explaining it might cause him some problems in his present office and it is doubtful that the Agency should be circulating its article on how Congress works. Mr. Maury acknowledged the article belongs to the Agency but was not opposed to circulating it after some editing.

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25X1 17. [redacted] - LLM) David O. Cooke, Deputy Secretary for Administration in the Comptroller Organization, Department of Defense, at Jack Maury's, Assistant Secretary of Defense for Legislative Affairs,

25X1A suggestion called on the Freedom of Information Act amendments (H. R. 12471), indicating that he is frequently in touch with [redacted] OGC, on this bill. Per Cooke, DOD has not made up its mind on whether or not to recommend a veto, and believes the bill is veto proof and that the Congress has made major concessions. I pointed out that very little concession had been made on the provision in the bill forcefully addressed by the President in his letter to the conferees concerning the breaking of executive classification in sensitive military, foreign, and intelligence fields by the Judiciary and Cooke agreed. I told him we were leaning heavily towards recommending veto as was Justice and in response to his query that State perhaps would not. When asked how the other departments and agencies were lining up, I told him we were not making a tally and did not know.

25X1A CIA INTERNAL USE ONLY [redacted]

GEORGE L. CARY
Legislative Counsel

cc:
O/DDCI
25X1A Ex. Sec.
[redacted]
Mr. Thuermer
Mr. Warner
Mr. Lehman
Mr. Clarke
EA/DDO
DDI
DDA
DDS&T
Comptroller

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