

necessarily include facts as well as law and policy. Policy is made in the light of facts, and even purely legal memorandums contain analyses of factual situations which must necessarily be incorporated in the memorandums. Litigation files encompass law and fact inextricably. Moreover, those memorandums which deal with factual matters should be equally protected from indiscriminate disclosure, as they have been in the past. A factual report of a Treasury agent or informer which may not be part of an "investigatory file" protected by exemption (7) is as worthy of protection as a purely legal memorandum. The privilege against disclosure of communications, whether dealing with fact, law, or policy, within an agency or between agencies of Government is not only recognized and protected by the courts but supervised by them to prevent unjustified withholding. See Kenneth Culp Davis, "Administrative Law," volume I, sections 3.13, 8.15. Clearly preferable would be an exemption of "communications between officers or employees of the U.S. Government relating to the internal operations of the Government, excepting communications which are solely compilations of fact not otherwise confidential under this section."

*Exemption (6).*—The Department believes that the modifier "clearly" in this exemption should be deleted since it seems to contemplate some unwarranted disclosure and to encourage disclosure of personal files which until now have been kept confidential. If any unwarranted disclosure occurs, one result may be to expose the United States under the Federal Torts Claims Act, 28 U.S.C. 2674, to liability for a tortious invasion of personal privacy. See Harper and James, "The Law of Torts," sections 9.5–9.7. On the whole, it would be preferable simply to exempt personnel and medical files and similar private personal matters.

*Exemption (7).*—The limitation on disclosure of investigatory files compiled for law enforcement purposes is interpreted to mean that private parties cannot obtain information from such files except in the context of discovery proceedings in litigation as now provided by law. But the bill does not make this clear, as it should. Anything less than such protection for criminal investigations would disrupt law enforcement, expose informers to reprisals, and harm innocent citizens. However, more than this protection is needed both with respect to law enforcement and to the investigation of civil matters which should be kept confidential until the responsible agency has reached a decision.

With respect to the investigation of crime, effective law enforcement requires withholding from indiscriminate disclosure the overall plans, procedures, and instructions of Government agencies on law enforcement matters as, for example, in connection with the organized crime drive. It should also be apparent that the investigation by an agency, in other than criminal matters, of appropriate means to carry out a statutory responsibility may also need to be withheld from indiscriminate disclosure until the investigation culminates in a final decision, such as a report to Congress. One clear example of this is the investigation by the Treasury of the most practical and appropriate changes in the silver content of coinage to be recommended to Congress. As pointed out in connection with exemption (5), these internal matters would not be protected under that exemption since they necessarily deal with factual problems.

*Exemption (8).*—The Treasury Department considers this exemption necessary.

#### IV. REPEAL OF INCONSISTENT PROVISIONS

Section 2 of the House bills repeals all laws or parts of laws inconsistent with the requirement that every agency make all of its records promptly available to any person, except records or information within the eight enumerated exemptions. But the instant repeal of such laws might throw doubt on the continuing validity of regulations on disclosure of national defense and foreign policy matters until further Executive orders and guidelines could be issued. Also a general repealer is often uncertain in its effect until after litigation. Therefore, it is the Department's view that no amendment of section 3 of the APA should apply until after a reasonable period of adjustment and that, in the interest of clarity and to preclude any future misunderstanding, the provisions and parts of provisions repealed should be explicitly indicated in a repeal provision.

*Conclusion.*—It should be stressed that the foregoing discussion of the provisions of the legislation should not be taken as suggesting that if the deficiencies which are pointed out are remedied, the bills would then be acceptable. Our basic position is that the discretion of the Executive must, in the last analysis, continue to exist. The President, charged as he is by the Constitution with the duty of proper enforcement of the laws, cannot have his constitutional duties curtailed by legislation which would substitute another judgment for his.