FEDERAL PUBLIC RECORDS LAW

(PART 1)

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HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

EIGHTY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, H.R. 6172, H.R. 6739, H.R. 7010, H.R. 7161

BILLS TO AMEND SECTION 161 OF THE REVISED STATUTES WITH RESPECT TO THE AUTHORITY OF FEDERAL OFFICERS AND AGENCIES TO WITHHOLD INFORMATION AND LIMIT THE AVAILABILITY OF RECORDS

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FEDERAL PUBLIC RECORDS LAW

(Part 1)

TUESDAY, MARCH 30, 1965

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

Present: Congressmen John E. Moss (chairman of the subcommittee), John S. Monagan, Robert P. Griffin, and Donald Rumsfeld.

Also present: Samuel J. Archibald, chief, Government Information; David Glick, chief counsel; Benny L. Kass, counsel; Jack Matteson, chief investigator; Robert Blanchard, investigator; and J. P. Carlson, minority counsel.

Mr. Moss. The subcommittee will be in order.

The Foreign Operations and Government Information Subcommittee begins consideration of bills introduced by 15 Members of the House of Representatives to establish a Federal public records law. The bills are based on many years of study—in the House of Representatives, in the Senate, and in the executive branch—of the problems created by restrictions on public access to Federal records.

Our task in these hearings will be to make a careful, objective assessment of the testimony of witnesses who will have helpful comments on the proposed solutions for Government information problems. We are faced with the challenge of reconciling, through established democratic processes, often conflicting needs: the need for people to be fully informed about the actions of their Government and the need for protection of information which, if indiscriminately disseminated, would make impossible the effective functioning of the Government.

The legislation before this subcommittee is based upon 10 years of study by the Government Information Subcommittee in the House of Representatives and upon careful and competent work by the Senate, particularly by the Administrative Practices and Procedure Subcommittee under the chairmanship of Senator Edward V. Long of Missouri. In the House, the 10 years of study has proved—among other things—the unfortunate fact that governmental secrecy tends to grow as Government itself grows.

The obvious need for adequate information in a democratic society needs no emphasis, for without the knowledge necessary to cast an intelligent vote, the value of the vote itself is diminished. And without the fullest possible access to Government information, it is impossible to gain the knowledge necessary to discharge the responsibilities of citizenship.

But it is not easy to guarantee access to all Government information; the protection of some types of information is as important as the dissemination of others. As the Government grows, as more and more Government services are provided, more and more information from the private sectors of our lives is gathered by the Government. In considering what information held by the Government shall be available to all of the people, we must consider not only the need for a well-informed public but also the need to protect the right of individual privacy.

Many States of our Nation have solved this problem. Many State legislatures have enacted public records laws, but the Federal Government lags far behind. Many civic and professional organizations have recognized this shortcoming, and we will hear their testimony during these hearings. Many Government officials and organizations of Government employees have recognized the need for clear guidelines to point the way to solutions of Government information problems. We will hear their testimony.

The legislation before this subcommittee has been proposed to fill a legal void—a void into which executive agencies have moved because of the ambiguities of the only general information laws which Congress has passed. I know that no one supporting the legislation would want to throw open Government files which would expose national defense plans to hostile eyes. I do not believe, on the other hand, that Government employees have any desire to impose the iron hand of censorship on routine Government information. These two extremes are obvious. Our task will be to work out an in-between solution which will guarantee the right of every citizen to know the facts of his Government while protecting that information which is necessary to the functioning of government.

(H.R. 5012 introduced by Hon. John E. Moss, of California, follows:)

[H.R. 5012, 89th Cong., 1st sess.]

A BILL To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 161 of the Revised Statutes of the United States (5 U.S.C. 22) is amended to read as follows:

"SEC. 161. (a) The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

"(b) Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records that the complainant seeks are situated, shall have jurisdiction to enjoin the agency from the withholding of agency records and information and to order the production of any agency records or information improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. As used in this subsection,

the term 'agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress or the courts.

"(c) This section does not authorize withholding information from the public or limiting the availability of records to the public except matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intra-agency memoranda or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

SEC. 2. All laws or parts of laws inconsistent with the amendment made by the first section of this Act are hereby repealed.

(The following identical bills were also introduced:)

H.R. 5013 by Hon. Dante B. Fascell of Florida.
H.R. 5014 by Hon. Torbert H. Macdonald of Massachusetts.
H.R. 5015 by Hon. Robert P. Griffin of Michigan.
H.R. 5016 by Hon. Ogden R. Reid of New York.
H.R. 5017 by Hon. Donald Rumsfeld of Illinois.
H.R. 5018 by Hon. Ed Edmondson of Oklahoma.
H.R. 5019 by Hon. Thomas L. Ashley of Ohio.
H.R. 5020 by Hon. Richard D. McCarthy of New York.
H.R. 5021 by Hon. Charlotte T. Reid of Illinois.
H.R. 5237 by Hon. Sam Gibbons of Florida.
H.R. 5406 by Hon. Robert L. Leggett of California.
H.R. 5520 by Hon. James H. Scheuer of New York.
H.R. 5583 by Hon. Edward J. Patten of New Jersey.
H.R. 6172 by Hon. Charles A. Mosher of Ohio.
H.R. 6739 by Hon. Jack Edwards of Alabama.
H.R. 7010 by Hon. William B. Widnall of New Jersey.
H.R. 7161 by Hon. John N. Erlenborn of Illinois.

Our first witness this morning will be Norbert A. Schlei, Assistant Attorney General.

Mr. Schlei, would you come forward?

STATEMENT OF NORBERT A. SCHLEI, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY WEBSTER P. MAXSON, DIRECTOR, OFFICE OF ADMINISTRATIVE PROCEDURE, DEPARTMENT OF JUSTICE

Mr. SCHLEI. Yes indeed, Mr. Chairman. Thank you, Mr. Chairman.

It is a pleasure for me to appear before this committee, Mr. Chairman, and I thank the chairman and the subcommittee for giving me this opportunity to appear.

I might say that as a Californian, it is a particular pleasure to appear before the chairman of this subcommittee, and I only wish that I was able this morning to be more affirmative than I am going to be in the course of my testimony.

I have a statement which I would like to present.

Facilities for collecting and disseminating news and information are of special significance in a democracy. Our communications media are unequaled elsewhere in the world and constitute an invaluable national asset.

The United States has some 20,200 newspapers and magazines. In 1964 our daily and Sunday newspapers printed more than 18 billion copies. A single weekly news magazine currently claims almost 13 million readers. At the present time the number of broadcast radio and television stations operating in this country is 7,257. In the last few years extensive sales of automobile radios and small, portable transistor receivers have given a new mobility to the listening and viewing habits of our highly mobile society. It is estimated that there are now in regular use at least 62 million television sets and 214 million radio receivers—93 percent of all American homes are said to be equipped with television sets.

The increasing attention of Americans to public affairs is responsible in part for the expansion of our broadcast facilities. Broadcast industry spokesmen report a growing public demand, particularly in television, for the so-called public affairs specials, discussion programs, and interviews with public figures prominent in the news, as well as more complete news coverage generally.

Through our extensive communications facilities, the American public has become the best informed society in the history of the world. The real significance of this development lies in the strength which it adds to the fulfillment of the promise of American democracy. The steady flow of information concerning public affairs to all Americans, wherever located and whatever their status, is truly the lifeblood of our democratic system.

A genuine democracy is governed by the composite judgments of its people. Unless those judgments are informed judgments, of necessity the system ultimately will fail, and until such time as it does, it cannot be a real democracy without an informed public.

Therefore, where the press and other observers of public events may be wrongfully shut off from sources of information, democracy suffers.

Indeed, the damage wrought in any particular instance may be far greater than the denial of public understanding which results directly from nondisclosure. Unjustifiable secrecy in public affairs breeds distrust, suspicion, and rumor, and these are the most insidious of all enemies of enlightenment. No problem is of greater ultimate consequence to the sucess of our democratic system than the fundamental problem of public information.

The considerable frequency with which the President discusses developments, formally and informally, with representatives of the news media evidences his earnest desire to keep the public as fully informed as possible concerning governmental affairs. As for the Department of Justice, I can assure you that the Attorney General is determined that this Department shall stand second to none in making available to the American people, to the press, and to interested individuals all of the information in the possession of the Department which properly can be disclosed.

In general, I am sure that no group more fully appreciates the need for public understanding of the functions and operations of government than that relatively small body of individuals who are the heads of the Federal departments and agencies. Every such official knows or soon learns from some part of his own experience that nothing in public service can be more frustrating than to toil in an area of widespread public misunderstanding. In such situations he sees govern-

ment in its most unsatisfactory, most difficult, and generally most ineffectual form.

At the same time, if our system is to surmount its challenges, disclosure must always accord with the public interest. A successful democracy will never be built upon freedom of information achieved simply by affording to any and all persons unrestricted access to official information. Because of the scope and complexity of modern government, there are, literally, of infinite number situations wherein information in the hands of the government must be afforded varying degrees of protection against public disclosure. The possibilities of injury to private and public interests through ill-considered publication are limitless. And again, no one quite so fully appreciates the necessity for nondisclosure as the public official who is charged with the custody of the records involved and the administration of the program to which they relate.

The problem, so-called, of public information is, therefore a very real problem and a very difficult one. Mr. Paul Conrad, as spokesman for some 22 daily newspapers in the State of Washington, described it well in a letter to Senator Magnuson in 1963 in support of the Senate bill to revise the public information section of the Administrative Procedure Act, S. 1666, in the 88th Congress. Mr. Conrad wrote:

> If ours is in fact a government by and for the people, then there is a place for secrecy and a place for easy access to information about government. Democracy requires many delicate balances, and this is one. Too much secrecy, or too free access, can render a great disservice to the people.

The "delicate balance" to which this letter refers often requires the most sensitive of judgments. The basic thrust of H.R. 5012, the bill before this subcommittee, is to eliminate any applicaiton of judgment to questions of disclosure or nondisclosure, and to substitute, therefor, a simple, self-executing legislative rule which would automatically determine the availability to any person of all records in the possession of all agencies, except Congress and the courts.

The bill would reserve to the President authority to classify as "secret" information in two designated areas—national defense and foreign policy. However, even in these two areas, the bill seeks to prohibit nondisclosure except as the President, by Executive order, identifies the matters which he has determined must be kept secret and specifically requires that they be withheld. Otherwise, however, H.R. 5012 attempts to leave nothing to Executive discretion.

I respectfully submit, Mr. Chairman, that this approach is impossible and can only be fatal to this committee's undertaking. There is no way, I submit, of eliminating judgment from the means we use to resolve this problem, and substituting for that judgment a verbal formula to be applied by another branch of government which is not charged with responsibility for execution of the laws. The problem is too vast, too protean, to yield to any such solution.

I do not, Mr. Chairman, come prepared this morning to document in detail the particular ways in which H.R. 5012 would adversely affect the public interest. The other departments and agencies, each in turn, will do that job of documentation as to the types of records and information with which each is particularly concerned.

In a sense, therefore, my testimony is a preface or introduction to the reports and testimony of the rest of the executive branch.

I come to express the basic thesis to which we believe the detailed evidence leads: that there is no form of words that can protect the public interest well enough to justify substituting that form of words for "executive judgment" and "discretion"; that the fault is not with the draftsmanship of this proposal but with its approach.

There is one other point that I would like to make in some detail. In its consideration of the bill which resulted in the act of August 12, 1958, Public Law 85–619, amending 5 U.S.C. 22 to add the provision now sought to be deleted, Congress had before it a complete exposition of the doctrine of Executive privilege and its history and development. Since it is set forth fully in the legislative history of that amendment, I shall not present it again at this time.

As the legislative history of the 1958 amendment demonstrates, Congress at that time acknowledged the basic proposition that, under our fundamental principle of separation of powers, the Constitution fixes the boundaries between the three coequal branches of our Government, and no act of any branch can diminish, remove, or otherwise impinge upon the constitutionally derived authority of another branch.

The 1958 amendment was enacted and approved by the President only upon assurances in the House and Senate debates that the amendment did not upset or diminish any power of the Executive which he derived from the Constitution.

President Johnson has made it clear that, like President Kennedy before him, he believes the doctrine of Executive privilege should be used as sparingly as possible, in situations where its use is clearly and urgently necessary. He has sought to prevent abuse of the doctrine by directing that it not be asserted except in situations where he has personally reviewed the matter and authorized its use. As a result, the doctrine has never once been used during this administration (see p. 202).

However, this attitude on the part of this administration, while strongly maintained is, of course, a matter of policy rather than of law and does not reflect any change in the applicable law. And in the present consideration the same basic proposition of constitutional law is again applicable to the same question.

H.R. 5012, like H.R. 2767 in the 85th Congress, which became the 1958 amendment, cannot impinge upon the constitutionally derived authority of the Executive to withhold documents of the executive branch where, in his discretion, he determines that the public interest requires that they be withheld. Since H.R. 5012, by its terms, seeks to limit the Executive in the exercise of his constitutional authority to determine whether executive documents are to be disclosed, by setting forth in subsection (c) limited exceptions to the absolute disclosure requirement of subsection (b), the bill would contravene the separation of powers doctrine and would be unconstitutional.

Although the provision of the bill for judicial relief is unclear, if it would remove from the executive branch to the judicial branch the authority to determine, de novo, whether documents of the Executive are to be disclosed or not disclosed, that provision is also unconstitutional on the same ground.

H.R. 5012, like H.R. 2767 in the 85th Congress, can result in a valid enactment only if it leaves undisturbed the inherent authority of the executive branch to govern the disclosure and nondisclosure of its records.

In sum, Mr. Chairman, we believe that H.R. 5012 is unwise in that it seeks to resolve a terribly complex problem in a too simple way that does not recognize the complexities involved. Further, to the extent that the bill would seek to shift to the judicial branch a constitutional prerogative of the Executive, we believe it would be unconstitutional.

Again, Mr. Chairman, I thank the chairman and the subcommittee for this opportunity to appear.

Mr. Moss. Thank you, Mr. Schlei.

Mr. Monagan.

Mr. MONAGAN. Thank you, Mr. Chairman.

I find some difficulty in this position, viewed from the point of view of a legislative committee and in the light of the experience that I have had and I know other members of the committee have had in attempting to get information from the executive branch.

The difficulty with this position is that it seems to me to leave the standard entirely within the executive branch, which is in a sense saying that the executive branch could never err, could never have a faulty or illegal basis, let's say, for withholding information.

I have seen examples in which a congressional committee, in the pursuit of its legitimate activities with relation to the foreign aid program, has sought to get information from the executive branch and has been met by the assertion of executive privilege.

This has been made in different situations. I will not go into the varieties now. Some of them are more complicated and more difficult than others.

But even in a case in which there was an executive session and a confidential situation where the disclosure would only be to the committee itself, we have been met by a refusal.

And, as a practical matter, even though a committee may throw its weight around, may have conferences, and so forth, about the only thing you can do about it if you are left with the standard that you propose is to bring somebody before the Congress and charge him with contempt of Congress. And that is a very extreme and impractical method of procedure.

So that I am suggesting to you that you are not permitting us to take any halfway step or to move at all in the direction of setting up some standard whereby this information could be judged and the validity of the request could be determined.

Mr. SCHLEI. Congressman, let me begin answering your question by saying that I would not deny that there are examples of abuse in this area. It is obvious; it is clear. This committee has brought out many such examples in its operations.

However, I would suggest, as you perhaps indicated, that there are lots of ways for this committee and for the legislative branch generally to exert pressure on the executive when the executive interprets——

Mr. MONAGAN. I have not suggested that any of them would be effective, though. I do not believe that they would.

Mr. SCHLEI. Well, I have certainly seen many examples of the quick production of information at the request of a congressional committee that was not forthcoming perhaps at the request of someone else earlier.

My experience has been that the pressure exerted by such bodies as this committee is very effective and is very salutary and helpful and healthful to the process of government.

But when there is a collision, what is occurring is something that occurs not infrequently in our system of separation of powers. There are legislative prerogatives that the executive may not touch and that the judicial branch may not touch.

The judicial branch will refuse to entertain a challenge to the qualifications of a legislator, for example, although he may be clearly unqualified to take his seat in terms of standards in the Constitution and perhaps in the law of his State. Congress is made the sole judge of the qualifications of its Members by the Constitution, and the other branches may not meddle.

There is a remedy for misuse of executive prerogative and legislative prerogative and judicial prerogative, which is to go to the people and to use the political process as a remedy against such abuses.

I think that the political process within the three branches of the Government corrects many abuses. And the forum that there is—and it is a highly effective one—for any abuse of prerogative that is not reachable by that process is to go to the people, and the press will be quick I think to bring to the attention of the public abuses in the field of public information.

Mr. Moss. Would you yield at that point?

Mr. MONAGAN. Yes.

Mr. Moss. On this matter of the courts not being willing to look at the qualification of a legislator, have not the courts in the last few years opened a very broad new area where historically, from the very beginning of the republic up until the time of the Tennessee case before the Court, *Baker*——

Mr. SCHLEI. *Baker* v. *Carr*?

Mr. Moss. Yes. The courts would not look to a matter of apportionment of a legislature. But they did.

Mr. SCHLEI. That is true, sir.

Mr. Moss. Have they moved into the legislative area then by expanding their authority? Or have they expanded their authority? What have they done?

Mr. SCHLEI. Well, if you ask for my personal view, Mr. Chairman, it has been my opinion since I became a lawyer and first studied these matters that the Supreme Court made a great error and refused to discharge its constitutional function when it refused to hear the suit of a voter who was denied an effective right to vote by malapportionment.

And that wrong decision, what I considered a wrong decision, was in effect for some 25 years, during which time—I think it was about that period of time—the Supreme Court and other Federal courts did not look into apportionment matters.

My view is that the 14th amendment should have been enforced with respect to apportionment matters all the time. And the Court has now returned to what it should have been doing.

I do not think the Court has ever tried to put aside any legislator's election or to void any acts of a legislator. It has never gotten into the qualifications of a particular legislator to sit.

Mr. Moss. I raised that because I doubt if these are immutable facts. The courts do from time to time change their opinion as to the authority of the courts.

Mr. SCHLEI. Well, that is true, Mr. Chairman. I certainly hope they do not try to do anything about the principle of separation of powers, which I would consider a cornerstone of our whole system of government, one of its most basic principles.

Mr. Moss. I think right in the area in which your testimony is directed today that we would be able to put specific citations in the record where the Court has asserted an authority to determine whether information would be made available or would not. So that this is not a clean slate that we are going to start writing on today. This is one where there is some record.

Mr. SCHLEI. Of course there is, sir.

Mr. Moss. And it tends to support your views on occasion and the views inherent in my legislative proposal on other occasions.

Thank you, Mr. Monagan.

Mr. MONAGAN. Well, I agree with the chairman. My period of intimate acquaintance with constitutional law was about 1937, and I must say that there is quite a difference in the adjudications of the Court today and what was considered to be the legitimate bounds of constitutional law in those days. But that is a different war. I do not think we can get into that at this time.

But just to take one specific instance. You spoke about the force of public opinion. Well, the case that I have in mind was a situation in which a subcommittee was interviewing witnesses from the executive branch in an executive session, and, importantly, there was no confidential matter involved in the sense of being a security situation, something that should not be disclosed to the public. At the same time, there was refusal in that instance to make the information available, with the committee stating that it would not be made public but would be used only by the committee.

Now, as a practical matter, there is no way that you can cope with that situation. Theoretically, yes, you could go through the process of finding the witness in contempt and then bringing him before the bar of the House. But——

Mr. SCHLEI. Congressman, may I ask whether that was not in the previous administration, the Eisenhower administration?

Mr. MONAGAN. No, because this was in—well, I cannot give you the date. It was this subcommittee, and while Mr. Hardy was chairman of the subcommittee, so it was about 1960 I would say.

Mr. SCHLEI. Well, I recall, Congressman, that when the Kennedy administration took office there was a pending controversy with the Eisenhower administration over AID records, and I think the Comptroller General was involved in the controversy in some way.

I did not personally participate in the resolution of that, but I understood that it was compromised in some way, and it has not since arisen again.

Mr. MONAGAN. I would not say that it was resolved on the side of making the information available. It was resolved on the side of not taking any further steps.

Mr. Griffin was on the subcommittee.

Mr. GRIFFIN. I am trying my best to remember the specific instance. My general recollection is in agreement with the gentleman.

Mr. Moss. I believe it involved a case where, if the law had been followed to its ultimate, the payment of certain funds would have been ruled illegal by the Comptroller General as a result of a statutory provision in one of the foreign aid authorization acts.

Mr. SCHLEI. Something about the inspector general's office.

Mr. Moss. It involved the office of the inspector general in the Agency for International Development. And it was resolved, as many of these conflicts are, by both sides backing down a little, moving into the gray area of accommodation, rather than a showdown on either side.

Mr. SCHLEI. Well, if I may offer the view very respectfully, Mr. Chairman, I think that that way of resolving these disputes is very often the best way of resolving them from the standpoint of the public interest, and that we are all better off because that was the case. There was no clear-cut victory on either side.

Mr. MONAGAN. Mr. Chairman, I am sorry Mr. Hardy is not here. I am sure he could comment much more pungently than I on the solution. But perhaps the staff could check the facts.

(The material referred to follows:)

STAFF MEMORANDUM

To: Congressman John E. Moss. MAY 7, 1965.
From: Benny L. Kass.

The facts discussed referred to an investigation in 1961 by Foreign Operations and Monetary Affairs Subcommittee of the House Committee on Government Operations, under the chairmanship of Representative Porter Hardy. The subcommittee began an investigation into the operations of the International Cooperative Administration programs in Peru and attempted to obtain the necessary documents and reports. Although a formal claim of "executive privilege" never was made, State Department witnesses who appeared before the subcommittee were initially instructed by their department not to testify. When President Kennedy learned of this matter, he immediately ordered the instructions recinded, and 24 hours later the witnesses were ready to cooperate with the subcommittee.

Mr. GRIFFIN. Perhaps this is an instance in which the committee should provide the witness with a memorandum, instead of the other way around, and ask him to comment.

Mr. MONAGAN. I merely make the point that there are difficulties that we could find a formula for that would not be reached by the approach that is taken by the witness.

Thank you, Mr. Chairman.

Mr. Moss. Mr. Griffin.

Mr. GRIFFIN. Mr. Chairman, I want to apologize first for being a little bit late. I was attending to other duties also important to a Congressman. On this particular occasion, a ninth-grade class of Western Junior High School, of which my son is a member, is visiting this committee room to get a firsthand view of our Congress in action.

Mr. Schlei, I will not attempt to interrogate you. I would comment, however, that I am disappointed that the thrust of your statement is a complete rejection of the bill.

I can understand that the bill may not be perfect and that perhaps there are other areas that should be exempt. As I read your state-

ment, I found no suggestions of that nature, merely that the question of what should be made public is a matter of bureaucratic judgment.

You do not want legislative judgment in this field. You do not even limit the judgment to the President. Presumably it would be bureaucratic judgment, and we would be left with their decision?

Mr. SCHLEI. Well, I think, Congressman, that the points that I would make are, first, that there has to be a residue somewhere for discretion, that it is not possible to create a closed number of categories, any number of specific categories, without the possibility of disastrous oversight; that there has to be a catchall category, if you like, that leaves some discretion.

And I think that, secondly, there has to be a preservation of the constitutional executive prerogative. Now, that does not have to be given to every bureaucrat, as you say. I personally would think that it ought not to be confined by any legislative proposal to the President himself. Perhaps to the heads of departments or agencies.

I would not take the position that the exercise of that discretion could not be confined by legislative enactment to a limited number of officials.

But I think that there has to be a preservation of the constitutional prerogative. Somebody has to have it, retain it. And, secondly, there has to be a preservation of a category that allows a discretionary withholding when it is considered essential in the public interest.

Mr. GRIFFIN. Well, I think it should be registered in the record that there is a good deal of opinion to question whether there is a constitutionally derived Executive privilege. Certainly there is a lot of question about the scope of it. I will not try to argue that here but just register that Executive privilege is not necessarily accepted by all members of this subcommittee, as you might expect.

Mr. SCHLEI. I do understand.

Mr. GRIFFIN. I want to associate myself generally with the opening statement made by the chairman of the subcommittee and express the hope that these hearings will be fruitful in developing good legislation, perhaps improve the bill that I joined in introducing. The legislation should make it possible for the public, and particularly Congress, to get more information about what is going on in our Government.

Thank you, Mr. Chairman.

Mr. MOSS. Thank you.

Mr. Schlei, I would like to turn to page 8 of your statement.

Mr. SCHLEI. Yes, sir.

Mr. MOSS. It comments upon the legislative history of the 1958 amendment in a manner which is contrary to my recollection of that history, in which I participated very actively.

You say:

> The 1958 amendment was enacted and approved by the President only upon assurances in the House and Senate debates that the amendment did not upset or diminish any power of the Executive which he derived from the Constitution.

I refer to that history in one exchange with Mr. Johansen of Michigan. I will read his question:

> May I interrupt the gentleman at this point, because I think in my own mind I now have the nub of the issue. If this bill were adopted, what discretionary authority does the department head have to withhold information where it is

not specifically provided by law that he must withhold information? Is there surviving with the adoption of this bill a discretionary authority in the department head to withhold information?

My response:

I want to be very careful on this language, because the gentleman is asking me if there is an inherent authority, as has been claimed by every Executive from Washington to Eisenhower. I would say that if there is such authority, if there is that inherent power, it is not affected by this change in this statute. But I will not concede that the broad and naked power claimed does exist in that. I want that very clear in my response. If it exists, it is not affected.

Throughout those hearings and throughout the debate in the House and in a statement following the message of President Eisenhower when he signed the legislation, I went to extreme lengths, was extremely cautious, to make it very clear that, as the spokesman for the committee and as an exposition of my own views, we did not recognize anything. We did say that if it existed we were not, by that statute, upsetting it. We could not.

Now, can the Congress write law requiring information to be supplied to the Government?

Mr. SCHLEI. To be supplied to other branches of the Government?

Mr. Moss. Yes, to the executive branch. I think here we will confine our discussion to the executive branch.

Mr. SCHLEI. Well, now, I do not quite understand——

Mr. Moss. All of the executive departments and agencies. I would exclude from the executive branch of the Government the independent regulatory commissions.

Mr. SCHLEI. I see. But the law would require that the executive branch supply information to the public?

Mr. Moss. No; it would require——

Mr. SCHLEI. Or to the Legislature?

Mr. Moss (continuing). That the public supply information to the executive branch.

Mr. SCHLEI. Oh, yes indeed; sir.

Mr. Moss. All right. Can the Congress then direct that that information be either privileged or widely available to anyone who seeks it?

Mr. SCHLEI. Yes; it can, Mr. Chairman.

Mr. Moss. In other words, the Congress has the right to say John Q. Citizen: "You're going to respond to this questionnaire of the Government under penalty"——

Mr. SCHLEI. Yes, sir.

Mr. Moss (continuing). "If you're inaccurate," and it can further direct, once the executive received this information, the manner in which it can be disposed of or treated?

Mr. SCHLEI. Yes, sir.

Mr. Moss. Now, much of the information that we are discussing here is information which is supplied the Government as a result of the requirement of law, is it not?

Mr. SCHLEI. Some of it certainly is, yes, sir.

Mr. Moss. A great portion of it is; is it not?

Mr. SCHLEI. Yes, sir.

Mr. Moss. Does the Congress then have the authority, having failed to do it at the time it originally authorized the executive to

require this information, to come in now and direct the manner or the rules which would govern the use of this information?

Mr. SCHLEI. I think, Mr. Chairman, that there is no question that there is a legislative power to regulate the handling and the availability of that information. But I would also take the position that there is a residual constitutional authority in the President and the heads of the executive departments in particular situations to assert executive privilege.

Mr. Moss. All right. Can the Executive require the public to supply information under penalty of law if they fail to give it correctly?

Mr. SCHLEI. No, sir. Not without some legislative authority, not that I know of.

Mr. Moss. In other words, the executive, then, becomes the custodian of the information which develops as a result of the requirement by law——

Mr. SCHLEI. Yes, sir.

Mr. Moss (continuing). Written by the Congress?

Mr. SCHLEI. Yes, sir.

Mr. Moss. And he does not have an inherent authority, then, to require that this information be supplied by the public?

Mr. SCHLEI. No, sir; he does not that I know of.

Mr. Moss. None at all? Well, then, I want to express the same disappointment expressed by my colleague Mr. Griffin that we would be faced here with a rejection, a blanket rejection, of any possible amendment to law affecting records held by the Government and the right and sometimes the need of the public to have orderly access to them.

Mr. SCHLEI. Well, I——

Mr. Moss. I think it would have been far more constructive had the Department of Justice broken this down and dealt with the areas where they felt Congress could properly direct the method of use or disposal and those areas where they felt there was a strong privilege vested in the Executive.

Now, we are not trying to reach executive privilege. I do not know what it is. It has been variously stated by various Presidents. Some have claimed that you could delegate it down to the lowest echelon of the career service and that they could act with all the power of the President. And others have said that only the President can order, in each and every instance, withholding of information.

Now, I do not know where it is. And the Justice Department does not know where it is.

Mr. SCHLEI. Well, I can tell you, Mr. Chairman, that in this administration the President has made it clear that he is going to exercise the right of personal approval of each proposed instance——

Mr. Moss. All right.

Mr. SCHLEI (continuing). Although I do not think he takes the position that as a matter of law he is obliged to do that, but he thinks that he should do that, and he has indicated that he will.

Mr. Moss. All right; fine. Now, we are not trying to get at that instance where the President is going to claim executive privilege, because, as a matter of practical fact, we cannot, can we?

Mr. SCHLEI. I guess not, sir.

Mr. Moss. Now, we could do it this way: We could amend the Constitution, if we could get the concurrence of the legislatures of three-quarters of our States, without the need of the President to express approval or disapproval.

Mr. SCHLEI. That is right, sir. There is no veto power on a constitutional amendment.

Mr. Moss. We could say the President has no inherent powers, that his are specifically set forth in this document, and that is all they are, could we not?

Mr. SCHLEI. Yes, sir.

Mr. Moss. We do not want to do that. That would be rather extreme.

Mr. SCHLEI. I should think so.

Mr. Moss. We could probably in our appropriations say that the funds we appropriate cannot be used to maintain any records that are not available to the public, that we are not going to make these taxpayers pay for something they cannot see. We could do that.

Mr. SCHLEI. Yes, sir.

Mr. Moss. That would be extreme, disruptive of orderly government.

So we are not trying to get at Executive privilege. This is the area where Congress and the President and the courts are going to continue to adjust and accommodate.

What we are trying to get at here is a requirement that departments and agencies of the Government set forth very clearly the rules and regulations governing access to information and that they make information available unless it is withheld in the interest of national defense or by some statutory authority given by the Congress.

Now, you recognize the right of Congress to enact a statute directing the disposal of certain types of this information. You have a reservation, and I imagine this reservation goes to the so-called internal working papers.

Mr. SCHLEI. Yes, sir. That is one category of documents.

Mr. Moss. And reflecting in many instances the final official acts of departments and officials of Government.

Mr. SCHLEI. Yes, sir.

Mr. Moss. And here you feel we have no right to act?

Mr. SCHLEI. Well, I think, Mr. Chairman, that the committee has—that the Congress has every right to legislate with respect to the ordinary handling of Government information. But I think that there is a residual Executive prerogative to withhold despite any legislation in a situation where the national interest demands it in the considered judgment of the Executive.

That is the traditional concept of Executive privilege. I have not taken the position that no legislation could be constitutional in this area by any means.

Mr. Moss. We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, that is very broad. That means that any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other nations can, by appropriate designation, be excluded from the provisions of this act.

We recognize that there are going to be certain needs to keep some of this information locked up. And the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classification, which in my judgment are observed far more in the breach than in the performance. But, nevertheless, they are observed, and they are top secret, secret, and confidential.

Now, they are not supposed to be affecting the national security unless they are classified, are they?

Mr. SCHLEI. Well——

Mr. Moss. The whole objective of the Executive order is to have a category in which you can place and identify this information, so that it is secure.

Now, what hardship is imposed there? What infringement of the Executive right or responsibility is diminished by this provision of the proposed legislation?

Mr. SCHLEI. Mr. Chairman, I may have misunderstood the proposal here. I did not understand that the legislation contemplated the issuance of a broad-gage Executive order which delegated authority and created categories of information.

Mr. Moss. Mr. Schlei, I thought we had such an Executive order——

Mr. SCHLEI. Well——

Mr. Moss. Touching upon security.

Mr. SCHLEI. We have as to national defense information, but I take it that we need, with our other problems, besides the national defense security, information which we cannot freely let be made universally available.

Just to give you an idea of some of the catergories of documents that occur to us in the Justice Department, you have such documents as prisoners' files. Now, the medical information in those files would be exempt from disclosure under exception G in the statute here, but there would be no assurance that the rest of these files could be withheld from the sensational press or gangsters or invidious in-laws or——

Mr. Moss. Are you not provided with statutory authority now on those files?

Mr. SCHLEI. No, Mr. Chairman.

Mr. Moss. Are you sure?

Mr. SCHLEI. You, as a matter of fact, inquired about a year ago, and I worked on the preparation of the response. And we have no authority but the Constitution to withhold that information. And also, for that matter, FBI reports are protected only by an opinion of Attorney General Jackson based on the Constitution.

Mr. Moss. Let's take the prisoner files. We have had prisoners ever since this Nation first came into being.

Mr. SCHLEI. Of course, sir.

Mr. Moss. And if there is a need these to be kept from public view, can we not have statutory authority? Can we not sanction the protection, whatever it might be, that is required here?

Mr. SCHLEI. Yes, Mr. Chairman. But the problem is——

Mr. Moss. Is there a better system than that of law? Is it a better system to leave to the increasing number of Federal employees the sole determination of what will and will not be available?

Mr. SCHLEI. Well, Mr. Chairman, I think it is possible to enact rules in certain areas that will improve the situation for everybody. But if you try to cover the whole gamut of the public information problem in the Federal Government—that is, in the executive branch—within the compass of one statute, either you will not have enough exceptions to cover some category of information that turns out to be crucial, or you will have enough rules to cover the gamut and the result will be that you actually shield more information than is now shielded.

I think that it is just too complicated, too ever-changing a problem to be covered by a closed system of rules. If you have enough rules, you end up with less information getting out because of the complexity of the rule system that you establish.

I think that there are areas where the making of rules could clarify the situation. It could make more information available than we now have. It would relieve administrators of headaches that they would like to be rid of. Make it available.

But I do not think that you can take the whole problem Federal Government-wide and wrap it up in one package. That is the basic difficulty, I think, on which we founder here.

That is why the Federal agencies are ranged against this proposal.

Mr. MOSS. Of course, that is an interesting statement—that the Federal agencies are ranged against the proposal. I believe I have had Justice, Treasury and the Federal Mediation and Conciliation Service indicates a desire to come here and testify.

And, as I understand, over on the Senate side last year there was Justice, Treasury, Internal Revenue Service, and Federal Trade Commission.

This does not seem to me to indicate a broad conviction on the part of the other departments and agencies—one, that the legislation would be onerous or, two, that they are overly concerned.

Mr. SCHLEI. Well, Mr. Chairman, I think that they have all, a great many of them—my impression has been that a great many of the departments and agencies have commented adversely and that the Bureau of the Budget has made an effort to provide an orderly presentation to the committee and not get a great, long string of agencies that would say more or less the same thing. We have tried to be economical about it.

But I think that there is quite widespread opposition within the executive branch to the attempt to cover the whole problem in one package as is attempted here. That really is the crux of the problem, I think.

There are many areas, individual areas, where we think rules could be formulated that would be constructive and helpful from the standpoint of the public, the standpoint of people who are working for the public and the Government.

Mr. MOSS. And I think it would have been helpful had we had that type of statement from the Government's lawyers, the Department of Justice.

Mr. SCHLEI. Well, Mr. Chairman, I deeply apologize. I can assure you that we have devoted many hours to working on that kind of approach. We just have not got to the point yet where we can come forward with it. But I am sure that this problem is not going to go away the day after tomorrow, and, hopefully, we will finish our work

while it will still be relevant and helpful to the committee. I would be hopeful——

Mr. Moss. I am confident it will not go away day after tomorrow.

And let me say that I have chaired a subcommittee dealing with this subject matter for 10 years. I have given much thought and study to it and heard very many well-informed and well-intentioned individuals express opinion on it. And over on the other side of the Hill, in the Senate, continuing the work of his predecessor in the Senate, Tom Hennings, is Senator Long. And, strangely enough, he has come up with about the same conclusion I have.

And then we have professional groups. And I do not refer only to the press, because this really is no more a matter of concern to the press than it is to the bar or to the public. It is far too frequently identified as some seeking by the press of a privilege or a right that no one else has. The press has no greater right than any other individual, actually.

And you say that you do not think this can be clarified and that we might succeed in bottling up more than we would release. And yet, after careful study, we have not been impetuous here. Ten years in moving to a piece of legislation is rather a long period of time.

Mr. SCHLEI. Yes; it is, sir.

Mr. RUMSFELD. Mr. Chairman——

Mr. Moss. We feel this step can be taken now and that it will succeed in making more and not less information available, and we feel it would be in the public interest that this step be taken now.

We hope to convince the members of the committee. Most of them have indicated their conviction by the introduction of companion legislation. And that is why I really wish that we had a more constructive statement from the Department.

Mr. Rumsfeld.

Mr. RUMSFELD. I have a question or two, Mr. Chairman. Before I get into the questions that have come to my mind during your comments, on a question asked by the chairman, is it correct that the Bureau of the Budget has restricted some agencies of the Federal Government from coming before this committee as an economy move?

Mr. SCHLEI. Oh, no.

Mr. RUMSFELD. Your statement indicated the Bureau of the Budget was regulating an orderly flow of testimony to this committee.

Mr. SCHLEI. Well, all the departments and agencies of the Government are more or less in touch with the Bureau of the Budget on legislative matters, so that we can be coordinated with the President's policies and program, as you know. And it is just a matter of our talking to the Bureau of the Budget and saying, "Well, how many of us are going to testify? Who do you think ought to express this point?"

And in an informal process of that kind the Bureau of the Budget may say, "Well, we think the Treasury Department ought to come. It feels it is important. And this department ought to come. And do you think that you should be added to that number?"

And the agency will say, "No. If they are going up, we will just file a report. I think they will make the points that we will want to make."

And in a process, informal, like that, there is no restriction or compulsion.

Mr. RUMSFELD. Let me ask the chairman: Have you received reports from the other departments of the Government that are not requesting an opportunity to testify?

Mr. Moss. Oh, yes.

Mr. RUMSFELD. They have all sent a report in lieu of actually appearing?

Mr. Moss. Not all. As a matter of fact, we did not get a comment from the Bureau of the Budget.

Mr. SCHLEI. Mr. Chairman, I happen to know that it will be up very shortly.

Mr. RUMSFELD. I was struck here today by the similarity between the testimony we received here and some that is going on in the Judiciary Committee on the voting rights bill, where witness after witness is appearing saying it is unconstitutional, and, of course, in that instance the Justice Department is saying it is constitutional. And under questioning, a great many of the people who are saying it is unconstitutional are having a great deal of difficulty coming up with any precise reasons as to why it is unconstitutional.

It seems to me that when the Justice Department testifies here, if you are going to claim this bill is unconstitutional, that a somewhat more precise definition of why it is and of executive privilege would have been in order.

Further, it strikes me that your statement conflicts with your answers to the chairman. As I have listened, you began with the statement which said that the bill was unconstitutional, and you made statements to the effect that we could not substitute for executive judgment a verbal formula to be applied by another branch of Government which is not charged with responsibility for execution of the laws, that the problem is too vast to yield to any such solution, implying that legislation in this solution is not only unconstitutional but impossible, referring to the infinite number of situations where it should be withheld—as defined by the executive branch.

And, yet, in answer to the chairman, you have indicated that Congress does have the legislative authority and that Congress has, in fact, already entered this area in appropriation bills, by requiring disclosure of certain types of information.

So your statement says it is unconstitutional, yet at the same time you admit Congress is already involved here.

Mr. SCHLEI. Well, I might begin by saying, Congressman, that the last word from the executive branch on these required disclosure riders to appropriation bills is that they are invalid.

Mr. RUMSFELD. That they are invalid?

Mr. SCHLEI. Yes. I think that was an opinion by Attorney General Rogers under the previous administration, but, at any rate, the last word is one of opposition from the executive branch.

My view is that so long as the ultimate prerogative of the executive is recognized that there can be a provisional regulation of the handling of information short of an exercise of that prerogative by the Congress, and I think that that is what happens in the relations between the executive branch and the judicial branch. There is an executive privilege problem there too.

Mr. Moss. Mr. Rumsfeld, would you yield at that point?

Mr. RUMSFELD. Yes, sir.

Mr. Moss. How can we recognize it if you cannot define it?

Mr. SCHLEI. Well, Mr. Chairman, I would be pleased to supply a definition.

Mr. Moss. Of executive privilege?

Mr. SCHLEI. Yes.

Mr. Moss. One that you would like to live with?

Mr. SCHLEI. Well, I think I could live with it, Mr. Chairman, but it would be awfully broad, broader than your taste I think.

Really, as you know, there is an extensive literature on this matter, and the law consists not only of statements, of definitions, but of policies, and precedents, extending back to Washington. It is like many another concept in the law which——

Mr. Moss. It was also used as the basis for pleadings in the *Youngstown Sheet & Tube* case, was it not?

Mr. SCHLEI. You mean when President Truman——

Mr. Moss (continuing). Seized the steel mills.

Mr. SCHLEI. Seized the steel mills? Yes. Well, I think that was one of the concepts that was called upon as a possible analogy, but——

Mr. Moss. The court did not agree that there was a privilege broad enough to cover that, though, did they?

Mr. SCHLEI. To seize the steel mills? No, sir; it did not.

Mr. RUMSFELD. Mr. Chairman, in view of the fact that the Justice Department has come before us with a very brief statement saying simply that the bill is unconstitutional and that venturing into this area is unconstitutional, and the disagreement that some members of the committee have with this position, I wonder if it might be valuable to have the Justice Department take that extra step of going beyond that and saying that if it were constitutional they feel that certain types of information within the Department are of such a nature that some changes in the provisions of the bill would be helpful to them and would protect the public interest better, even though they say that it is unconstitutional.

I would still like to have their opinion.

Mr. Moss. It would be more constructive, I think, than what we have before us at the moment.

Mr. SCHLEI. If I could respond immediately to that, Mr. Chairman, this may not be terribly precise but it will indicate some of the kind of documents that we ourselves have that we would have trouble with under this legislation.

One is the prisoners' files, other than medical, involving other than medical information, that seems to us to be problematical.

The second category——

Mr. Moss. On that, parole records which are part of the file are in a different category, are they not?

Mr. SCHLEI. Well, we have a problem with parole board files. Under exception No. 7, investigatory files compiled for law enforcement purposes would be protected. And that probably would cover information collected in an investigation looking toward revocation of parole. But a question we would ask would be: Would it cover the board's case summary prepared immediately following the appearance of an applicant before it? Would that be covered by exception 7 for investigatory files compiled for law enforcement purposes?

That seems to us a problem that ought to be resolved one way or another if the legislation were to go forward.

A terribly important category, it seems to me, is interagency communications relative to prospective litigation. Communications of that kind would be protected only to the extent that they might deal "solely with matters of law or policy," which is exception No. 5, The Lands Division, for example, might have no right to withhold the very large number of letter and reports it receives or sends to other Federal agencies relative to the protection of public lands.

Reports and analyses prepared by attorneys of the Lands Division or other agencies which ordinarily are protected in litigation by the attorney's work product privilege, with which I am sure the committee is familiar, might be made available under the provisions of the bill.

And a third, perhaps a fourth I am up to now, category is communications relating to efforts to compromise or settle disputes. Instructions to negotiators, for example, might be withheld only to the extent that they relate solely to matters of law or policy.

Letters to private parties would be freely available to the public. Communications from private parties might be confidential only to the extent that they are matters which are trade secrets or commercial or financial information and privileged or confidential.

Mr. Moss. Now, much of your commercial and financial information is protected under existing statute, is it not?

Mr. SCHLEI. Well, what we have in our files, I do not know that it is, Mr. Chairman. I do not think it is. I think it is dependent on the general executive prerogative.

Mr. Moss. How carefully have you checked the some 78 statutes which confer authority for withholding of information?

Mr. SCHLEI. Well, I have not checked them carefully myself, Mr. Chairman. I have with me Mr. Maxson, who is the Director of the Office of Administrative Procedure, a constituent part of my Office, the Office of Legal Counsel. And I think he is rather thoroughly familiar with those statutes.

I am to a large extent relying on his work in giving you these specific categories of information which seem to us to create trouble, problems, under the language of the statute as it now is.

Mr. Moss. Back in the 86th Congress, we published a document entitled "Federal Statutes on the Availability of Information." It is a very comprehensive document.

Mr. SCHLEI. Well, would that protect communications anticipating litigation or correspondence about the settlement of disputes, Mr. Chairman? I really am virtually certain that there is no statute that has any bearing at all on that problem, and that if this statute were enacted we would be unable to withhold a good bit of that information as to which it is absolutely crucial that it remain away from the public.

Mr. RUMSFELD. Mr. Chairman, could I ask a question on this point?

Mr. Moss. Mr. Rumsfeld.

Mr. RUMSFELD. Where would this type of information fall? Say that under antitrust legislation passed by the Congress the Justice Department investigates the possibility of a suit against some electrical contractors and at some point they completely drop these proceedings, discontinue the investigation, decide not to proceed, or to take it to court. Is that information the type of information you would want protected after it had been dropped?

Mr. SCHLEI. Yes.

Mr. RUMSFELD. The reasons why it was dropped?

Mr. SCHLEI. I do not know about the reasons why it was dropped, but if we got a lot of half-baked complaints which turned out after investigation not to be true——

Mr. RUMSFELD. Let me narrow it down a little bit more. Say the investigation was conducted by one individual who was prepared to proceed with the suit, and at that point there was a change in Justice Department personnel and the suit was dropped.

Mr. SCHLEI. Well, I think it probably, undoubtedly, should be possible to investigate the performance of duty by the Justice Department man. And I think there would be found to be a way to investigate that without harming the people who are involved in the investigation. But it is obviously a sensitive kind of a thing, and you would not want to knock over all kinds of private citizens and harm their interests if you could possibly help it in the process of looking over the performance of the Justice Department employee, which ought to be subject to review by the legislative branch and by superiors in the executive branch, and so on.

Mr. RUMSFELD. Thank you.

Mr. GRIFFIN. Mr. Chairman, could I ask a further question?

Mr. MOSS. Mr. Griffin.

Mr. GRIFFIN. Mr. Schlei, on page 8 of your statement you say:

> President Johnson has made it clear that, like President Kennedy before him, he believes the doctrine of executive privilege should be used as sparingly as possible, in situations where its use is clearly and urgently necessary. He has sought to prevent abuse of the doctrine by directing that it not be asserted except in situations where he has personally reviewed the matter and authorized its use.

It may be that President Johnson has said that, although I am not aware of any public statement or of any statement to the Congress to that effect.

It is true President Kennedy before him made it clear in communications and in other ways that that was his policy.

Can you direct me to times and places and language where President Johnson has asserted that policy in line with the previous policy of President Kennedy?

Mr. SCHLEI. Congressman, I will do that later today, if I may. I checked yesterday as to whether I could say this, and I could. And I am clear that President Johnson has taken this position. But I do not offhand recall in what form or the date that he did, and I will supply that information to the committee.

Mr. MOSS. Thank you.

Mr. GRIFFIN. It may be that I am not fully informed and he has taken a position I am not aware of. I shall appreciate you supplying the subcommittee with a memorandum providing that information.

Mr. SCHLEI. I will be pleased to do that, sir.

Mr. GRIFFIN. Thank you.

Mr. RUMSFELD. Mr. Chairman, could I ask a question?

Mr. MOSS. Certainly.

Mr. RUMSFELD. You made the statement that it was the position of the Justice Department that some provisions which Congress has

attached to appropriation and other bills in the past have been unconstitutional; is that correct?

Mr. SCHLEI. Well, that is not exactly what I said, Congressman. If you do not mind my being a little technical, I said that the appropriation rider dealing with the Inspector General's Office in the AID agency was rgearded as unconstitutional in an opinion of the Attorney General under the Eisenhower administration. The Attorney General was Attorney General Rogers.

Mr. RUMSFELD. Is such an opinion considered to be the opinion of the Justice Department?

Mr. SCHLEI. Yes, that opinion has been referred to several times I believe in somewhat similar, analogous situations with approval in this administration.

There have been some riders, for example, one that said that no sale or lease of property could be made by the Panama Canal Corporation without the approval of a committee of Congress, and I think the *Rogers* opinion was referred to in connection with that rider. But we have never that I recall offhand dealt with the specific problem, and the general principles expressed in it at least are those——

Mr. MOSS. Would you yield at that point?

Mr. RUMSFELD. Yes.

Mr. MOSS. Is there not also an opinion of the Comptroller General that the rider in connection with the Inspector General's Office is constitutional?

Mr. SCHLEI. I think there was a dead collision there, Mr. Chairman. That is my recollection of it.

Mr. MOSS. Back in the gray area, and it is not clear who is right and who is wrong? An accomodation was made?

Mr. SCHLEI. That is correct, sir. There was no clearcut resolution of that dispute as I recall in accordance with one opinion or the other. It was walked away from.

Mr. MOSS. A draw at the moment?

Mr. SCHLEI. A draw the last I heard.

Mr. MOSS. But here is the danger: It is a draw when you look at the record, but it will be cited from now to eternity on appropriate occasions by the Attorney General's Office as further supporting their claim that such actions are unconstitutional.

Mr. RUMSFELD. That was my point, Mr. Chairman. What are the mechanics for testing such a position?

Mr. SCHLEI. Well, the mechanics, the forum in which disputes of that kind have to be resolved, Congressman, is before the public and before the Congress in the Halls of Congress. The judiciary cannot resolve a conflict between the executive branch and the legislative branch. We have a separation of powers principle in our Government, and when there is a collision between two of the coequal branches, it has to be resolved by the political process.

Mr. RUMSFELD. You are saying, then, there is no legal procedure or set of procedures whereby the executive branch, the Department of Justice, could test such a position?

Mr. SCHLEI. Well, if there were a lawsuit to resolve that problem, the Comptroller General would be represented by the Attorney General of the United States, and the Attorney General might in hs capacity as attorney of record see fit to confess judgment. And in that

case the resolution, I think, would be regarded as unsatisfactory by the people who though the Comptroller General was right.

The thing is that when we get these confrontation situations the usual processes for resolving disputes are really not available in our system of government. We have three coequal branches, and when they really are in conflict—it happens very rarely, fortunately—but when they really are in conflict the political process slowly and usually effectively resolves it.

Mr. RUMSFELD. Well, then, just for the sake of clarity in the record, assuming that the proposal before this subcommittee or some similar proposal were to pass the Congress and the opinion of the Justice Department was that it was unconstitutional, it would stand and there would be no way, according to what you have said, that its constitutionality could be tested?

Mr. SCHLEI. Well, that is not accurate, Congressman, because this statute gives rights not just to Congress but to members of the public. And under this statute a member of the public who would presumably seek information and be refused would bring a lawsuit, and he would be separately represented. It would not be the Government suing itself. It would be a member of the public resting his rights on a statute enacted by Congress seeking relief against the executive branch.

And the judiciary would decide that. My own view is that they would decide that by saying that the doctrine of separation of powers prevents them from exercising jurisdiction to compel the executive branch.

Mr. Moss. I would like to clarify one thing. This is not intended to affect the rights of the Congress. This is dealing with a public right, this proposed legislation.

Mr. SCHLEI. Yes, sir.

Mr. Moss. Only with a public right. And Congress can, as an equal branch, use its own rights and privileges in seeking to get its information.

This proposed bill does not affect the rights of the Congress.

Mr. SCHLEI. I understand that, Mr. Chairman.

Mr. Moss. Mr. Kass.

Mr. KASS. Mr. Schlei, has the Supreme Court ever decided that, inherent in the executive branch of the Government, is the constitutional right to withhold information?

Mr. SCHLEI. Well, I believe that there are decisions recognizing that inherent in the authority to execute the laws is the authority to withhold information; yes.

Mr. KASS. Could you give us some citations either now or for the record?

Mr. SCHLEI. I can certainly give them to you for the record.

(The material referred to follows:)

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) appears to be the only case in which the Supreme Court has treated such authority to withhold information in terms of a constitutionally derived discretion in the Executive, in the exercise of which the Executive is accountable only to the electorate. Other cases involving the nonavailability of official information determine the question in the context of evidentiary privilege and the reach of discovery procedures in judicial proceedings, which are matters within the authority of the courts. Three such cases have reached the Supreme Court: *Totten* v. *United States*, 92

U.S. 105 (1875) (State secrets); *Scher* v. *United States*, 305 U.S. 251 (1938) (identification of informants); and *United States* v. *Reynolds*, 345 U.S. 1 (1953) (military secrets). In each of these cases the Court recognized a privilege of the Executive based upon the nature of the information involved.

Mr. KASS. What about the *Reynolds* case, *United States* v. *Reynolds*? A 1953 decision.

Mr. SCHLEI. Well, let me just see if that is the case that I think I remember. Was that a litigation about an airplane crash?

Mr. KASS. Correct.

Mr. SCHLEI. In which the question was the availability of a Government investigative report about whose fault the crash was?

Mr. KASS. This is correct.

Mr. SCHLEI. Yes. And the court, as I recall, held that that report did not have to be disclosed.

Mr. KASS. On what basis though?

Mr. SCHLEI. Well, my recollection was that the basis at least in part was the doctrine of executive privilege.

Mr. KASS. But did not the court at one point say, and I quote from Justice Vinson's opinion on page 8, that—

The Court itself must determine whether the circumstances are appropriate for the claim of privilege.

Mr. SCHLEI. Yes.

Mr. KASS (reading):

And yet do so without forcing the disclosure of the very thing the privilege is designed to protect.

Mr. SCHLEI. Well, Mr. Kass, the difference there I think is that that was a question of executive privilege vis-a-vis the courts rather than the public or the Congress. So that you got into an area where the courts have some privileges of their own.

Now, if the court decides that it is not going to honor a claim of executive privilege, the court I do not think would take the position that it could compel the President to disgorge a state paper which he considered crucial to the Republic. What they would do is say, "You cannot proceed in this litigation. We are going to throw you out of court—or, perhaps decide the issue here involved against you—unless that document is produced."

So there is a judicial privilege in effect that limits and is juxtaposed against the executive privilege that might have come into play in that situation.

Mr. KASS. Now, the *Reynolds* case dealt with a matter of state and military secrets. What about the recent court of appeals case *Machin* v. *Zuchert*, where the same factual situation existed except the Air Force said there were no classified documents involved. The court said that they are going to determine what information will be made available to Mr. Machin. Are you familiar with that case?

Mr. SCHLEI. I am sorry to say I am not.

Mr. KASS. Could you, for the record, supply the information later on?

Mr. SCHLEI. Yes, indeed. Delighted to.

(The material referred to follows:)

This case establishes the proposition that to the extent that the disclosure of official information would hamper the effective operation of an important government program, the information must be treated as privileged, and such

privilege extends beyond the information itself, to deliberations on the information and conclusions and policy recommendations drawn from the information.

Machin v. *Zuckert* involved a demand for a military aircraft accident report developed from testimony before an Air Force Accident Investigation Board. Apparently, testimony before the board customarily was adduced under promises of confidential treatment. The court acknowledged the appellee's claim that the substantial reduction in aircraft accidents and improvements in equipment over the years depended upon candid testimony concerning aircraft accidents. The privilege was considered necessary to avoid inhibiting future witnesses before such boards and thereby seriously prejudicing the aircraft accident analysis program, and perhaps the improvement of military equipment. The privilege was held not to extend to information the disclosure of which would not inhibit future witnesses before investigating boards, and the district court, rather than the military department, was determined to have authority to decide how much of the information demanded was within the privilege. The inference of the decision is that such authority would be in the Executive if state secrets were contained in the report demanded.

The broad principle on which the decision is founded would seem to be applicable in any case where disclosure would hamper an important governmental function, for example, investigation for purposes of law enforcement or regulation.

Mr. KASS. Thank you.

You spoke of the concept of executive privilege vis-a-vis the courts as compared to the concept of executive privilege vis-a-vis the Congress. Is not this concept vis-a-vis the courts really what this bill is intended to accomplish?

Mr. SCHLEI. Well, it is involved, but basically the courts would not be called upon to decide disputes in which the information is incidentally relevant as evidence. The courts would be called upon really to regulate the relationships of the executive branch and the public with respect to the information wholly apart from any rights and duties, legal rights and duties, any case or controversy, within the concept of article III of the Constitution.

And I think that that is a constitutional infirmity, as a matter of fact, in this proposed legislation. Someone would be seeking information from the Federal Government who has had no jural interest in it, so that there seems to me some question whether a court would be able to assume jurisdiction over the controversy under article III of the Constitution which limits the jurisdiction of Federal courts to "cases and controversies"—a very complicated concept that might not extend to a situation of this kind.

Mr. KASS. Does not a citizen have a jural right to information from the Government—that is, information not within these eight categories?

Mr. SCHLEI. Well, I am not sure. Suppose a member of the press would like to get some information about a prisoner, say.

Mr. KASS. Mr. Schlei, I think you answered Mr. Moss that it is not only the members of the press who are concerned here.

Mr. SCHLEI. Yes, that is true.

Mr. KASS. It is the American Bar Association, the lawyers in general, and everybody else—historians, professors, and so forth, and John Q. Citizen.

Mr. SCHLEI. Well, then, take John Q. Citizen who is just curious about some particular prisoner in the Federal system. He wants to know some information that is not within these exceptions, and he brings a lawsuit, and the court says, "Well, where is your standing to sue? In what way is your ox gored by the refusal of the Federal Government to disclose this information?"

And the citizen says, "Well, I am just a member of the electorate, and I want the information."

And the court is going to say, and may say what it says to a taxpayer, "You have no interest in this information apart from that of the great mass of people in the country, and if we recognize that as standing to sue, we would have an infinite number of lawsuits to decide, and we are going to rule that you have no standing to sue unless you have some particular personal interest in what you seek."

Mr. Moss. Supposing that John Q. Citizen says, "Well, in a couple of months we are going to have an election, and I'm going to have to cast a vote for President. I haven't been able to make up my mind, and I won't until I am able to form a judgment as to whether the Justice Department has acted properly in handling this matter. I need the information to make that judgment."

Mr. SCHLEI. Well, I——

Mr. Moss. It is probably farfetched, but it is possible.

Mr. SCHLEI. It certainly is possible.

I think a court could say, "This man is trying to exercise his franchise. He needs that information. We have been given no concrete reason why he shouldn't have it." And proceed.

Or it might say, "Well, if they won't give it to you and they refuse to satisfy you on this basis, your remedy is to vote against the administration and get an administration in there that will answer for treatment of prisoners."

Mr. Moss. The remedy might be that he should vote for whomever is able to run the Government better—not against something but for something.

Mr. SCHLEI. That is usually a sound philosophy, Mr. Chairman. I would hope that the person who could best run the Government—I would think that usually it would be a person who could recognize the advisability of making available information to the maximum extent consistent with doing the job.

Mr. Moss. You know, talking of inherent rights, Dr. Harold Cross, who worked with this subcommittee back 8 to 10 years ago, had the novel conviction that inherent in the right to speak and the right to print was the right to know. The right to speak and the right to print, without the right to know, is pretty empty—to know about Government or about anything else that an inquiring mind might want to know about.

Mr. SCHLEI. I think there is some truth in that, Mr. Chairman. They are obviously related. They are related rights.

Mr. Moss. Continue.

Mr. KASS. Mr. Chairman, in that connection, I do not know how novel Dr. Cross' statement was, because Cooley on "Constitutional Limitations" way back in the 19th century stated at page 886, regarding the first amendment, freedom of speech and press, that:

> The evils to be prevented were not censorship of the press merely but any action of the Government by means of which it might prevent such free and general discussion of public matters as it seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The Supreme Court has not yet taken that position, but they have not gone the other way yet, Mr. Schlei; have they?

Mr. SCHLEI. No, they have not. I think they have generally appreciated the necessity of being able to circulate information widely and to publish a newspaper, for example, free of discriminatory taxation, as in the *Grosjean* case.

The Supreme Court I think has been very sensitive to the right of free speech, and I think perhaps we could find places where they have recognized its relationship to the right to know to some degree.

Mr. KASS. Mr. Schlei, what is your current statutory authority for withholding prisoner files from the public?

Mr. SCHLEI. I do not believe there is any statutory authority.

Mr. KASS. Could you check for the record 18 U.S.C. 4082 and supply us with information as to whether that goes to the question of withholding prisoners' information?

Mr. SCHLEI. I will indeed, sir.

(The material referred to follows:)

The section provides simply that persons convicted shall be committed to the custody of the Attorney General or his authorized representative. It contains no provision relating specifically to the availability of prisoner records or files.

Mr. KASS. Do you have statutory authority, presently, for the internal communications regarding prospective litigation? I think you mentioned the Bureau of Land Management. What is your current statutory authority for withholding those?

Mr. SCHLEI. Well, I do not think there is any statutory authority in the usual sense. Conceivably, the authority could be traced to some application of the Federal rules. But that would be a sort of a logical exercise. The fact of the matter is that it rests on judicial doctrines as to what parties in litigation will be compelled to produce and what is privileged, what is out of bounds. It is nonstatutory privileges and attitudes.

Mr. KASS. Is the information contained in these litigation files primarily factual?

Mr. SCHLEI. Well, it would be hard to categorize them as factual or legal. They are just both and mixed. There are letters that talk about facts, and there are letters that talk about facts in the light of the law and make settlement recomendations, that appraise facts and appraise legal positions. They are just every imaginable kind of——

Mr. KASS. On the assumption that H.R. 5012 became law and that one of the exemptions from disclosure would be No. 5, dealing with interagency or intra-agency memoranda or letters solely on matters of law or policy, what would the Department of Justice opinion be as to whether your litigation files dealing with mixed matters of law, policy and/or facts would fall under this exemption?

Mr. SCHLEI. Well, we have thought that they would not. That has been our interpretation, our estimate, as to how this language would be interpreted. Because this word "solely" makes you pull in your horns on making any broad gage interpretation.

And these letters and materials just would not deal solely with matters of law or policy. There would be facts about the conduct of people and remarks, the evidence of what people said, that might be presented in support of a claim or against a claim—evidence, in other words, which is obviously something other than law or policy.

Evidence is factual matters, and yet they really are the kind of thing that I think that all the members of the committee and every-

one here would agree on—that litigation files relating to pending or prospective litigation should not be readily available to the opposites in the litigation, the newspapers or interested citizens.

Mr. KASS. Especially for the Department of Justice and the FBI, would that not fall under No. 7—"investigatory files compiled for law enforcement purposes except to the extent available by law to a private party?" This deals specifically, as I understand it, with the rules of disclosure.

Mr. SCHLEI. Well, I do not think you could call law enforcement a Lands Division suit about how much the Government is going to pay somebody in a condemnation situation, or perhaps a suit against the Federal Government in the Tort Claims Act field. That would not be law enforcement.

I think law enforcement connotes an investigative, a police, criminal law enforcement effort. Would you not agree?

Mr. KASS. I won't comment. If the Department of Justice had internal memorandums or internal working papers dealing solely with facts, would you then have any objection to making them available? In other words, facts compiled by your agency or given to you by others for investigatory or litigation purposes? Would you object to that information being made available?

Mr. SCHLEI. Yes; because it would disclose the litigation position of the United States in a way that——

Mr. KASS. Would not the litigation position, Mr. Schlei, be based on the policy, not the facts which create the policy? Not the facts which create the litigation position? I am talking solely of the facts.

If you could, in your compiling of this information, separate it on the basis of facts on the one hand; law and policy on the other—and I would interpret "policy" as meaning your litigation position; whether to go to court or not; whether to press charges; what your attack is going to be—would you then be willing to release that information?

Mr. SCHLEI. No, Mr. Kass. I think that the evidence that you have, the facts that you have, are terribly confidential in prelitigation, during a litigation situation. You make possible all kind of perjury if the opposition knows exactly what you are able to prove and what you are not able to prove. They can construct a story that is consistent with what they know you are limited to and go between your evidence. But if they try to construct a story not knowing what your evidence may be, they are under compulsion to tell the truth or face the possibility of being very badly impeached.

Mr. KASS. But have we not gone away from the concept of surprise?

Mr. SCHLEI. Well, we have to some extent, but there are limits to discovery, and there are privileges, and there is this concept that the work product of a lawyer is immune from discovery, and that would include a lot of factual material.

I have read a number of cases, incidentally, where the possibility of perjury is spoken of by the courts as a reason for restricting discovery of matters that could be discovered by independent investigation.

Mr. KASS. For the purpose of the committee's analysis of this specific area on litigation files, could you submit either a proposed amendment to the bill or, in the alternative, language which, in the report, could

state that it is intended that internal memorandums would include the litigation files?

Mr. SCHLEI. Yes, sir; we will.

Mr. KASS. Could you supply that for the record?

Mr. SCHLEI. I think that is going to be a fairly lengthy process, but I will move along as fast as we can. That is going to require some study; I think, substantial study.

(The material referred to follows:)

(Every agency shall make promptly available to any member of the public, in accordance with published rules stating the time, place, and procedure to be followed, records in its possession) * * * "except * * * litigation and administrative adjudication files, including communications and records concerning negotiations for settlement or other efforts to avoid formal proceedings."

Mr. KASS. Mr. Schlei, what is your interpretation of exemption No. 2? What information would fall under those records relating solely to the internal personnel rules and practices of an agency? How does your agency interpret that?

Mr. SCHLEI. Well, we were inclined to be critical of that exception because it did not seem to us actually that the personnel rules and practices of an agency, many of them, ought to be exempt. They ought to be public. How you handle various personnel problems and where somebody goes to complain if he is treated wrongly by his superior, and so on. All those things I would suppose should be public. They should be published somewhere. They should be up on a bulletin board.

And there are some personnel rules and practices that ought to be exempt, and I think that—let's see——

Mr. KASS. It is No. 2.

Mr. SCHLEI. And so that exception, it seemed to us, protected from disclosure things that did not need protection, as well as perhaps not going far enough as to some aspects of information that the Government gets about its employees.

Mr. KASS. Where an individual is, let's assume, fired from the agency—for cause we hope—would the facts and circumstances surrounding this discharge fall within the personnel practices of an agency as you read it?

Mr. SCHLEI. I should not think so, although you are talking here about records that are related to the "practices" of an agency, and conceivably a record, although it contained only a summary of some facts, say, might be related to the "practices, personnel practices," of the agency, part of a file, part of a series of documents.

I am just talking off the top of my head about that problem, but I would say that you could get a situation where a factual statement or document came within that exception.

Mr. KASS. We are all talking, as you say, off the top of our heads. We are trying to create legislative history to determine what we intend.

Mr. MOSS. What this was intended to cover was instances such as the manuals of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent.

Mr. SCHLEI. Ah! Then the word "personnel" should be stricken. Because "personnel" I think connoted certainly to use the employee

relations, employee management rules and practices of an agency. What you meant was material related solely to the internal rules and practices of any agency for the guidance of its employees—something like that.

I do agree that there should be protection for the instructions given to FBI agents and bank examiners; people who, if they are going to operate in expectable ways, cannot do their jobs. Their instructions have to be withheld.

But I think that word "personnel" does not do the job well enough, Mr. Chairman. I am sure it can be done.

Mr. Moss. We will hope to seek a way of doing the job without exempting internal rules and practices.

Mr. SCHLEI. I suppose that could cover quite a lot of ground, Mr. Chairman.

Mr. Moss. Because I am afraid that we would there open the barn door to everything.

Mr. SCHLEI. Well, it is one of those things, Mr. Chairman, that just shows how hard it is to cover the whole Government with a few words. There are a number of problems.

Mr. Moss. Oh, we recognize the difficulty and the complexity, but we are perfectly willing to work at it.

Mr. SCHLEI. All right, sir.

Mr. KASS. Mr. Schlei, how would H.R. 5012, if enacted, affect the so-called Trade Secrets Act, 18 U.S.C. 1905?

Mr. SCHLEI. May I submit a statement in answer to that?

Mr. KASS. Please do. The question is whether this would, in effect, repeal the Trade Secrets Act, which I do not believe is the intention of the chairman.

(The material referred to follows:)

Since the section imposes criminal sanctions upon officers and employees of the United States who divulge certain kinds of information coming to them in the course of their employment "in any manner or to any extent not authorized by law," the scope of the section would be reduced to the extent that H.R. 5012, as enacted, would require the disclosure of such information. The application of the proscription of 18 U.S.C. 1905 is determined by the authority granted by other statutes. H.R. 5012, if enacted, would be one such other statute. Presumably, its requirement that all official information, save that within the stated exceptions, be disclosed would constitute authority to disclose, within the meaning of 18 U.S.C. 1905.

Mr. Schlei, in 1946 Congress passed the Administrative Procedure Act and incorporated therein section 3, the so-called public information section. In the 19-year history of that act, and taking in consideration the legislative history of section 3, do you feel that section 3 has really operated as a public information section making information available to all within certain reasons?

Mr. SCHLEI. Well, I know it has been suggested that the section has not operated as a public information section but as a restriction of public information section. And it certainly has provided the guidelines along which the controversy has raged as to whether information should be available or not.

I do not need to be persuaded that there have been abuses of that section and there have been things that have occurred that are unfortunate and regrettable, and this committee has brought many of those to light, and constructively so.

I think that there could be some improvements made in that section. I am confident that there could be. But the basic approach taken by that statute of leaving a discretionary standard as the ultimate standard is one which I think cannot be altogether dispensed with. I think that is an essential feature—that retaining that is an essential feature of any improved statute.

Mr. Moss. Who exercises the discretion?

Mr. SCHLEI. Well, Mr. Chairman——

Mr. Moss. We are talking about the whole Government, and in the absence of more definitive guidelines than exist at the moment, who exercises the discretion?

Mr. SCHLEI. Well, I am afraid that all too often it is a fellow at a very low level, Mr. Chairman. I have given a considerable amount of thought, as I mentioned earlier, to an improved statute, and I personally see a lot of merit in giving the citizen who is denied information the right to a decision at a high level in the executive branch—perhaps restrict the authority to finally deny information to the heads of departments and agencies or give a right of prompt appeal upon the denial of information to the head of a department or agency.

I have no authority to advance that as a proposal of the executive branch, but it has seemed to me to offer possibilities for improvement, and we will be checking that out with departments and agencies in the Government to see whether we think it is feasible and can sponsor it.

Mr. Moss. You know, just in the 12 years that I have been here in Washington, Government has grown quite a bit.

Mr. SCHLEI. Yes indeed, sir.

Mr. Moss. And in the Congress this year, the committees of Congress or on the floor of the House or the Senate, we have acted to further expand Government. And I think this places upon both the Executive and the Congress a very serious responsibility to insure that the public is going to be kept informed, not exposed to propaganda.

Now, you in your statement recited the facts of the great communications systems of this Nation, broadcasting and the press. But you know the press is not as large as it used to be, and broadcasting tends in the major areas to be concentrated in fewer and fewer hands.

Mr. SCHLEI. That is true, sir.

Mr. Moss. And the opportunity for propagandizing rather than informing is, therefore, enhanced.

And we know that Government—and these problems are completely nonpartisan; they are political but they are not partisan—we know that Government as it acts and achieves is going to boast of its achievements. We are not going to be concerned about the Government failing to have its light shine. But the things it does not talk about, where reluctance might exist, are where my curiosity becomes stimulated.

And it is in these areas where fewer and fewer people really today have the responsibility of keeping the American people informed. And by that I mean that, in relation to the size of Government, there are far fewer people today covering the activities of Government than there were 20 or 30 years ago.

Now, it is an almost impossible assignment, and there are far too many who go down to the Press Club and pick up the handouts,

and these are always going to tell the most favorable side of the story.

But where there is a will to seek, then I think there must be availability. That is all we are trying to do here—insure that availability.

Now, if I knew that the President of the United States or even the Attorney General was going to look at each instance where refusal was the final result, I would not be as worried as I am when I know that rarely is it ever going to get up to the President or the Attorney General or to you. Many times information is controlled rigidly at very low echelons in Government, and the only way we can change that is to impose some requirement under the law.

Obviously the Executive is not going to do this. They have not done it. And I think something must be done. We cannot just continue to drift and rely on the good faith of people or the good judgment of people who inherently, when they are in a safe spot in Government, do not want to start any controversy, and the easiest thing in the world is to sit on that information.

And you never have difficulty—and that is why I did not put it in this bill—in finding that it is "in the public interest" to withhold. Because each person who has the first chance to withhold is part of that public, and he knows darn well it is in his interest to withhold.

And so we have a real problem and one where we should apply our best intelligence, both of the Executive and of the Congress, in an effort to resolve it in a fashion which guarantees a right of access under reasonable rules.

On this right of appeal against the rigidity of bureaucracy, it exists in Government as it would exist in business. You have got businesses today that hold on to every bit of information. Unless their corporate image is improved, it does not go out. And much of that has transferred to Government. But here the proprietorship is much more broadly dispersed, and we are all part of it.

Mr. SCHLEI. We are all stockholders, Mr. Chairman.

Mr. MOSS. We are all stockholders. And we all have a need to know, whether or not we exercise it.

Mr. KASS. Mr. Schlei, you referred earlier to prisoners' records. In looking over this bill, H.R. 5012, would not exemption from disclosure No. 6, dealing with personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, cover that?

Mr. SCHLEI. Well, query about what "similar matters" means. We were dubious about that.

Mr. KASS. Why do you want to withhold the prisoners' records?

Mr. SCHLEI. Well, because there are many possibilities of harm to the man's rehabilitation. For example, there might be interviews with his family members and they have said, "Well, he never was any good, and we hope you keep him there a long time."

Now, if a man comes out of prison and goes back to live in that family situation, maybe not immediately in it but touched by it, his rehabilitation would be badly affected if he knew that those people had said that in an unguarded moment about him.

Mr. KASS. Does not release of that information clearly invade the person's personal privacy?

Mr. SCHLEI. Well, it is in a personnel or medical file, but——

Mr. KASS. What kind of file is it in?

Mr. SCHLEI. Well, it is in a file that we maintain as to each prisoner in the Federal prison system.

Mr. KASS. Is that not, in effect, called the personnel file?

Mr. SCHLEI. Well, I think that if it came down to releasing something like that, we would argue that it was a "similar matter." But I think it will be helpful if this ever becomes law if we make a little legislative history here that prisoners' records are "similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

Mr. KASS. Mr. Schlei, you referred earlier to the litigation files. How do you read the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure, their aspects dealing with the disclosure and discovery proceedings, as far as exemption No. 3—"specifically exempted from disclosure by statute"? Would there be any connection or correlation between these two?

Mr. SCHLEI. Between the Federal criminal rules——

Mr. KASS. Or civil rules dealing with disclosure.

Mr. SCHLEI. Well, I do not know that the Federal criminal rules provide that any information in the possession of the Government is exempt from disclosure. They create a right of discovery where none existed at all before. Traditionally, as you know, there has been no discovery in criminal cases. The defendant has his fifth amendment, and the Government need not provide discovery.

Now there is a growing right to discovery in Federal criminal cases which is embodied in the Federal criminal rules, but I do not think that the Federal criminal rules specifically exempt anything in the possession of the Government from disclosure by statute.

Mr. KASS. But do they not spell out, both the Federal civil and criminal rules, the procedure for handling your litigation files?

Mr. SCHLEI. Well, perhaps that argument could be made as to the particular individual with whom you are litigating. But this statute——

Mr. KASS. You would still be litigating with a particular individual in each case.

Mr. SCHLEI. Yes, but this statute talks about any member of the public. And it would be hard to say that the criminal rules say anything about the right of a representative of the New York Times, say, or of somebody who for some reason wanted to know about the case. The criminal rules obviously deal only with an adversary situation. And I would think you would have a tough time appealing to them for protection against disclosure to somebody not even a party to a criminal case with you.

Mr. KASS. Would it not be an adversary proceeding, though in the civil sense where a person has brought suit under section (b) of this statute?

Mr. SCHLEI. Yes. Well, is it your thought that the legislative history would make clear that exemption 3 really reads in the Federal civil rules and that any disclosure as to litigation files in civil matters would have to be sought in accordance with the Federal Rules of Civil Procedure?

Mr. KASS. This is the question I am asking you.

Mr. SCHLEI. I have to acknowledge it never occurred to me. That did not occur to me as a possibility. And I could only ask that you give us a chance to remedy that failure.

Mr. KASS. Would you supply an answer for the record?

Mr. SCHLEI. We will make a submission to the subcommittee of what we come up with.

(The material referred to follows:)

No. It is my view that litigation and administrative adjudication files generally should be exempt from the requirements of this bill.

Mr. KASS. Thank you.

One additional question, Mr. Schlei. In 1947, in an interpretation of the Administrative Procedure Act, the Attorney General's manual on the APA stated at page 17:

This section [sec. 3, the public information section,] unlike the other provisions of the act, is applicable to all agencies of the United States excluding Congress, the courts, and the governments of the Territories, etc. Every agency, whether or not it has rulemaking or adjudicating functions, must comply with this section.

In the 19-year history of the Administrative Procedure Act, is it your feeling that every agency of the Federal Government, to your knowledge, has complied with section 3 of the Administrative Procedure Act?

Mr. SCHLEI. Well, I think the hearings of this committee have made it amply clear that there have been instances of noncompliance.

Mr. KASS. In that connection, would it be better to amend, as this bill does (5 U.S.C. 22) the housekeeping statute, to make sure that this is applicable to all agencies, departments, commissions, etc., in the Federal Government?

Mr. SCHLEI. I would not indicate any preference, Mr. Kass. I think that as long as it were made clear in the statute and legislative history that it was of universal applicability, it would make little difference whether it was in title 5, United States Code, or in the Administrative Procedure Act.

Mr. KASS. We have had, in answer to a questionnaire the subcommittee sent out, numerous small agencies or commissions or boards that have commented to us, "We are not rulemaking, we are not adjudicatory, and therefore the Administrative Procedure Act doesn't apply to us."

Maybe their lawyers did not read the manual, or maybe they did not have any lawyers. But, in any event, they felt that they were not covered by section 3 of the act.

In that connection, would it be better to put it in title 5, United States Code, section 22?

Mr. SCHLEI. I guess it would be better. I am not positive about title 5, United States Code, section 22. But I do recall thinking now that it seemed inappropriate to deal with the problem of public information and the people's right to know in a statute called the Administrative Procedure Act. There is an inappropriateness there in the layman's sense that might get you into a situation where people would not suspect a regulation applicable to them was in that statute.

And I would concur that it seems better to make the regulation elsewhere than in the Administrative Procedure Act.

Mr. KASS. Thank you, Mr. Schlei. I have no further questions.

Mr. Moss. Mr. Griffin?
Mr. GRIFFIN. No.
Mr. Moss. Does Mr. Carlson have any questions?
Mr. CARLSON. No, sir.
Mr. Moss. I want to thank you very much, Mr. Schlei, for your appearance here this morning. It has been very helpful and very informative.
Mr. SCHLEI. Thank you very much, Mr. Chairman. It was a pleasure.
Mr. Moss. The subcommittee will now stand adjourned until 2 p.m. this afternoon.
(Whereupon, at 12:08 p.m., the subcommittee recessed, to reconvene at 2 p.m., this date.)

AFTERNOON SESSION

Mr. MONAGAN (presiding). The hearing will come to order.
Our next witness will be Mr. H. T. Herrick, who is General Counsel of the Federal Mediation and Conciliation Service.
Mr. Herrick, we are glad to have you with us.

STATEMENT OF H. T. HERRICK, GENERAL COUNSEL, FEDERAL MEDIATION AND CONCILIATION SERVICE; ACCOMPANIED BY GILBERT SELDIN, ASSISTANT DIRECTOR, OFFICE OF MEDIATION ACTIVITIES

Mr. HERRICK. This is Mr. Gilbert Seldin, Assistant Director of the Office of Mediation Activities in our agency.
Mr. MONAGAN. Thank you. You may proceed. Do you have a prepared statement?
Mr. HERRICK. I have a prepared statement, Mr. Chairman, but I am not going to read the entire document.
Mr. MONAGAN. Well, without objection, the statement may be made a part of the record at this point, and then you may summarize it as you wish or handle it in any way you may like.
Mr. HERRICK. Thank you.
Mr. Chairman and members of the committee, my name is H. T. Herrick, General Counsel of the Federal Mediation and Conciliation Service. I am accompanied by Mr. Gilbert Seldin, Assistant Director of our Office of Mediation Activities. We would like to thank you for giving us an opportunity to comment on H.R. 5012. We would also like to express regrets on behalf of the Service's Director, Mr. William E. Simkin, whose prior commitments prevent him from appearing here today. Mr. Simkin is in New York, in the newspaper industry negotiations which are now in a very tense—even delicate—condition. Mr. Walter Maggiolo, Director of the Office of Mediation Activities, is also in New York.
Before addressing myself to those parts of H.R. 5012 which are troublesome to the Service, it would probably be appropriate to tell you a little about the Service's history and functions, to provide a background which will help to explain the reasons for our concern.
The Federal Mediation and Conciliation Service was established in 1947 to assist the collective bargaining process by making available "full and adequate governmental facilities for conciliation, mediation,

and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreement * * * and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining * * *."

This is all we do. The Service issues no decisions or rulings; it does not adjudicate; it has no enforcement powers; it cannot issue subpenas or compel testimony. Use of mediation is entirely voluntary. In short, the Service exists for the sole purpose of assisting those who are willing to use its facilities to settle their differences, if not amicably, at least peaceably, without resort to the economic weapons of the strike or lockout.

Let me dispose of the "voluntary arbitration" part of our statutory mandate at the outset. My office maintains a roster of qualified arbitrators, whose names are submitted, usually on five- or seven-man panels, to the parties to grievance disputes arising under a collective bargaining agreement which provides for the selection of arbitrators through Federal Mediation and Conciliation facilities. The arbitrators on our roster are private citizens who are chosen and paid by the parties. Our arbitration records are not confidential. All arbitration awards received by the Service are released for publication by the three labor services, Bureau of National Affairs, Commerce Clearing House, and Prentice-Hall, unless the parties themselves agree that they should not be published. Since arbitration is a private juridicial process, created by contract between the parties themselves, we feel that the awards belong to the parties, and that they are therefore entitled to prohibit publication. So much for our arbitration function. The balance of my testimony will relate solely to mediators' reports, letters, and memoranda involving contract negotiation or other disputes in which the bulk of the Service's work is done.

The tasks of mediation and conciliation are carried out by a field staff of about 250 professional mediators who are located in 7 regional offices and numerous 1- and 2-man duty stations throughout the industrial centers of the country. For the most part, mediators work alone, whenever and wherever the parties to an industrial dispute are willing to use their services. Each year, the mediation staff of the agency actively participates in the settlement of about 7,000 disputes; it maintains telephone or other contact with the parties to about 13,000 other contract negotiations; it receives notice of the pendency of about 80,000 other disputes every year in which the parties do not require any third party assistance in order to achieve peaceful settlements.

Time will not permit a detailed description of the mediator's art this afternoon. It is enough to say that in the negotiations in which the Federal Service actively participates, our mediators serve as a kind of catalyst in whose presence agreements can be reached. They sometimes do nothing more than soothe tempers; they sometimes serve as a transmission belt for ideas and proposals between parties whose emotions are so engaged by the pressures of the moment that they cannot fruitfully participate in joint meetings; they sometimes serve as sounding boards for proposals; frequently they suggest alternatives to proposals which they know will be unacceptable unless changed, watered down, or restated; they sometimes are told in advance that one or another party would be receptive to a particular proposal, even

though for tactical or other reasons the receptive party cannot break a deadlock by advancing the proposal on its own behalf.

The skillful mediator must bring to his job a solid knowledge of the collective bargaining process, as well as a large fund of tact. He must not lose his temper—unless the needs of the particular negotiation require him to do so. He may be required to know something about pension plans, wage and salary administration, job evaluation systems, the manufacturing process, the personalities and idiosyncrasies of the negotiators, the internal political structure of the union, the competitive pressures which may exist in the industry, and a thousand and one other things which appear on the bargaining tables of the Nation.

There are many things that the mediator must bring to his job, and most of them cannot be taught; they must be learned through experience acquired by exposure to the bargaining process. But in any tabulation of the qualities that a mediator should have before he can be truly skilled, one thing is absolutely essential: He must be able to earn and keep the confidence of the parties. Their confidence can be earned only by an impartial, honest, discreet man.

Collective bargaining requires both strategy and tactics. It is frequently a kind of poker game, with the cards played close to the chest. For a mediator to be truly effective, he must have some capacity to kibitz, if you will, to know a little about the cards which are to be played as the game develops. No mediator can possibly play this role if the parties think that the things he learns in confidence will be told to the public—which includes the party on the other side of the bargaining table.

One way to preserve the confidence of the parties would be for the Service to abolish all of its case records; to allow each mediator to function in silence and on his own, keeping no documents, and communing only with himself. However, orderly administration does not permit the Service to operate in this manner. Mediators must file reports and keep records. They must consult with their superiors, both in the regional offices and in the national office. Since some effort is made to develop not only a broad expertise applicable to any negotiation, but also specific expertise applicable to particular parties in successive negotiations, case histories are developed which can be useful in future years, or for other mediators.

In short, the Service does keep records, and it uses them in the following ways, among others:

1. The Service is engaged in a constant program of training, improvement, evaluation of mediation techniques, and search for ways of increasing its effectiveness. Because so many of our mediators work alone from very small field offices, one-man and two-men offices, they do not have the benefit of close contacts and daily associations with other mediators, so that we do have a systematic program of seminars and workshops in which there can be an exchange of ideas and experience based upon reports and records which are kept in significant disputes. The interchange of information and ideas is essential if we are to do effective work in the fluid and dynamic world of labor relations.

2. Regional offices and the national office must constantly be informed of the status of negotiations. Case reports are used by supervisors—the regional directors and assistant regional directors—and

by the national office staff, to be sure that the mediator assigned to the case is making every effort and is using all available facilities and techniques to assist the parties in reaching agreement. While we have less supervision than most agencies, in fact, in the field we have a total of only 14 supervisors and—what we have is essential, and it could not be effective without adequate, informative, and frequently subjective reports.

3. Finally, regional offices and the national office must be able to evaluate the status of any given dispute. Because of the small number of mediators and their heavy caseload, conflicts in dates are frequent. Complete and honest reporting is vital whenever it is necessary to change a case assignment, to supplement mediation efforts by sending in one or more additional mediators to sit as a mediation panel, or to add "new blood" in a sticky negotiation by dispatching one of the small number of national office representatives—or "troubleshooters"—in an effort to start a stalled negotiation, to bring in a fresh approach, or to add a mediator with special expertise in particular kinds of problems.

The records on which the activities described above depend can be useful only if the reporting mediator describes with complete candor everything of importance that takes place in the negotiation. If one party tells the mediator in confidence that next Monday he will put two more cents on the table, this fact may be reported to the national office—but not to the other side. If the mediator thinks that one or the other side is stalling, that a party does not seem to be bargaining in good faith, or that settlement is being impeded by a personality quirk of one of the chief negotiators, these facts and opinions must be reported. Since much of our work is done in "crisis" bargaining, in a few short days before a strike deadline, replacement or supplement mediators and national office representatives cannot enter negotiations "cold." They must be as fully informed as possible about all aspects of the negotiation to which they are assigned. Records are essential.

Very frequently a negotiation may lead to litigation, possibly in a suit for damages resulting from a strike, in an unfair labor practice case before the National Labor Relations Board, or in an arbitration proceeding in which the intent of the parties cannot be determined without testimony as to what took place when the contract language in dispute was being negotiated.

Within the last year, eight mediators have been subpenaed; in most of those instances they have been asked to bring their case records, reports, or other memorandums with them.

A witness is called only when one party to the litigation thinks his testimony or records will be helpful to him and adverse to the other side. Corroboration of one side frequently impeaches the credibility of witnesses on the other side. The mediator who testifies, or who produces his case reports, will not be welcomed back to the next negotiation by the party damaged by his testimony.

We acknowledge that in all of these situations there is a delicate balance of conflicting public interests. If a party in a court or Board proceeding has not told the truth about his conduct in a negotiation, there is a strong public interest in producing impartial testimony concerning what actually took place, to assist the tribunal in question to reach a correct decision. Nevertheless, we believe that there is an even

stronger public interest in protecting the mediation process, and the impartiality and acceptability of our professional staff.

I might add that the National Labor Relations Board and the courts agree with us as to which is the stronger public interest in these situations. The NLRB has, in a number of cases, had occasion to consider whether or not to try to enforce a subpena against a Federal mediator, and invariably they quash those subpenas and do not insist that they testify, and this has also been our record in the rather smaller number of cases in which mediators have been subpenaed in either court proceedings or in some States in arbitration proceedings.

Mr. GRIFFIN. In the eight cases you referred to, none was required to testify?

Mr. HERRICK. That is correct, sir.

Mr. MONAGAN. Excuse me, was that in the courts or in the NLRB?

Mr. HERRICK. I think four of them were NLRB cases, three of them were court cases, and one was an arbitration proceeding in a State where the arbitrator had power to subpena.

I might say that in one of the cases the mediator had testified some years ago before a joint committee of the Congress about a transaction which he was later asked to testify about in a court proceeding and we have some reason to think that we might not have been successful in that case.

Unfortunately, the mediator was very ill at the time of the court proceeding, and was in the hospital on the day of the hearing, and died within several weeks after that, so that it was never tested. In all of the other cases the subpenas have been quashed.

Mr. GRIFFIN. What do they use in their reasoning? There is no statute to point to, is there, to give them——

Mr. HERRICK. No, sir; there is not. We have our own regulations which I will refer to, which prohibit mediators from testifying concerning information which they have acquired in the performance of their official duties.

We rely primarily upon the public policy which we feel justifies our holding this kind of information confidential.

This classification, of course, has been imposed under the Administrative Procedure Act, and we feel that we have met the standard of good cause shown because of the peculiar nature of the work that the Federal Mediation Services does.

This overriding interest has long been recognized by the National Labor Relations Board—the agency chiefly responsible for adjudicating disputes that arise between employers and the representatives of their employees. The Board agrees with our appraisal of these conflicting policies. It does not compel testimony of mediators or production of their records. Its reasons were stated almost 20 years ago in *Tomlinson of High Point*, 74 NLRB 681, 685 (1947):

> However useful the testimony of a conciliator might be * * * to execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference * * *. The inevitable result would be that the usefulness of the Conciliation Service in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived

from making their testimony available in particular cases. (See also *New Britain Machine Co.*, 105 NLRB 646.)

For all of these reasons, the Service has always classified case records "confidential," and it believes that by doing so it meets the standard of present section 3(c) of the Administrative Procedure Act, "for good cause shown."

Our classification is contained in section 1401.2 and 1401.3 of the Service's Regulations (29 CFR, ch. XII, pt. 1401).

Section 1401.2 states the "good cause" upon which the Service has relied in classifying its case records and reports.

> Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion.

Mr. MONAGAN. Where is that citation?

Mr. HERRICK. This is on page 8 of the statement, sir.

Mr. MONAGAN. Thank you, page 8.

Mr. HERRICK. Section 1401.3 describes the records which are subject to the "confidential" classification:

> All files, reports, letters, memorandums, minutes, documents or other papers (hereinafter referred to as "confidential records") in the official custody of the Service or any of its employees, relating to or acquired in its or their official activities under title II of the Labor-Management Relations Act, 1947, as amended, are hereby declared to be confidential. No such confidential records shall be disclosed to any unauthorized person, to be taken, or withdrawn, copied or removed from the custody of the Service or its employees by any person, or by any agent or representative of such person without the prior consent of the Director.

We feel that labor and management and other interested parties must be assured that information which is given to Commissioners and other employees of the Service will not be disclosed, and the regulation goes on to classify the files, reports, letters, memorandums, et cetera, which are basically our case files.

The Service does not classify all of the disputes information which it receives. Section 8(b)(3) of the Taft-Hartley Act requires the parties to collective bargaining agreements to file dispute notices with the Federal Mediation and Conciliation Service, and with comparable State agencies, not less than 30 days before the modification or termination date of a collective bargaining agreement which has been opened for negotiation. Section 1401.4 provides that such dispute notices are not confidential. It states that interested parties "have the right"—and frequently do request—"to receive certified copies of any such notices of dispute upon written request to the regional director of the region in which the notice is filed."

We believe that our effectiveness would be seriously jeopardized by passage of H.R. 5012 in its present form. We believe that the special needs of the Service must be recognized, and that it must continue to classify the reports and records described in the regulation quoted above. We do not believe that the Service has abused, or indeed, could abuse, the classification of "confidential" by keeping such case records, reports, and files from the general public—including competing parties in a labor dispute subject to FMCS jurisdiction.

As stated earlier, we have no coercive power. Until the passage of the Civil Rights Act, the Mediation Service and the National Mediation Board performed a unique service in a unique way. Since we have no power to compel, the Service issues no rulings or decisions. We "proffer" our services—nothing more. The parties which accept them expect our agents to function with discretion. The parties which reject them conduct their own negotiations without our assistance. We may disagree with their rejection, we may try to persuade them to change their minds, we may let it be known that the offer to help will remain outstanding until the dispute is settled. We do not meet in secret to consider ex parte evidence or investigative reports, and to order somebody to do something on the basis of information which is then classified confidential.

Several weeks ago the committee's staff asked the Service to consider whether the exception set forth in section 161(c)(4) of the proposed bill would protect its confidential records and files. We answered on March 23, 1965, that in our opinion subsection (4) would not give us the protection we need.

Subsection 161(c)(4) of the proposed legislation would except from the public inspection requirement "trade secrets and other information obtained from the public and customarily privileged or confidential." This exception is taken verbatim from S. 1666, which passed the Senate during the last session. On its face, the exception does not apply to the bulk of the information which comes to mediators in the performance of their duties. There are situations in which an employer who does not wish to plead poverty at the bargaining table for fear of having to reveal financial records under current National Labor Relations Board decisions will give the mediator confidential competitive information or financial information to explain an adamant position. Such information might be considered a "trade secret"—but information of this sort is an exception to the general rule, so far as our agency is concerned. The information which we seek to protect concerns bargaining strategy and tactics, proposals and counterproposals, personalities, and methods of the negotiators, and similar matters which do not fit neatly within the category protected by exception (4).

We have studied Senate Report 1219, which accompanied S. 1666 (S. R. 1219, July 22, 1964). According to the report, exception (4)—

> is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client and other such privileges. To the extent that the information is not covered by this or other exceptions, it would be available to public inspection.

Mediators do not obtain information by "questionnaire or inquiry." Most of the information obtained by mediators is obtained at the bargaining table, or in give-and-take sessions with the parties, separately or together.

The Senate report also shows a congressional intent to protect information normally subject to such traditional privileges as the doctor-patient or lawyer-client privilege.

We do not feel that the mediator-party privilege stands on the same legal or historical foundation as those of the doctor-patient or attorney-client relationships.The art of mediation, as practiced by the Service, is relatively new. It is a product of our industrial society. But within our limited field of operations, we think a mediator-party privilege is as important as the ancient and honorable privileges extended by common law to the doctor, the lawyer, or the clergyman. Unfortunately, we do not believe that the statement of legislative intent in Senate Report 1219 is sufficiently clear to protect this new privilege any more than it would protect a newspaper reporter-source privilege, which is also a product of relatively modern times.

In order to clarify the status of information obtained by mediators in the performance of their duties, we have proposed, in our letter of March 23, 1965, that exception (4) be changed to read as follows:

> Trade secrets and other information obtained from the public and customarily privileged or confidential, or *information acquired during mediation or conciliation of labor disputes.* (Italic indicated new material.)

We would like to see the bill make this explicit so that nothing will be left to interpretation and the need to consult the legislative history.

Nevertheless, we also recognize that the committee may have reasons for not wishing to change the language of the proposed bill. If the committee decides to report the bill with exception (4) in its present form: we ask it to give the most serious consideration to insertion of appropriate language in the committee report which will make it abundantly clear that the present exception is intended to be broad enough to give Mediation Service files and records the protection necessary to enable us to fulfill the congressional mandate that we provide full and adequate governmental facilities for conciliation and mediation in collective bargaining disputes. Accordingly, we have suggested that the following language be incorporated in the legislative history at an appropriate place:

> The exception would also include information given to Federal mediators in the regular performance of their duties in mediating and concilating labor disputes.

In conclusion, let me thank you again for the privilege of presenting the views of the Federal Mediation and Conciliation Service on this important piece of legislation. Now, if there are any questions, Mr. Seldin and I will be happy to answer them to the best of our ability.

Mr. MONAGAN. Thank you very much, Mr. Herrick.

It seems to me that we have three areas that we are potentially dealing with here. First of all, we have the area that exists while a dispute is actively going on, and it would seem to me that there would not be much question about the fact that communications of the sort that you mentioned should be kept protected at that time.

Now then, you move into another area; the area, as you say—the first would be negotiation, the second would be litigation or arbitration; in other words, a formal proceding that would be subsequent to negotiation but immediately connected with it.

It is your position, I take it, that there is or should be a privilege comparable to the lawyer-client or husband-wife or the other accepted privileges; is that so?

Mr. HERRICK. Yes, sir. The problem is that our agency is one which, in essence, must be accepted by the parties, by both parties. In other words, we cannot and never have tried to compel parties who do not want to use our services to accept them, although there is some language in the statute that suggests that if necessary this might be done by obtaining a court order. There is "shall meet with the Mediation Service" language in the statute—nevertheless, this has never been used; never been tested; and, as a practical matter, negotiation taking place under those circumstances would probably be pretty futile.

We do feel that even after a contract is settled and, possibly, there is some subsequent litigation before the NLRB, no mediator could possibly testify in a proceeding of that sort without completely destroying his acceptability to the person whose interests were damaged by his testimony.

Mr. MONAGAN. Well, all right. That is the second situation where there is still some activity going on.

What about the case where final settlement which has been made through negotiation or through litigation, and the file has been closed insofar as its activity is concerned? What is your position on communications of that sort after that point?

Mr. HERRICK. Well, two things, Mr. Chairman: First, a bargaining relationship between two parties is really never closed unless the union is decertified or the employer goes out of business. In other words, even after a contract is completed there is a continuing relationship during the life of the contract, through the grievance procedure, and so on. So that the contract eventually comes up again, and the chances are that the same mediator will be back if a dispute seems imminent; again trying to produce a settlement 1 year or 2 years or 3 years later.

So that, if the frequently very candid observations and comments which he has put into the file as part of the process that I have described earlier were to be released to the parties 2 years later, we still feel that this would jeopardize the mediators acceptability.

Mr. MONAGAN. You feel that it is indefinite in time, in other words?

Mr. HERRICK. They all keep going on and on, except where the company goes out of business or a particular plant is closed or a union is decertified.

It seems only yesterday that——

Mr. SELDIN. May I add a point on that? One of the activities we engage in is what we call our preventive mediation program. Frequently in a situation where relations are pretty bad between parties both subsequent to contract negotiations, the same mediator usually will endeavor to work with the parties to see if he can somehow create a better climate. Now, this would be somewhat poisoned if some of his records indicating his real opinion of the parties at the time of negotiations were public.

Mr. MONAGAN. All right.

What about the scope of the privilege? In this classification under section 1401.3 on page 8. This says—

> All files, reports, letters, memorandums, minutes, documents, or other papers are hereby declared to be confidential.

In other words, that is a very broad, it is practically a blanket classification. Are there any limitations on that?

Mr. HERRICK. Well, about all we have in the way of files and records relate either to the internal administration of the Mediation Service or to actual disputes. That is, that certainly is, there's no getting away from it, a broad statement.

Mr. MONAGAN. Even in the traditional privileges that are generally accepted there are certain limitations such as that the communication has to be made for the purpose for which the privilege was created, and that the relationship must exist, and so forth.

Mr. HERRICK. This really has two parts, of course. Obviously, the classic common law privilege would not extend to a statement made by the union in the presence of a company.

Mr. MONAGAN. Yes.

Mr. HERRICK. So that you cannot really call that a privilege.

Mr. MONAGAN. It has to be confidential, to begin with.

Mr. HERRICK. That is correct.

Mr. MONAGAN. That is, it is intended to be.

Mr. HERRICK. Yes; but the problem that we have also involves this problem of maintaining our impartiality, so that if the mediator has to come in—well, let me give you an example.

Frequently in an unfair labor practice proceeding there is a dispute between the charging party and the respondent as to who said what during a particular stage of the negotiations. How was a certain offer phrased, and so on.

If the mediator can be subpenaed and brought in to testify about that, the chances are he is going to support one side or the other. It is hard to see where there is a conflict in testimony, how a mediator, testifying honestly, could avoid supporting one side or the other in this.

So that it is more than just a privilege. It is a need to keep the mediator and to keep the Mediation Service away from any semblance of having taken sides as to the merits of a dispute of that sort.

We try very hard to strike a fine balance between being impartial but, at the same time, getting these very candid appraisals of what is going on in the negotiation, predictions as to what is going to happen, and so on.

Mr. MONAGAN. You have indicated that there is a balancing of the interests involved in arriving at your judgment. Would you say that the extent of the privilege might depend upon the degree of public interest that in a particular situation was involved in whatever the statement was? It is a little hard for me to think up specific instances where this might be true. But let us say in a criminal case with a subpena, you referred to subpenas, let us say there might be a declaration that an individual was a member of the Communist Party or something like that, where that might be relevant to the criminal prosecution.

It would seem to me that you would have same difficulty in persuading a court not to permit evidence of that sort to be admitted.

Mr. HERRICK. I agree. I think we probably would have some difficulty. I think we would try—I am happy to say that all of the cases that I am familiar with have not involved anything quite of that nature.

Mr. MONAGAN. I am trying to think of an extreme case just to test the extent of your position.

Mr. HERRICK. If a murder were committed at the bargaining table, for example, a mediator might be a very important witness. Our regulations do permit the Director of the Service to give mediators permission to testify, and I think that we would, as we always do, approach these things on a case-to-case basis. But I cannot——

Mr. MONAGAN. Well, the difficulty is that the application of the standard rests with the executive agency, and I think what we are trying to do is to consider some abstract standards that might apply fairly generally without reference to a more or less objective judgment by the agency that was involved.

Mr. HERRICK. We are conscious of the problem.

I think the example of the murder at the bargaining table is one that I hope will never happen. Mayhem is usually more oral than that at the bargaining table.

I might say, of course, that our judgment—it is not strictly accurate to say that our judgment is not subject to any kind of review. In any situation in which there is a subpena, let us say, before the National Labor Relations Board, there can be an effort made to enforce the subpena before a district judge, and, I suppose, this would be appealable to the court of appeals.

Mr. MONAGAN. I was thinging more of making records available to a committee, for example, rather than through subpena.

Mr. HERRICK. I cannot say; as far as I know we have never been asked for records by any congressional committee, except in that one instance that I gave which was many years ago. I do not know, I am just not familiar with any other illustrations of that.

Mr. MONAGAN. I want to compliment you on your statement and particularly on making a suggestion both as to language by which the bill might be amended, and also in the alternative language that might be used in the report.

I am not sure that your recommendations will be adopted, but it is a good practice and one that I want to compliment you on.

Mr. GRIFFIN. Well, I want to join in that statement of commendation. I think that it is an excellent statement, Mr. Herrick.

So far as I am concerned, I think the Service does an excellent job, and has high standing. It would seem to me that a murder at the collective-bargaining table would not be the type of confidential communication that would normally be considered in a lawyer-client relationship. I think there is that type of relationship that the mediator has with the parties to collective bargaining. Even though they might both be present, they are dealing jointly on a confidential basis within the room where the bargaining is taking place. I do not think that either party would expect that what they are saying within the confines of that room would be made public. If it were going to be made public, they might conduct themselves in a much different way and say different things.

Mr. HERRICK. I think that is correct. I think, of course, one analogy might be discussion of settlement efforts in an ordinary piece of litigation. Yet the fact that there is a give and take and an exploration of each other's minds is not something that would come into a subsequent litigation based on positions that are much harder and much further apart.

Mr. GRIFFIN. I feel confident that some of the committee, if it does enact this legislation, would certainly implement your suggestion in someway to make sure that that is done.

Mr. HERRICK. Thank you very much.

Mr. MONAGAN. Mr. Kass.

Mr. KASS. Mr. Chairman, I have no questions, but I would like to insert the letter dated March 23, 1965.

Mr. MONAGAN. If there is no objection, it will be inserted.

(The document referred to follows:)

FEDERAL MEDIATION AND CONCILIATION SERVICE,
Washington, D.C., March 23, 1965.

MR. BENNY L. KASS,
Counsel, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. KASS: In accordance with our conversation of March 15, the Federal Mediation and Conciliation Service has considered the problems presented by the proposed legislation which is now under consideration by Congressman Moss' subcommittee of the Government Operations Committee of the House of Representatives.

We have carefully considered exception (4) in the proposed legislation which would except from the public inspection requirement "trade secrets and other information obtained from the public and customarily privileged or confidential." In our view, this exception will not adequately protect the confidentiality of information obtained by Federal mediators during their performance of official duties.

Exception (4) is taken verbatim from S. 1666, which was passed by the Senate at its last session. The exception is discussed in some detail at page 13 of Senate Report No. 1219, July 22, 1964. According to the report, the exception "is necessary to protect the confidentiality of information which is obtained by the Government *through questionnaires or other inquiries*, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include *information customarily subject to the doctor-patient, lawyer-client, and other such privileges.* To the extent that the information is not covered by this or other exceptions, it would be available to public inspection." [Italics added.]

Information received by mediators is never obtained by questionnaires, such as those used by the Bureau of Labor Statistics in collection of Walsh-Healey data. Such information, indeed, is seldom obtained by "inquiry." It usually comes to the mediator in the form of proposals, counterproposals and other discussions by the parties before or with the mediator, either together or in separate sessions with one or another of the parties. Furthermore, the "privileges" referred to in the report are well established, and their origins precede by many years the development of labor mediation as we now know it. For these reasons, we do not believe that the proposed exception, even read in the light of S.R. 1219, is broad enough to protect this agency's confidential case reports.

To protect the confidentiality of these reports, we propose the following change in the language of exception (4):

> trade secrets and other information obtained from the public and customarily privileged or confidential, *or information acquired during mediation or conciliation of labor disputes.* [Italic indicates new material.]

In the alternative, we would add to the legislative history of the exception, in an appropriate place, the following sentence:

> The exception would also include information given to Federal mediators in the regular performance of their duties in mediating and conciliating labor disputes.

Mr. Abner and I will be available to discuss these proposals at your convenience.

Sincerely yours,

H. T. HERRICK, *General Counsel.*

Mr. MONAGAN. Thank you very much.

Our next witness is Fred Smith, Acting General Counsel of the U.S. Treasury, accompanied by Mrs. Charlotte T. Lloyd, Chief of the Legal Opinion Section.

Mr. Smith, you also have a prepared statement?

Mr. SMITH. Yes, sir.

Mr. MONAGAN. You may proceed.

STATEMENT OF FRED BURTON SMITH, ACTING GENERAL COUNSEL, TREASURY DEPARTMENT; ACCOMPANIED BY MRS. CHARLOTTE T. LLOYD, CHIEF, LEGAL OPINION SECTION, TREASURY DEPARTMENT

Mr. SMITH. I would like to read some of my statement, Mr. Chairman, I may not read all of it.

Mr. MONAGAN. Well, suppose that we insert the entire statement in the record. That may be done if there is no objection, and then you summarize it and we will just use the statement unless there is some substantial variation.

Mr. SMITH. Thank you.

Mr. Chairman and members of the committee, I want to say, first, that I appreciate the opportunity that has been afforded to the Treasury Department to present its views on H.R. 5012 and the various related bills which are before the committee.

The Treasury Department has a broad and continuing interest in problems relating to the disclosure of information to the public. We, therefore, are deeply concerned with the various identical bills now before your subcommittee, of which H.R. 5012 is the first, described as legislation to establish a Federal public records law. This legislation is intended to require every agency to make all its records promptly available to any person unless the records consist of matters which fall within eight specific exemptions.

My Department agrees wholeheartedly with the objectives of providing the fullest possible information to the public. It has sought to realize this objective in its long dealings with the American public in its many areas of operations. The Department does business with literally millions of citizens through the collection of taxes, the management of customs, the issuance of public securities, the disbursements of large sums of money, and the provision of safety regulations for navigation, to name only a few of the many areas of contact between the Treasury and the citizens. We have received almost no complaints of insufficient knowledge by the public of matters with which they are concerned. The record of compliance by the various offices and bureaus of the Department with section 3 of the Administrative Procedure Act, providing for the publication and availability of information, which was recently submitted to your subcommitte, indicates, I believe, that a great wealth of information has been published and made available to the public as a whole and to persons immediately concerned.

I should like to state at the outset that it is our sincere belief that problems in the area of public disclosure do not stem from an inadequacy of the existing laws on the subject, but from occasional misapplications, or failures in implementation, of such laws. In general, I believe that this administration has a very good record in mak-

ing information available to the public and that the existing provisions of the Administrative Procedure Act on publication of information constitute about as good a standard as can be devised for this purpose. It is for this reason, and because after earnest study we find that H.R. 5012 and the related bills would be seriously prejudicial to the effective conduct of the Government and damaging to many private individuals, that we have felt compelled to report to your subcommittee that we are opposed to their enactment. We believe that we can demonstrate to the subcommittee that if legislation is passed which requires all Government records, with a few noted exceptions, to be made available to any person, the executive branch will be unable to execute effectively many of the laws designed to protect the public and will be unable to prevent invasions of the privacy of individuals whose records have become Government records.

I would like to develop this under four headings, the first of which relates to the requirement that disclosure be made to persons who do not have a legitimate interest in a matter; (2) the inadequacies of the exemptions; (3) the inappropriateness of the court provisions; and (4) the doubtful constitutionality of the legislation.

(1) Requirement that disclosure be made to persons who do not have a legitimate interest in the matter.

A statute which requires that records be made available to "any person" must be tested quite literally by considering who "any person" might be. Prof. Kenneth Culp Davis, author of the authoritative text, "Administrative Law Treatise," dramatized this point to the Senate Subcommittee on Administrative Practice and Procedure when it was considering similar legislation last summer by citing as an example of what would be possible under a provision such as that contained in this bill, that high school children playing games would be enabled to require all of the White House records to be made available to them, minus those in the exceptions. Another example he cited was the possibility of a deranged person requiring the records of the Justice Department concerning judicial appointments. While these are possibly extreme examples, it is not hard to point to other types of persons who could, and in large numbers undoubtedly would, demand quantities of records to further their own malicious, illegal, or meddling purposes. The purposes behind demands might or might not be known to the agencies, but in any case would seem to be irrelevant under the legislation.

We feel compelling such demands to be met would not only serve no useful purpose but would put the agencies involved under a legislative mandate to waste their time. Legislation such as that proposed would encourage irresponsible demands.

In this connection we should like to emphasize the difference between making information on Government operations available to the public and a requirement that all records must be promptly available to "any person." In our opinion, section 3 of the Administrative Procedure Act makes an appropriate distinction between the right of the public to information which must be published or made generally available and the right of any single individual to demand the disclosure of nonpublic Government records for his personal benefit. In the latter case, the Government is now required to honor such a demand if the person lodging it is a person properly and directly concerned with the in-

formation sought. The subcommittee, therefore, is urged to consider the problem from two perspectives: First, what information should be made generally available to the public as a whole, and, secondly, what should be the ground rules by which any single person can demand entry into Government files. We have observed that advocates of legislation similar to that under consideration usually speak of the right to obtain Government records in terms of the right of a person who has business with an agency to get certain information, or of a newsman requesting greater liberality on behalf of the press. Interests like these have a different claim upon Government information than have, say, local gossips interested in finding out personal information about their neighbors.

Next I would like to refer to what we feel are inadequacies in the exemptions listed in the bill.

I believe the exemptions should be tested to insure that they are adequate to safeguard Government records, the protection of which is required to insure the public interest in the enforcement of law and legitimate individual privacy.

A recent example is the public interest in questions relating to the future of our coinage—Mr. Chairman, I was just citing a recent example with which I have been concerned which is the public interest in questions relating to the future of our coinage, and whether it will continue to contain silver.

In a very short while the Treasury Department will be sending to the Congress the results of a comprehensive study of all aspects of this problem which has been underway for many months, together with such recommendations for new coinage legislation as are deemed appropriate. Under the provisions of H.R. 5012 much of the data that has been compiled in this study—statistics, the results of the testing of various possible alloys for our coins, et cetera—would have had to be made available upon request to any persons inquiring. Any person interested in speculating on what might happen to the price of silver or other metals could obtain access to this data. Misuse of the information or misinterpretation of such information as to what the Treasury's recommendations were likely to be could have greatly aggravated the problem of the shortage of coins, which we have rather successfully overcome, by stimulating the hoarding of such coins or silver, for example. We think that it is obvious that it was not in the public interest to make premature disclosure of this information. Although H.R. 5012 contains an exemption from the disclosure requirements for intra-agency memorandums dealing solely with matters of law and policy, the factual material I have mentioned would not have been protected.

I might interpolate at this point another example or two which I do not have in my statement. Information as to purchases by the Federal Reserve System, for example, of Government securities in the market, if prematurely disclosed could have, we feel, serious effects on the orderly handling of the Government's financing requirements so that in all of these things there is a question of timing. There are many things on which full disclosure is made in reports which are published or filed with the Congress with a timelag, there is no basic secrecy about these matters, and yet the premature release of these could be very damaging to the general interest.

Mr. Moss (presiding). Let me ask you this: Is this information presently protected by a rule or regulation promulgated under the authority of the Administrative Procedure Act or under 5 U.S.C. 22?

Mr. SMITH. I believe so; yes, sir. Our basic regulations for the Department as a whole and our subsidiary regulations for various portions of the Department, specify certain documents which are readily available, and then specify that certain others are deemed confidential for various reasons, and I would think that those examples that I have mentioned would come within the specifications.

Mr. Moss. Now, the examples you mentioned, let us go back to this matter of the coinage problem and ask whether information relating to coins or coinage is specifically protected by a rule or regulation of the Department of the Treasury? You have, under 5 U.S.C. 22 the authority to make rules and regulations for the custody, use and preservation of your records. Under section 3, is it not, of the Administrative Procedure Act you have a right to make rules and regulations on the information to be made available, do you not?

Mr. SMITH. Would you care to have me read the basic provision in our regulations, sir, that I think relates to this?

Mr. Moss. Yes.

Mr. SMITH. This is entitled—

CONFIDENTIAL OFFICIAL RECORDS

For one or more of the following good causes, certain information in the official records of the bureaus, divisions, and offices enumerated above is held confidential and is not available to the public:

(1) The information has been submitted in confidence to the Treasury Department;

(2) The information relates to a financial matter or some other type of transaction between the Government and an individual or corporation, the disclosure of which would be prejudicial to the individual or corporation involved (such as by aiding a competitor) without furthering the public interest;

(3) For security reasons, such as protection against counterfeiting;

(4) The information pertains to negotiations with foreign countries, which information, because of its nature or because of an agreement between this Government and the foreign countries concerned, is required to be held confidential;

(5) The material is made confidential by law, such as tax returns; or

and I think this is the one that applies, although some of the others might have—

(6) The disclosure of the information would clearly be inimical to the public interest.

Mr. RUMSFELD. Mr. Chairman, may I ask a question?

Mr. Moss. Certainly you may.

Mr. RUMSFELD. Your first point, I think, was that it was submitted in confidence to the Treasury Department?

In other words, the supplier of the information determines the classification, secrecy classification, of it? If the person says, "I am giving you something in confidence," then it automatically falls within this provision, is that what you are saying?

Mr. SMITH. Yes, largely. This relates, of course, to voluntary information, not information that they are required to submit to us.

I will give you an example. In our program which was recently announced to help our balance of payments the banks and other financial institutions were requested by the President to cooperate voluntarily; we have an elaborate questionnaire as to their foreign

lending activities, in which we have asked them on a purely voluntarily basis to tell us periodically, every 3 months about their foreign lendings and we have told them that this will be received in confidence and held in confidence.

Obviously, there is information in these detailed questionnaires which would be of great value to competitors, and so forth, and we honor that confidence. This is the type of thing to which this refers, I believe.

Of course, where somebody is required by regulation to submit something, then we are the determinant as to whether it can be submitted on such a confidential basis.

Mr. RUMSFELD. Thank you.

Mr. Moss. You may continue.

Mr. SMITH. A matter of great consequence to the public interest is the integrity of the Nation's currency. Under the bills before you, any counterfeiter could obtain the records of how the ink and paper are prepared for the production of currency. Only trade secrets obtained from the public may be withheld under exemption (4), not those which are derived from the work of a Government agency, such as our Bureau of Engraving and Printing. Further examples could be given.

Exemption (1), the most important of the eight, relates to the necessity of protecting national defense secrets from disclosure. The phrase "national defense" might be interpreted by a district court or by others as applying only to traditionally military concepts. In the modern world, however, the total commitment of our resources to national defense makes such a definition patently too narrow. The stability of our monetary arrangements, for which the Treasury bears heavy responsibility, may be as crucial a weapon in our defense as a military weapon, we believe, and I am glad to say we have a positive suggestion to make here. The term "national security" would enable a court more easily to weigh these considerations and therefore would provide more adequate coverage.

I should like now to refer briefly to the problem of the disclosure of records which pertain to private corporations and individuals.

Mr. Moss. On this matter of national security, do you classify under Executive Order 10501?

Mr. SMITH. The Treasury Department?

Mr. Moss. Yes.

Mr. SMITH. Yes, indeed.

Mr. Moss. Doesn't the Executive order itself use the term "national defense" rather than "national security"? Do we have a copy of the Executive order?

Mr. SMITH. I think we have one here, if you will bear with me for just a minute. I am not sure whether we do or not.

I think I have it, sir, if you will just bear with me a minute.

No, sir, I am sorry. All I have is the Treasury Department order which was issued under it. I thought I did.

Mr. Moss. Do we have a copy of the Executive order available here in the committee room?

Mr. SMITH. The title, I have reference to the title here in our regulations, and as far as the title is concerned it says "Safeguarding official information in the interests of the defense of the United States."

So the title does say "In the interests of defense of the United States."

Mr. Moss. I believe the order is consistent throughout in using the term "defense" and the language of the proposal here before us specifically required by the Executive order to be kept secret in the interest of national defense or foreign policy.

Now, if that is using the term of the Executive order which gives the authority for classification, then what do you gain by using "security" rather than "defense"?

Mr. SMITH. Well, sir, the term commonly used within the executive branch, at least in talking about these things, is "national security." It is possible, I believe, that if it were made clear in the legislative history that the scope of the term "national defense and foreign policy" as used in this bill were as broad as the presently understood breadth of the area in which we could, for example, classify things under the Executive order, it is possible——

Mr. Moss. Can you now classify matters relating to monetary policy?

Mr. SMITH. On some of our international monetary negotiations and major transactions we do; yes, sir.

Mr. Moss. Do you then classify under the authority given you by Executive Order 10501?

Mr. SMITH. I believe so, because I believe that is——

Mr. Moss. This was intended to specifically recognize that Executive order.

Mr. SMITH. Yes.

Mr. Moss. The No. 1 exemption. We will pass on to that later when we get it.

You may continue.

Mr. SMITH. If I can make one further comment on that, Mr. Chairman, it seems to me that there could be some domestic matters which were of such major consequence to the welfare and continuance of the Nation which might not relate to any foreign threat, but could still be and might need to be privileged. I am thinking in terms of the thirties when we had the bank failures and everything else, and the President started off each Executive order "I hereby declare the existence of a national emergency," and, in fact, used authority in the Trading With the Enemy Act.

So far as I know, there was no outside threat or there was no need to worry about the defense of the United States from foreign sources, and yet the economic future of the country was certainly at stake there.

We had thought that the term "national security" would be broader, but I would say that as long as the legislative history——

Mr. Moss. I do not disagree that it would not be broader, but the question is whether you rely upon Executive Order 10501 as the authority for classifying such information. If you do, then it seems to me that the language of this order determines whether or not you classify for defense or for security. Just looking at the order—I now have a copy here—I find in each instance it uses "defense" not "security." And, therefore, you are classifying—whatever this might say, you would be classifying for defense.

Mr. SMITH. I would like to make one thing clear. I stated in answer to your question that certain international monetary activities of ours are classified under 10501 with a security classification. But there are a lot of other operations in that area that we feel are very delicate and that should not be given out, at least at the time they take place, which are not given a security classification, but which, nevertheless, are not made available to the public. In other words, these would be in the area where we would consider it contrary to the public interest to make them available.

Mr. Moss. How many of those are covered by specific statute? You have some 78 statutes available.

Mr. SMITH. Yes, indeed. I know of none, sir, that cover these international monetary activities of ours, if that is what you are referring to.

Mr. Moss. Let us find that out.

Mr. RUMSFELD. If I might ask a question while you are looking for it.

Mr. Moss. You may.

Mr. RUMSFELD. I happened to see an article by Jack Anderson in the Washington Post of Tuesday, March 30, about the availability of individual income tax returns "for the most frivolous reasons with a minimum of ceremony. Snoopers from a long list of Federal, State, and local agencies can pry into almost anyone's financial secrets in the Internal Revenue Office."

You made a point earlier in your remarks to the effect that these tax returns were classified, referring to the public. Is this article which you indicated you apparently read——

Mr. SMITH. Yes, I did.

Mr. RUMSFELD (continuing). Reasonably accurate?

Mr. SMITH. I think it is a very inaccurate——

Mr. RUMSFELD. They are very much available to anyone in Government?

Mr. SMITH. No, indeed. I think it is a very inaccurate article, and I would say that this is a vital area to us in the maintenance of taxpayer confidence, that the impression not be given that income tax and other tax return information is readily available to the public. The facts are that——

Mr. RUMSFELD. I was referring to the column, his column, his article, which indicated that these various returns were available to any number of people in the Agriculture Department or the Veterans' Administration, and he goes on to list the Civil Rights Commission, Housing and Home Finance Agency, every conceivable department or agency of the Government he indicated has access to this information.

Mr. SMITH. Well——

Mr. RUMSFELD. I am not referring to the public now.

Mr. SMITH. Right.

Mr. RUMSFELD. Although that amounts to the public when you add up all the Federal employees in the United States, you are approximating it, at any rate.

Mr. SMITH. I would like to say this, that a number of those that are mentioned do not have access to——

Mr. RUMSFELD. In other words, you are saying his article is wrong?

Mr. SMITH. It is wrong in a number of respects. Now, there are certain departments and agencies of the Government which, pursuant to carefully prescribed regulations, may obtain tax-return information for specific purposes.

For instance, the Department of Health, Education, and Welfare, which administers the social security laws, has a legitimate right in connection with matters relating to unemployment insurance, for example, to check on whether information given to them as to a man's income is accurate. HEW does have that.

Mr. RUMSFELD. What about the Justice Department?

Mr. SMITH. The Justice Department has access, of course, in connection with its investigation and prosecution of crimes against the United States. But those——

Mr. RUMSFELD. Let me ask you this, mechanically when an individual from the Civil Rights Commission or Civil Service Commission or HEW decides that they want to have some information on a specific individual income tax return, you say that the regulations are carefully prescribed. My question is how are they enforced, what does he do?

Mr. SMITH. The head of the department or agency, to begin with, has to request it. It cannot be just any old employee. It has to be the head of the department or agency, and he has to state the reason why he wants it, and then the furnishing of tax return information has to be approved by the Commissioner of Internal Revenue or by the Secretary of the Treasury.

Mr. RUMSFELD. You are stating that is the general rule. What are the exceptions to that? Does a U.S. attorney have to state the reason he wants it?

Mr. SMITH. I will have to check the provision on the U.S. attorney.

Mr. RUMSFELD. But there are exceptions to this general rule you just articulated?

Mr. SMITH. I am not sure there are. Yes. U.S. attorneys may request, and the application, to be in writing, shall show the name and address of the person for whom the return is made, the kind of tax reported on the return, the taxable period, the reason why the inspection is desired. The application shall, where the inspection is to be made by a U.S. attorney, be signed by such attorney, and where the inspection is to be made by an attorney of the Department of Justice, be signed by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General.

It has to be addressed to the Commissioner of Internal Revenue, and then there is——

Mr. RUMSFELD. You must just have volumes and volumes of files where you keep these requests. Does it go down below to the Assistant Attorney General in that regulation?

Mr. SMITH. No.

Mr. RUMSFELD. I mean it must take rooms to house the files for all these requests.

Mr. SMITH. Well, sir, it certainly takes rooms to keep all of our taxpayer's files.

Mr. RUMSFELD. No; I mean just to file these forms that HEW has to make out to go and look at one.

Mr. SMITH. Well, I do not think the requests to look at these are all that numerous. I do not happen to know how many there are. We have a small section of the people in the Internal Revenue Service who handle these requests.

Mr. RUMSFELD. I do not want to pursue this, it is a little off the track, and I think the information that the chairman was seeking has arrived. But I would personally be curious to know how many people are involved in processing such requests and what the average number has been in the last year or two.

Mr. SMITH. Well, I will be happy to supply that. I just do not happen to know it.

Mr. RUMSFELD. I do not think it is necessary for the record, but if you would like it for the record——

Mr. MOSS. Supply it for the subcommittee.

Mr. SMITH. I would be glad to.

Mr. RUMSFELD. Fine. Thank you.

Mr. MOSS. If you would continue with your statement, you may.

Mr. SMITH. I was about to refer to the problem of the disclosure of records which pertain to private corporations and individuals. Government records necessarily include much information on the business and personal lives of millions of individuals. The problem of disclosure has often been before the courts on the plea of private persons seeking to prevent Government disclosure of information concerning them. At the present time, another committee of the Congress is now intensively studying the question of possible invasions of privacy by the Government. It should be recognized that a great deal of undetected discovery of personal information by third parties having no legitimate claim for access to it would be possible if "any person" could obtain Government records concerning other persons unless those records came within exemption (4) or (6). Therefore, the scope of these exemptions becomes crucial.

Exemption (4) is a most necessary one, this is the trade secrets one, but it is not clear whether it is broad enough to include both information submitted to the Government under a pledge of confidentiality and information which is tendered to the Government in confidence. There are established rules of evidence as to what information need not be submitted in court because it is "privileged." It is not clear whether the reference to information which is "privileged" in exemption (4) is restricted to such rules of evidence. The Treasury Department would like to be certain that the mass of personal information it holds in the files of the Internal Revenue Service, the Bureau of Customs, and the Bureau of the Public Debt, for example, would be exempted under this section. I will cite you an example.

Supposing somebody, just as a matter of curiosity, wants to know the extent of a neighbor's purchases of Government bonds, and we have records of all the Government bonds held in the names of any given person. This type of information is not submitted to us in confidence under any pledge of confidentiality. It is not information that is obtained from persons, so it is not covered by this—let's see, which one is it—it is not obtained from the public, so it is not under (4), at least it does not seem to be, and yet we do not feel that this is the kind of information that ought to be just given out to anybody that wants it for any purpose.

Exemption (6) for "personal and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," is even less clear. We wonder whether the reference to "similar matters" would include matters disclosed to the Treasury concerning persons who are not Government employees but are applicants for some privilege. These applicants might be seeking a foreign assets control license, an alcohol or tobacco license, merchant marine certificates, or authorization to practice as customhouse brokers. It is hoped that matters concerning them given to the Treasury would be as exempt from disclosure to any person as would be the personnel files of Treasury employees.

A greater ambiguity is presented by the proposed test for preventing disclosure; namely, "a clearly unwarranted invasion of personal privacy." An invasion of personal privacy is now a recognized tort whenever the invasion is unwarranted. An invasion of privacy is unwarranted, according to modern law, when the public interest does not warrant the invasion. The test proposed in the statute would therefore appear to divide unwarranted and those which are unwarranted but not clearly so. We are of the view that no unwarranted invasion of privacy is justified and doubt the propriety of attempting to legitimatize it.

Next I would like to speak about what we feel is the inappropriateness of the court provisions. The provisions in subsection (b) for district court action in the event of nondisclosure of Government records give extraordinary advantages in litigation to any person who may want to see Government records regardless of the propriety of his demand. The provisions, in our opinion, depart from the principles of fairness which characterize the judicial process and would deprive the Government of the benefit of many usual rules of judicial procedure.

In the first place, any disappointed person is given standing to sue an administrative agency without question, simply upon his complaint that he did not receive all of the records and files which he had demanded. Persons who are dissatisfied with other types of agency action or inaction are entitled to seek judicial relief if they have suffered legal wrong because of the agency action or have been adversely affected or aggrieved by such action within the meaning of any relevant statute. We believe that persons who are disappointed in obtaining Government records and files should be provided with a judicial remedy only if they have thereby been wronged or adversely affected.

In civil litigation the plaintiff has the burden of showing that he is entitled to relief and, if he does not make this showing, his complaint may be dismissed. Under the proposed legislation the complainant has no obligation to show any reason for obtaining Government records or any need for such records, he simply complains that the Government has not given him what he demanded. The propriety of his claim, no matter how contrary to the public interest it might be, apparently must be disregarded by the court. This seems to us not only an arbitrary limitation on the judicial process but one which may cause a heavy and unnecessary burden on the judiciary as well as upon those in the executive branch who must defend these court actions.

Furthermore, Congress has provided that certain court actions are to be given precedence over other litigation in unusual cases which

are of general public importance. The proposed legislation would provide precedence over all such expedited actions as well as over regular court actions for the demands of random individuals, regardless of the public interest in the satisfaction of their demands. My testimony has already indicated the types of mischievous and dangerous demands which the Government may be called upon to honor. Subsection (b) would make the judiciary, in addition to the executive, the victim of such demands.

Under the discovery rule—34—of the Federal Rules of Civil Procedure a litigant must show "good cause" for obtaining documents from the adverse party. However, since the proposed subsection (b) would open to any plaintiff or defendant in Government litigation Government records to the extent demanded—unless within the eight exceptions—the discovery rule is nullified insofar as the Government is concerned. The adverse party, however, remains protected by that rule. Furthermore, subsection (b) does not allow for the protection for privileged documents permitted under the Rules of Civil Procedure and under 18 U.S.C. 3500 in criminal cases for delivery of Government documents to the court in camera and, if the court finds necessary, sealed for appellate court review.

Finally, it is questionable whether district courts should be invited to engage in a contest with administrators and to punish for contempt any administrator with whose judgment the courts may disagree. If an agency has declined a particular disclosure request, it would be doing so in conformity with its understanding of the law and regulations. The impropriety of a district judge imposing a contempt sentence and arrest upon an officer of an agency who is complying with the agency's regulations was pointed out by the circuit court in a well-known decision reversing the district judge's contempt decision and upholding the officer's adherence to the agency rules. (Appeal of U.S. Securities and Exchange Commission, 226 F. 2d 501 (6th Cir. 1955).)

(4) The doubtful constitutionality of the legislation.

Aside from the questions arising from the text of the proposed legislation, there is the basic question whether the legislation is constitutional. The President has the constitutional responsibility under article II to preserve the confidentiality of documents and information the disclosure of which would be contrary to the public interest in the faithful execution of the laws. The proposed legislation would remove this responsibility from the President and constitute an attempt to exercise it by the Congress. Such action by Congress would appear to violate the separation of powers which is basic to the Constitution. When 5 U.S.C. 22 was amended in 1958 with respect to Government information, and here I am getting into a point in my prepared statement that you commented on this morning, and I may be inaccurate here, the Senate in its debate recognized the constitutional power of the President to withhold information the disclosure of which would be contrary to the public interest—104 Congressional Record, pages 15688–15689, 15696, 1958. I can only say on that, sir, I think you made it abundantly clear that you did not recognize it, and others——

Mr. Moss. I think the House made it abundantly clear that the House did not recognize it.

Mr. SMITH. I do know that upon signing the bill the President made it abundantly clear that he was standing for this position anyway.

Mr. Moss. We had the unique instance of the President, in signing the bill, handing down an interpretation of the law and, as I pointed out the day of the signing in a statement placed in the Congressional Record, it was still the role of the courts to determine what the Congress intended and what the law is. I would be perfectly willing to leave that to the courts.

Mr. SMITH. I have in my statement cited some examples of disclosure which would be required under the proposed bill which we believe would be damaging either to the general public interest or to the private interests of many individuals. These have been cited out of a sincere desire to be of assistance to the subcommittee. Should the committee decide to recommend legislation in this area, I should certainly hope that it would see fit to make amendments, particularly as to the scope of the eight exemptions, to deal with these problems. However, I would not be honest with the committee if I did not express my conviction and that of the Treasury Department that no effort at legislation in this area will be beneficial unless it recognizes and contains express provision for the Executive to prohibit disclosure of information on grounds of the public interest. As I have pointed out, we believe this is a constitutional prerogative of the Executive and one that he must be able to exercise. If this reservation to the Executive were to be incorporated in the bill, then I believe that it is possible that my suggestions might be of assistance to the committee in its further consideration of this legislation. Should it be the committee's conclusion, on the other hand, that this reservation should not be included in the legislation, then I am not sanguine about the possibility of its preparing a bill which my Department would find acceptable, because I don't believe that it is possible for the Congress or anyone else to conceive a bill that can adequately anticipate and specify all of the situations in which, to protect the public interest, the Government should be able to refuse to disclose information.

I appreciate very much the opportunity which the subcommittee has given me to express the views of the Treasury Department. I would be glad to try to answer any questions that the committee may have.

Mr. Moss. First, let me say that I regard the statement you have given as being more in keeping with what we anticipated than was the statement we received from the Attorney General's Office this morning. We have attempted to deal with some of the areas of concern to you. I think that is appropriate, and certainly that is the reason we have hearings before these committees.

On page 13 you state that—

> I would not be honest with the committee if I did not express my conviction and that of the Treasury Department that no effort at legislation in this area will be beneficial unless it recognizes and contains express provision for the Executive to prohibit disclosure of information on grounds of the public interest.

Are you saying that we should, in anything we might decide upon here in committee, recognize a constitutional right of the President to act contrary to the statute if he finds it in the public interest?

Mr. SMITH. Well, sir, I think what I intended mainly there was to say that unless it incorporated what is, in effect, in section 3 of the Administrative Procedure Act at present, it would not be adequate. It does not necessarily, I feel, have to be the same words, but the equivalent of this provision in section 3 which reads:

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest.

I am not trying to say that anybody should really recognize anything. It is just we feel that it is essential——

Mr. Moss. The word "recognize" is the word that disturbs me.

Mr. SMITH. Yes.

Mr. Moss. The additional language.

Mr. SMITH. Well, I feel——

Mr. Moss. Granting the right to prohibit disclosure on the grounds of the public interest is a different subject.

Mr. SMITH. I think that is the essential feature.

Mr. Moss. Who should make this decision?

Mr. SMITH. I think that, in my opinion, and this is the way it works in the Treasury Department I know, that essentially it is the decision of the Secretary of the Treasury.

Now, that does not mean that there are not others who refuse on a given occasion or in a specific instance to disclosure a particular matter. But there can always be an appeal to the Secretary of the Treasury in the first place if they do not get it from the man in question and, secondly, the refusal is almost always based on policies which have previously been approved by the Secretary.

So that I think that essentially and ultimately the head of the Department is the man who should make this determination.

Mr. Moss. I would not be nearly as concerned if I could be convinced that that was the case. Going back over the years on occasion I have had great difficulty in getting a matter acted upon by the head of the Department. We have had some refusals referred to us, and they have been pretty well down the line. It has been very difficult to get the Department head to look at it.

Mr. SMITH. Well, sir, all I can say is that I have been in the Treasury 22 years, and I——

Mr. Moss. I am not saying we have had this problem with the Treasury.

Mr. SMITH. Yes.

Mr. Moss. Remember, we are not here considering problems arising only in connection with the operation of the Department of the Treasury. I think in the course of the past 10 years there have been sufficient reports in the press of instances uncovered by this committee to make it very clear that we are not just conjuring up something here. There have been problems, real problems, in an effort to overcome these problems that we are proposing an effective public records law.

Mr. SMITH. I would be the last one to say that there were not cases where there was an illegitimate attempt to refuse to provide information either to the Congress or to members of the public.

I will say this: that I think it has been my experience that there has been considerable improvement over when I first came to work in the Government. I came to work in wartime, 1943, and there was terrible overclassification, for example, in those days. People were busy and they had a good excuse—the war effort—for refusing to give anybody anything, and I think a lot of people in Government got into some very bad habits and forgot who they were working for; namely, the taxpayers, the citizens of the United States. But I really feel that as far as the dissemination of information is concerned, there has been great improvement. I certainly can see it in our own Department.

Mr. Moss. Yes; I think there have been improvements. This legislation here is proposed in an effort to bring about further improvements.

Mr. RUMSFELD. Mr. Chairman, may I ask a question at this point?

Mr. Moss. Certainly.

Mr. RUMSFELD. In your statement on page 13 it says—

> I don't believe it is possible for the Congress or anyone else to conceive a bill that can adequately anticipate and specify all of the situations in which to protect the public interest the Government should be able to refuse to disclose information.

This statement is a statement that is very similar to the one that was made this morning by a representative of the Justice Department, saying basically that this just cannot be done; the bill cannot be drafted that could solve the problem.

It reminds me of discussions before other committees where a portion of the executive branch of the Government comes before the Congress and requests contingency funds and says, "We just cannot possibly detail every aspect of these problems and we request a contingency fund."

Should the emphasis be on the words "anticipate in the future"? If we took out what might happen in the future, or types of information it might be desirable to refuse to disclose that we do not know about now, isn't it conceivable in your mind that some sort of bill could, in fact, be drafted to meet those instances that we today know of and that if some—I say this facetiously, some sort of a contingency fund for the future or some proviso whereby things that came up in the future that we were not aware of, could be worked out on some other basis during an interim period? Are you going to stand by this statement taking away the word "anticipate" and, therefore, the unknowns of the future, are you going to stand by the statement that a bill just plain cannot be drafted?

Mr. SMITH. Well, I think mainly, I was referring to anticipate for the future. I would say this: that we probably could do a pretty good job of listing the things that we felt should be withheld at present in the public interest. I am not sure that——

Mr. RUMSFELD. Everything is in the public interest; I mean, that is the only reason we are having this hearing.

Mr. SMITH. Well, records should be withheld because it is not in the public interest or contrary to the public interest to disclose them. I am not sure that your committee would agree with our enumeration, but let me say this: that in this statement on page 13 I was not trying to say that necessarily nothing could be done by legislation in this area. I think, as Mr. Schlei said this morning, and I would agree with him, that if there was a reservation to the Executive so that he could exercise what has been called executive privilege, then it is conceivable that something might be gained by legislation which would carve out areas where Congress feels that disclosure should be made, although I must say that my own personal opinion is that, as I said at the beginning of my statement, the problems are not so much the law on the subject as the implementation of the law.

I think if every department and agency of the Government would honestly and conscientiously adhere to what is in the Administrative

Procedure Act now that there would not be too much of a problem, and I think that is more the problem than what the law says.

Mr. RUMSFELD. You mention in your remarks this danger about nuisance requests or frivilous requests. Haven't we in the Government faced this problem in other areas, and isn't it conceivable that such a thing could be resolved by charges for the effort that would go into producing the document or the information—the cost to the Government of supplying this? You mentioned the high school student requesting voluminous information on White House records. You mentioned that, did you not?

Mr. SMITH. Yes; I gave that as an example.

Mr. RUMSFELD. I cannot conceive of a high school student if he is going to be charged for the amount of time that an employee is going to take and the paper and materials to supply the records, making such a frivolous request.

Mr. SMITH. I certainly feel that some provision would have to be made for user charges for a lot of the area covered by H.R. 5012.

Mr. RUMSFELD. I do, too.

Mr. SMITH. Because I really believe, if the bill were enacted in its present form—and I have not emphasized this in my statement, and perhaps I should—there would be a tremendous additional burden placed on the Government, and we would have to hire a lot of people to handle these requests.

Mr. RUMSFELD. I would personally feel that we should have user charges on that type of thing, and that the burden should be on the person who desires——

Mr. SMITH. We get a lot of nuisance requests now.

Mr. MOSS. Would you yield at that point?

Mr. RUMSFELD. Yes, sir.

Mr. MOSS. I think it has been clear from the very beginning of the work of this subcommittee, certainly it would be very clear in any report accompanying this legislation, commenting on the language on page 2, line 1:

> Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person.

Now, we certainly intend that this be reasonable, the Government not be put to any heavy costs or extra costs in compiling specialized information, that which is available conveniently. We are not asking here that there be a requirement imposed upon the agencies and departments that they go in and compile exhaustive data for a person who might just be curious, and certainly the consideration of any appropriate charges is a matter this committee would not reject.

The proposal here is advanced as a reasonable proposal by reasonable men to try to improve the availability of information to the American public, and for no other reason.

I do not think any of the authors of the legislation is any less concerned over the need of this Government to operate in an orderly fashion than those in the executive department who are charged with the responsibility of operating it.

Mr. SMITH. I am sure of that.

Mr. MOSS. I do not think we want to have information which would be prejudicial to the Government, to its security, whether it be fiscal or military, be made available to anybody.

I just wanted to make that clear that we are not asking here that you marshal up an army of new clerks to start gathering information.

Mr. RUMSFELD. I certainly did not mean to imply that your bill contemplated that because I also introduced the bill.

Mr. Moss. Yes; I felt that the response indicated that it might have been contemplated, and that is why I wanted to make it clear.

Mr. SMITH. I might make a point here, although it is not entirely relevant. We have a section of lawyers in the Internal Revenue Service called the Power of Attorney Section that has to examine powers of attorney of lawyers who claim to represent taxpayers.

The necessity for this is because there are all kinds of people who come in and represent themselves and who state, "I represent John Doe, taxpayer, and I want to get copies of returns or I want to get information." In many of these cases these people who were just trying to get—didn't represent them, or previously did but no longer do, or something like that—but just trying to get personal information. This is why we have to have a very careful examination of the power of attorney of every lawyer who comes in and claims to represent somebody to make sure he does.

It is amazing how many people will try for one reason or another, business purposes, to find out who are good prospective customers, what their assets are or something, to get information that is available within the records of these Government agencies.

So that I merely point this out to say that I may be wrong, but I think that if this bill were passed, there would be a tremendous flow of requests by people for information.

Mr. GRIFFIN. Mr. Chairman, may I ask a question at this point?

Mr. Moss. Certainly.

Mr. GRIFFIN. Mr. Smith, in the Treasury Department you have regulations, I take it, determining what kind of information is available to whom, and how, and when, don't you?

Mr. SMITH. Yes, we do.

Mr. GRIFFIN. And yet the thrust of your statement, as I read it, is that it is impossible for Congress to lay down any guidelines for rules as to when and where information should be made available?

Let me say that I certainly do not advocate that income tax returns should be made available to anybody or to the public generally. But you derive your powers in the Internal Revenue Service from laws passed by Congress?

Mr. SMITH. Right.

Mr. GRIFFIN. You would not have any record or any information to reveal if it were not for the laws that Congress passes?

Mr. SMITH. That is right.

Mr. GRIFFIN. And why can't we, in passing those laws, also determine who, when, and how the information that is accumulated under that law would be made available? Your statement seems to imply that it would be unconstitutional if we did so. I do not follow that at all.

Mr. SMITH. Well, I would like to make two or three comments on that, sir. One is that while a great majority of the information that we have is the result of laws passed by Congress, that there is other information that we get, voluntarily given, which is at least not the direct result; in other words, it is not required by any law to be given

to us, such as the voluntary questionnaires which banks and businessmen are now giving to the Government as to their international lending activities, for instance.

Secondly, and I do not pose as anything like the constitutional law expert that Mr. Schlei is, but under our separation of powers, as I understand it, while these laws are passed by the Congress and, therefore, we would not get this information if it were not for the laws passed by Congress, once these laws are passed by the Congress, the Constitution reposes in the President the responsibility and authority for the faithful execution of them and, therefore, it may be that even though Congress begot the child, it does not have complete control over the child after it is begot, to put it bluntly.

Mr. GRIFFIN. Are you saying that Congress, if it could have provided how such information would be made available, cannot amend the original statute—that we have somehow lost this legislative power that we would have had in the beginning?

Mr. SMITH. Well, that is a very difficult question for me to answer. I would only say this, that I am not at all sure but what even if you provided as to how the information, how and when and to whom it should be made available, that there might not be a situation in which the President, for overriding considerations of the national interest, would feel that he would not make it available.

Now, this is getting into a very—an area that I am very uneasy about.

Mr. Moss. Would you yield?

Mr. GRIFFIN. Yes, I yield.

Mr. Moss. Are you saying then in the faithful execution of the law the President has the right to disregard the law?

Mr. SMITH. No; because he has to support and defend the Constitution and the laws of the United States. But he also has the responsibilities for the national security and various other things under the Constitution.

Mr. Moss. He shall take care of the law, to see that the law is faithfully executed.

Mr. SMITH. That is right. I suppose in a situation where the overriding national interest that I referred to related to one of his other constitutional or legal responsibilities. But I am getting into deep water here and I think purely and simply I do not know the answer to your question. I think, Mr. Schlei attempted to answer it this morning, and I do not feel that I can do any better than he.

I wanted to make one further point though before I forget it, sir, Mr. Rumsfeld, that while we have set forth in our regulations the circumstances under which records can be made available, we ran into the same problem that we feel confronts the Congress in trying to legislate in this area and, therefore, item 6 of the list of things that won't be diclosed is: "if the disclosure of the information would clearly be inimical to the public interest."

In other words, we had to have a catchall phrase in our regulations because we did not feel that we could anticipate all of the possible situations in the future, so that what we have in our regulations parallels the point I was making with respect to the legislation.

Mr. RUMSFELD. I have a question, Mr. Chairman.

On page 13 of your statement again toward the earlier portion, you say that you would not be honest with the committee if you did not

express the conviction of the Treasury Department that no effort at legislation in this area will be beneficial unless it recognizes and contains express provision for the Executive to prohibit disclosure of information on grounds of the public interest. There is your Executive privilege again.

Mr. SMITH. Yes, that is the Executive privilege.

Mr. RUMSFELD. Why, if there is no law today which recognizes the principle of Executive privilege, should the bill that the subcommittee is considering bring it up? Doesn't this stem from the Constitution?

Mr. SMITH. I think the Administrative Procedure Act recognizes this. The first paragraph of section 3 exempts from the provisions——

Mr. RUMSFELD. Was this the creation of it or did it stem from the Constitution?

Mr. SMITH. Well, no—the Administrative Procedure Act did not originate the doctrine of Executive privilege; that is right.

Mr. RUMSFELD. That is my point, it did not create the concept or authority.

Mr. GRIFFIN. Do you claim it recognizes it though?

Mr. SMITH. The Administrative Procedure Act?

Mr. GRIFFIN. Yes.

Mr. SMITH. I believe it does.

Mr. GRIFFIN. What section?

Mr. SMITH. The first sentence.

Mr. GRIFFIN. I see.

Mr. RUMSFELD. My point is I fail to see why the proposal that is being considered by this subcommittee should contain express provision for Executive privilege since this doctrine comes from the Constitution and would exist, according to the people who subscribe to this theory, as the gentleman who appeared this morning obviously does, apart from anything we did or did not do.

Mr. SMITH. I would only say——

Mr. RUMSFELD. You see my point?

Mr. SMITH. Yes, I see your point.

I would only comment this way, that since it is in the law now and it is a position which the Executive has taken traditionally since the beginning of the Nation practically, if it were to be omitted from the law now, and I am sure that if this committee were to omit it from the law now, they would make it clear they were omitting it because they did not recognize the validity of the doctrine of Executive privilege, then it seems to me that the bill would squarely raise this constitutional issue.

Mr. GRIFFIN. Would the gentleman yield to me?

Mr. RUMSFELD. Certainly.

Mr. GRIFFIN. I want to enter into the record a challenge to the statement that section 3 expressly recognizes the doctrine of Executive privilege. I assume you are referring to the words "except to the extent that there is involved any function of the United States requiring secrecy in the public interest"——

Mr. SMITH. Yes.

Mr. GRIFFIN. "Or any matter relating solely to the internal management of an agency."

Mr. SMITH. The first.

Mr. GRIFFIN. Yes.

Is that the language that you are referring to?

Mr. SMITH. Yes.

Mr. GRIFFIN. Naturally reasonable men can differ on the meaning and interpretation. Congress is determining here that in those instances it is not necessary to make a disclosure, but there is no express recognition of any doctrine of executive privilege.

Mr. RUMSFELD. In other words, you are saying Congress wrote that and Congress could amend it or delete it or do anything it wishes.

Mr. GRIFFIN. Surely if there is any doctrine of executive privilege, it is founded on the Constitution and not on that section.

Mr. SMITH. I would certainly agree with that.

Mr. GRIFFIN. I do not admit a doctrine of executive privilege exists.

Mr. SMITH. The Administrative Procedure Act did not create the doctrine of executive privilege, I would certainly agree with that, and I do not think—I will even go so far as to say that I do not think it is important whether I agree or not that section 3 recognizes the doctrine of executive privilege.

Mr. GRIFFIN. You people in the agencies and departments may read it that way.

Mr. SMITH. I had always understood that is what it represented, a recognition of it.

Mr. MOSS. Would you yield to me? I would like to join in that statement of my colleague that I certainly can find nothing in section 3 that recognizes the executive privilege. It is a statutory expression saying that any function of the United States requiring secrecy in the public interest can be exempted from the provisions. But I do not see any recognition.

As a matter of fact, even the framers of the Constitution were able to deal with secrecy when they felt they wanted to grant it. They did grant it to the Congress in connection with the publication of a journal of the proceedings of the Congress. They required us to publish it excepting those portions which the Congress, in its judgment, deemed required secrecy. That is the only place you will find it. So they were not unaware of the fact that there might be a requirement for secrecy. But the only place they granted it expressly was to the Congress.

Now, I notice in the response to the letter I addressed, the February 12 letter addressed to the Treasury Department, that in response to question No. 7, "What limitations are placed upon the availability of records and files to the general public either by statute, rule, or practice," the Treasury's response was as follows:

The principal limitations placed on making available records and files of the Office of the Secretary are contained in the following statutes. The relevant regulations are generally those of the operating bureaus reported elsewhere.

A. Confidential information in general: 5 U.S.C. 1002 as implemented by 31 CFR Part 1; 18 U.S.C. 1905; 5 U.S.C. 139b.

B. Income tax information: 26 U.S.C. 6103, 6104, 6106, 7213.

C. Information on returns and order forms relating to narcotic drugs and marihuana: 26 U.S.C. 7237(e).

D. Bank information: 12 U.S.C. 77; 18 U.S.C. 1906.

E. Classified information affecting the national security: 18 U.S.C. 793, 794, 798 and E.O. 10501 (1953), as amended, and as implemented by Treasury Department Order No. 160, revised, dated March 23, 1962, as amended.

F. Miscellaneous information:

Information affecting the Reconstruction Finance Corporation: 18 U.S.C. 1904.

Coast Guard records of discharge books and certificates: 46 U.S.C. 643(f), and the source of certain information received by Coast Guard officials: 46 U.S.C. 234.

Subpenas in libel suits aaginst the United States: 46 U.S.C. 784.

Confidential information obtained under the Export Control Act of 1949, as amended: 50 U.S.C. App. 2026(c)."

Now, it would appear that you, in this instance, cited considerable additional material, additional statutory authority, as the basis for the withholding rather than relying upon the general provisions of section 3 of the Administrative Procedure Act.

Mr. SMITH. Oh, yes, sir.

Of course, the very first one we list is, I believe is, 5 U.S.C. 1002 which is the Administrative Procedure Act. We do list that.

Mr. Moss. Yes.

Mr. SMITH. Yes, sir.

Mr. Moss. The only interesting thing on 5 U.S.C. 22 that I would like to raise, I remember before we amended that, that it was cited by most departments and agencies time and time again as the authority for withholding. You may continue.

Mr. SMITH. I have nothing further, Mr. Chairman, except to be available to answer any further questions that you have.

Mr. Moss. Are there further questions?

Mr. Kass?

Mr. KASS. Mr. Smith, you stated on page 12 of your statement that the President has the constitutional responsibility under article II to preserve the confidentiality of documents and information. What is the specific constitutional citation, article II what?

Mr. SMITH. Well, section 3, I think it is, to faithfully execute the laws.

Mr. KASS. This was your interpretation?

Mr. SMITH. Yes.

Mr. KASS. Thank you. Section 3 of the Administrative Procedure Act, as I asked Mr. Schlei this morning, was passed in 1946. In the 19-year history of that section, do you think that the public information section has really been a public information section in the light of the legislative history of the section?

Mr. SMITH. So far as the Treasury is concerned, I think so. We make everything available except where we feel it should not be made available.

Mr. Moss. We have had a minimum of complaint against the Treasury.

Mr. GRIFFIN. In fact, according to Drew Pearson's column this morning you may be giving out too much information.

Mr. SMITH. We get it both ways.

Mr. KASS. Yet in your answer to Mr. Moss' questionnaire the very first citation given earlier was 5 U.S.C. 1002 not for public information but for withholding this information.

Mr. SMITH. Yes, sir.

Mr. KASS. If the Treasury Department—you touched on that earlier with Mr. Rumsfeld—were authorized to charge reasonable fees for obtaining the information, would this relieve the problem that you spoke of—the malicious, the evil, or the meddling purpose?

Mr. SMITH. Well, it would enable us to hire the people and make the facilities available for whatever volume of requests would come.

I personally think somewhere along the line there that the taxpayer should not be asked to foot the bill for a lot of trivial, meddlesome requests for information where there is no real need for it.

Mr. KASS. Do you mean the taxpayer, in general, or the individual taxpayer or the individual citizen?

Mr. SMITH. I mean I am talking about the taxpayers in general. Of course, as you say, if we had user charges, then the person requesting it would pay a fee, but you have got employees on the rolls and coming up for pensions after 25 or 30 years, and so on. I just do not think it is good government even where they pay for it to provide a facility for a useless request for information.

Mr. KASS. But don't you, in fact, have specific statutory authority for user charges in 5 U.S.C. 140?

Mr. SMITH. I am advised by Mrs. Lloyd that we do have authority. I do not know the full scope of it without examining that question a little further, but I know there is basic legislation for the establishment of user charges.

Mr. KASS. Mr. Smith, what is your present authority for withholding income tax returns?

Mr. SMITH. I think it is cited in that response of ours: 7213, title 26, 7213, I believe, is the basic——

Mr. KASS. As you read H.R. 5012, if that bill were enacted, would that in any way change the existing statutory authority given you by the Congress to withhold those income tax returns?

Mr. SMITH. Well, I meant to mention it in my statement and I neglected to put it in there, but we have been quite concerned to try to figure out what the legal effect of section 2 would be both as to the specific statutes and as to 18 United States Code 1905.

I would certainly think that there might be some disagreement as to whether those statutes were overridden and I would certainly recommend if this bill were acted upon, that you might want to wish to consider specifying in some way the impact of this bill on some of these other statutes.

Mr. KASS. Mr. Smith, you understand it is not the intention of the bill as drafted and as introduced by the members of the committee and others to repeal any existing statute which authorizes the Department to withhold information such as income tax returns?

Mr. SMITH. Well, I am glad to know that. We were not sure.

Mr. KASS. What is your present——

Mr. MOSS. You were not sure? What does the language on page 3, line 5, mean?

Mr. SMITH. Well, I am talking about section——

Mr. GRIFFIN. Section 2 of the bill.

Mr. SMITH. Section 2 of the bill which says "All laws or parts of laws inconsistent with the amendment made by the first section of this act are hereby repealed."

Mr. KASS. But, Mr. Smith, taking section (c)—"this section does not authorize withholding information from the public or limiting the availability of records to the public except matters that are," and then skipping down to exemption No. (3) "specifically exempted from disclosure by statute."

Mr. SMITH. Yes; I should have said that our main worry was the impact of this upon 18 U.S.C. 1905.

Mr. KASS. Well, now, how would this bill, which specifically exempts from disclosure matters which have been exempted by statute, affect the Trade Secrets Act?

Mr. SMITH. Well, 1905, as I recall it, prohibits disclosure of confidential information except as authorized by law, and when you get into this question of this section 2, if it were enacted, is it authorized by law? I mean does section 2 have the effect of meeting the test of 1905. I think that is our point.

Mr. Moss. I think it is a very good point.

Mr. KASS. Mr. Smith, in your opinion could this matter be sufficiently covered by the legislative history or would your department, faced with this statute if enacted, still have that problem?

Mr. SMITH. Well, we certainly would be amenable to any guidance given in the legislative history, and we would endeavor to interpret it naturally in the way in which it was intended by Congress. But I would merely suggest that there might be some way in which this could be clarified a little bit in order to avoid that problem.

Mr. KASS. Mr. Smith, what is your present statutory authority for withholding your own trade secrets? You started to mention that earlier, dealing with ink and paper processes for making money?

Mr. SMITH. I think that it is contrary to the public interest.

Mr. KASS. So the statutory authority——

Mr. SMITH. I do not think there is any specific statutory authority we could point to for that.

Mr. KASS. You would not point to 5 U.S.C. 1002?

Mr. SMITH. Well, that is public interest. I think we would say within the meaning of 1002 that the process for making the ink and paper for our currency must be maintained a secret in the public interest within the meaning of—yes, I suppose we could cite 1002.

Mr. KASS. So then your specific statutory authority in this instance is 1002?

Mr. SMITH. It would be the only specific one.

Mr. KASS. These are trade secrets or other informational matters which your department has, on its own, developed?

Mr. SMITH. Yes.

Mr. KASS. And not given to you by anybody else?

Mr. SMITH. Yes, and I might say there are other cases of that. For instance, the Coast Guard is constantly developing various kinds of equipment, electronic and otherwise, that it uses in its various activities.

Mr. KASS. Are these patented?

Mr. SMITH. Port security activities. Some are patented and some are not.

Mr. KASS. Mr. Smith, as the law now stands, 5 U.S.C. 1002, who, in your opinion, is a person properly and directly concerned who should be given information, who should be given Government information?

Mr. SMITH. Well, I think it depends upon the nature of the proceeding, of the subject matter. It is hard to generalize. But obviously, let us say a man who applies for a gold refiner's license is properly and legitimately concerned with the documents that he submitted to the Treasury.

For instance, if he wants to get them back later on or remember what he said in his application; in the case of a corporation, a majority

stockholder, or even a large stockholder, heirs, the heirs of that same person who applied for the gold license. This is the general area in which we consider who is properly and legitimately concerned.

Then in the case of the regulations of our specific bureaus that carry this out, for instance, the Office of Domestic Gold and Silver Operations, I believe they spell out who they do consider to be directly concerned, but it is hard for me to generalize throughout all the operations of the Treasury Department, for instance, in any given type of situation because they vary, whom we would consider properly and legitimately concerned.

Mr. KASS. But for the record on the case you illustrated, would not that information fall specifically under trade secrets and commercial or financial information obtained from the public and privileged or confidential—that information given on an application for a gold license?

Mr. SMITH. It might, yes, but I think we could cite some of such type of information that we would not feel was covered.

Mr. KASS. In the general sense on the availability of information, though. Mr. Smith, should there be a distinction between any person seeking information and those persons who are properly and directly concerned?

Mr. SMITH. We believe there should be; yes, sir.

Mr. KASS. Should there be criteria based on "properly and directly concerned," or should the criteria be more properly based on the type of information that you are going to make available or not make available?

Mr. SMITH. Well, I think that for a general statute it is very difficult to come up with any formulation more specific than something like properly and legitimately concerned or words to that effect.

I think that in applying such a requirement the agencies and bureaus should spell out what their determination is in any given situation so that it is clear to the public and to the Congress, indeed, if they look into the matter, how they are implementing this.

Mr. GRIFFIN. Mr. Kass, could I ask a question at this point?

Mr. MOSS. Certainly.

Mr. GRIFFIN. As an example, suppose that the gold balance, our gold balance, continues to go down. Could you in the Treasury Department decide some day that it is not in the public interest to disclose what our gold balance is from day to day? Would you do that?

Mr. SMITH. We actually do not disclose it from day to day. We publish information as to our gold transactions with a lag of 2 or 3 months.

Mr. SMITH. Something like that.

Mr. GRIFFIN. Two or three months?

Mr. SMITH. And we feel that it could be disastrous under certain circumstances to publish the information about our gold in international foreign operations, international gold operations.

Let me give you an example. You might have a number of situations coming together that would, all of which might be, unsettling to confidence in the dollar, and don't forget we have to worry not only about American citizens' confidence in the dollar, but foreigners, and let's say right at that point France buys $150 million worth of gold

from us, a big purchase. Tomorrow we may buy $50 million worth of gold from Italy. Turkey, and so on, so that in the next day $50 million from some other countries, is purchased, and when our 3 months' statistics come out it is 2 or 3 months later, there is $100 million of purchases balanced over against $150 million of sales, but at any given time, if we had to make available immediately in some of these international monetary operations of ours the information it could counteract just exactly what we are trying to accomplish.

For instance, whe we are performing exchange operations in foreign markets to maintain the price of the dollar in those markets, if the speculators knew how much we were spending to support the price or to push it down, either one, it could operate exactly contrary to what we are trying to accomplish in those operations.

Mr. GRIFFIN. Well, I do not know whether it is good policy or not, but have I put my finder on some information that would not be exempt under the bill as we have drafted it? In other words, under the bill would a person be able to get information on a day-to-day basis?

Mr. SMITH. I think there is some that would not be covered. Of course, here again we get into this point I made about what is national defense.

Mr. Moss. Do you classify it?

Mr. SMITH. The breadth of national defense.

Mr. Moss. Do you classify this information?

Mr. SMITH. I do not think—no, we do not, not these actual transactions. I do not think they are classified. National security classification.

Mr. Moss. What other type of classification are you authorized to use?

Mr. SMITH. Well, none, except our own official use administratively which merely means contrary to public interest to give it out at this time.

Mr. Moss. Are the persons who have access to this information cleared by any form of clearance procedure?

Mr. SMITH. Oh, yes; indeed.

Mr. Moss. At what level?

Mr. SMITH. Well, the whole Office of the Secretary which largely controls these transactions are all cleared for top secret or higher.

Mr. Moss. Is this information handled as though it were classified?

Mr. SMITH. Yes, sir.

Mr. Moss. It is given all of the protection that would be given to classified material?

Mr. SMITH. Are you talking about information on gold transactions or foreign exchange transactions?

Mr. Moss. That is right, the ones we have just been discussing.

Mr. SMITH. Yes, sir. That is very carefully protected; yes, sir.

Mr. Moss. For all practical purposes it is treated as classified information, then, isn't it?

Mr. SMITH. It is handled in the same way; yes, sir.

Mr. Moss. And the authority to handle it that way is your 10501, is it not?

Mr. SMITH. Well, sir——

Mr. Moss. In other words, you have not withheld a classification because you thought 10501 failed to cover it, have you?

Mr. SMITH. Well, I think the answer is this, sir, that we are cognizant of our responsibility not to classify as national defense information, not to abuse this classification authority of national defense information.

Now, for this reason we use that type of classification very sparingly. But, on the other hand, there is information of this type that we consider it would be seriously contrary to the public interest to have revealed, at least the timing of it, which we carefully safeguard.

Mr. Moss. Then, if you felt that this is material which is so sensitive that it has a direct impact upon the national security rather than the national defense—I do not think you separate the two, but let us assume that you can—then isn't the authority for classifying deficient in not recognizing national security rather than national defense?

Mr. SMITH. Well, there are some other considerations here that I ought to mention, probably. For instance, whenever we buy or sell gold it is with a foreign country.

Mr. Moss. Yes.

Mr. SMITH. And so it is a transaction that we are not completely at liberty anyway to give information on, make public, because if they are selling gold it may be contrary, they may consider it contrary, to their interests to have it publicized that they had to sell gold to us. So that I mean it is not information that is owned entirely by the United States.

Mr. Moss. That is specifically exempted.

Mr. SMITH. What?

Mr. Moss. That is specifically exempted by this proposed legislation, under "foreign policy."

Mr. SMITH. Right. I think as to gold transactions they come under foreign policy. I think a better example would be our foreign exchange operations in foreign markets where we are not selling to foreign governments or central banks. We are operating in exchange markets where private individuals and institutions are buying and selling foreign exchange. There the foreign policy exception does not come into play.

Then you get into this question about a little wire saying "I bought 500,000 marks today." That one thing in and of itself, is the national defense going to stand or fall if we give out that information? I am sure nobody would say that the country was going to fall if we gave it out.

On the other hand, if you had a trend in the market, and there were a series of transactions over a period of 4 or 5 days, it could be very serious. I think this is one reason why we do not attempt to give this the national defense type of classification.

Yet we feel it is very sensitive information, at least as to the timing of the release of it. It is like this silver thing that I referred to about our coins. When we make our report within the next couple of weeks to the Congress on the coinage situation and what we propose Congress enact about it, we are going to give the Congress a wealth of information. We are going to give them everything we have.

But if in these last 3 months while we were polishing this up we had to give out little bits and pieces of it, we would have had a controversy raging and speculation and everything else going on.

Mr. Moss. You know I do not think that is contemplated under this: "Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person," and I think some of the records you are discussing could be covered under appropriate rulemaking. Your report on a matter of coinage is not complete. At the moment it reflects no official records. It is a proposed, it is an interim report; it is an internal memorandum covered here under "interagency or intra-agency memoranda or letters dealing solely with matters of law or policy." Your recommendations to the Congress are a matter of policy, solely. You may put in a lot of stuff to support it, and if it is not broad enough to cover, I think you could suggest to us that we make a modification or cover it by appropriate language in the report.

Mr. SMITH. Well, factual information, for instance, I had a reporter on the phone the other day about when are we coming up with our coinage recommendations, and I said I hoped very soon. He said, "What alloys have you tested at the Philadelphia Mint?" Well, I said, "We have tested a whole bunch of alloys, all feasible possibilities." He said, "Did you test this one?" and he mentioned a specific metal or mineral.

Now, there is factual information that if we read this right is not covered by internal memos on law or policy. We have statistics and we have records of tests and things, just factual information which could be very damaging to give out at the wrong time, and yet I do not believe we would say that it is covered by internal memorandums of law or policy.

Mr. Moss. We have gone into a lot of matters here today, and it seems to me you cannot have a memorandum dealing solely with law that does not cite fact, and it is inconceivable to me that you could have a memorandum dealing solely with policy that does not cite fact.

Mr. SMITH. Well, I would suggest, sir, that I think that word "solely" is not helpful in there, because this is what, partly what, gives us concern, that if it has got some fact in it, and if you read this one way——

Mr. Moss. If you cite a statute, that is a fact, is it not, and a matter of law?

Mr. SMITH. But if we had an internal memo discussing policy, but along with it in there are some statistics, some facts, let us say, on testing coins, then I would not regard that memo as dealing solely with matters of law or policy, at least that is the way I interpreted this provision.

Mr. Moss. Mr. Smith, let me say that your discussion is very helpful, and I appreciate it. But I can only observe that the tendency in agencies is to regard these things very narrowly when we discuss them in a committee, and very broadly when they administer them.

Mr. KASS. Mr. Smith, would your agency have any objection to releasing those memorandums dealing soley with facts—in other words, facts compiled for your agency, no policies, no law, no interpretations, just facts, actual investigation reports, accident investigation reports, in the Coast Guard or other things like this?

Mr. SMITH. Oh, yes, there are certain ones that we would.

Mr. KASS. So there would be some objection even to specific factual memorandums after all——

Mr. SMITH. Yes.

Mr. KASS (continuing). For release.

Mr. SMITH. I cannot emphasize this question of timing too much. Something that could be very damaging to be put out today, we would be glad to give anybody 2 weeks from now. I think the matter——

Mr. MOSS. But the agency shall, "in accordance with published rules, stating the time, place, and procedure to be followed."

Mr. KASS. That is in the bill, line 2, page 2.

Mr. SMITH. Well, I thought that was merely saying between the hours of 9 and 5:30, at such and such an address.

Mr. KASS. I suppose you could also say between 2 and 4 a.m., on Sunday morning?

Mr. SMITH. But if you mean timing, if you mean that when somebody asks for something and we say you can check in 6 months from now, I do not believe you mean that.

Mr. GRIFFIN. You get into a discussion of that word "promptly" in line 3, don't you?

Mr. MOSS. That is right.

Mr. KASS. Mr. Smith, you objected to the phrase "clearly unwarranted invasion of personal privacy." Why?

Mr. SMITH. I almost took that out, but it seemed a little funny to say in a law you had to exempt something clearly unwarranted. But if it was just plain unwarranted that you should give it out.

Mr. KASS. Does not your own regulation that you cited earlier this afternoon stating something about those matters which are "clearly inimical to the public interest," what is the difference between that——

Mr. SMITH. I think there is a big difference there, because this puts the burden on us. In other words, this is the emphasis which is on not withholding. I think there the word "clearly" puts the burden on the Government agency to give it out.

Mr. KASS. Whose burden would this be under the "clearly unwarranted invasion of personal privacy"?

Mr. SMITH. I suppose it is the same situation, although I still must say that if it is an unwarranted invasion of personal privacy, I cannot see why Congress would want to say it should be given out. It is a minor point, though, I must say, I almost took it out of the statement because I do think it is a little petty, that point. It offended my sensibility a little bit.

Mr. KASS. Mr. Smith, one other question: We were talking earlier about the concept of persons properly and directly concerned. Who sets the criteria as to who is a person properly and directly concerned in your agency?

Mr. SMITH. I would say it was the head of the department and the heads of the bureaus that promulgate these regulations.

Mr. KASS. Do persons in other agencies and departments fall under the category of persons properly and directly concerned?

Mr. SMITH. It depends upon whether they have a legitimate need in their activities, they are authorized by law for the particular type of information in question.

Mr. KASS. I am talking about, for example, the Department of the Treasury files, compiled for whatever purpose and given then to the

Department of Justice for litigation purposes. Do you make a determination as to whether the people looking at those files in the Justice Department are properly and directly concerned?

Mr. SMITH. We make them state what their need for them is and, of course, in a great many cases it is our own litigation in the sense that the Justice Department are the trial attorneys for most all of the litigation in which the Treasury Department is a party. We do not do our own trial work except in the Tax Court. All the rest of our trial work is done by the Department of Justice.

Mr. KASS. Are there any clear guidelines spelled out by the Department of Treasury as to who will be a person properly and directly concerned for any information given out?

Mr. SMITH. Well, I believe that some of our bureaus' regulations do spell it out. For instance, I happen to know, because it was one I saw not too long ago, I do not believe I have it with me, in the regulations of the Office of Domestic Gold and Silver Operations, which issues licenses to processors, and refiners of gold, they have specified in there who are entitled to obtain information contained in the records of the licensing division on gold licenses and they also state that anybody can come in and find out if a given company has a gold license, and the size of it. In other words, how many ounces they are entitled to hold at any one time in their possession.

Mrs. Lloyd informs me that the Bureau of Customs specifies in its regulations who are directly and legitimately concerned.

Mr. KASS. Have you supplied that information to the committee in your questionnaire or, if not, could you supply it?

Mr. SMITH. We will check our questionnaire and if it is not in here we will be happy to supply it.

DEFINITION OF PERSONS PROPERLY AND DIRECTLY CONCERNED UNDER SECTION 3(c) OF THE ADMINISTRATIVE PROCEDURE ACT AS SET FORTH IN REGULATIONS OF THE OFFICES AND BUREAUS IN THE TREASURY DEPARTMENT

This memorandum provides information for the record of the hearings on H.R. 5012 and related bills before the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations on the definitions used within the Treasury Department of "persons properly and directly concerned" to whom matters of official record would be made available under section 3(c) of the Administration Procedure Act. This submission covers definitions provided in the regulations of the offices and bureaus of the Treasury Department in addition to the information on this matter previously provided to the subcommittee in the reports of the offices and bureaus of the Department in answer to the subcommittee's questionnaire on the operation of section 3 of the Administrative Procedure Act.

There follows a discussion of the pertinent provisions of the regulations of the offices and bureaus approximately in the order in which their reports were presented in the submission of the Treasury Department on March 16, 1965, including the regulations of the Office of the Comptroller of the Currency reported later to the subcommittee. Where the reports detail the information requested, it is referred to, but not reproduced here. Since the regulations vary depending upon the character of the official records concerned, the character of the records is indicated to the extent relevant. This submission includes reference to the furnishing of official information by a bureau to persons considered directly concerned therewith without specific request from such persons. This submission does not include reference to the regulations on making available to the public final opinions and orders pursuant to section 3(b) of the Administrative Procedure Act.

1. OFFICE OF THE SECRETARY

Title 31, Code of Federal Regulations, part 1, subpart A, provides for the disclosure of official information pertaining to the various divisions within the Office

of the Secretary and certain other offices of the Department. Section 1.2(f) provides that requests for information shall be addressed to the Administrative Assistant to the Secretary (now the Assistant Secretary for Administration) and shall state the "interest of the applicant in the subject matter and the purpose for which the information is desired." Further, if the applicant is an agent or attorney acting for another, "he will attach to the application evidence of his authority to act for his principal." Subsection (g) provides that the determination will be made "on the basis of the nature of the information desired" and that the determination will be made by the Administrative Assistant to the Secretary or the Secretary of the Treasury, the Under Secretary, an Assistant Secretary, the Fiscal Assistant Secretary, or the General Counsel.

The following offices which responded separately to the questionnaire are also covered by the disclosure regulations in title 31, Code of Federal Regulations, part 1:

2. Office of the Assistant Secretary for International Affairs.
3. Office of the Fiscal Assistant Secretary.
5. Office of Foreign Assets Control.
6. Office of Law Enforcement Coordination.
9. Bureau of Engraving and Printing.

4. OFFICE OF DOMESTIC GOLD AND SILVER OPERATIONS

The special regulations on the disclosure of information for this office (title 31, CFR, Cum. Supp., pt. 93) were set forth at length in the information submitted to the subcommittee. In section 93.16(b) the persons to whom official business records deemed confidential are available are described in five paragraphs. They include applicants for gold licenses, applicants who have been denied licenses, and persons whose licenses have been revoked, any agents of the foregoing, or their successors in interest. These persons may secure confidential information concerning the application and licenses in which they have an interest. In addition, disclosure may be made to "persons properly and directly concerned" upon the showing of a court order in pending litigation or in lieu thereof with the written consent of the person authorized to inspect the documents under the regulations. A person showing a legitimate interest may be advised of the form and amount of the license held by any other person. Also, official requests from State or Federal agencies or officers will be met.

7. DIRECTOR OF PRACTICE

The roster of all persons enrolled to practice and the roster of all persons disbarred or suspended from practice are available to public inspection. Matters of official record pertaining to the enrollment of individuals are available to persons properly and directly concerned. Persons seeking such information should set forth the interest of the applicant in the subject matter and the purpose for which the information is desired. If the applicant is an attorney or agent he should attach evidence of his authority to act for his principal (31 CFR 10.90, 10.91).

8. BUREAU OF CUSTOMS

The disclosure regulations of the Bureau of Customs, title 19, Code of Federal Regulation, part 26, describe the official records of customs business transactions which are held confidential because the disclosure would be detrimental to the interest of the parties involved without furthering public interest. Section 26.4 provides that the information contained in such papers and documents may be made available to the importers, exporters or their duly authorized brokers, attorneys or other persons directly in interest, or other agents. Provisions are included for disclosure of documents in litigation. Section 26.5 provides that an accredited representative of the press may be permitted to examine vessel's manifests and summary statistical reports of imports and exports and to copy for public information data not of a confidential nature. Certain limitations on the information which may be copied from outward and inward manifests are specified. Accredited representatives of regularly established associations are permitted to examine vessel's manifests for the purpose of securing data relevant to merchandise of the kind or class in the imports of which the association is interested, subject to other provisions of the regulations.

10. BUREAU OF ACCOUNTS

The regulations on disclosure of public records in the Bureau of Accounts in 31 CFR 270.2 describe the official records as including appropriation accounting records, collection and disbursing accounting records, accounting records relating to investment accounts, and others. The regulations state that certain of this information is held confidential "because it relates to the personal financial transactions of individuals or corporations, or because the disclosure of information would clearly be inimical to the public interest." A request for information in these records "should set forth the interest of the applicant in the subject matter and the purpose for which information is desired." The determination of disclosure will be made by the Secretary, the Under Secretary, or the Fiscal Assistant Secretary.

11. BUREAU OF THE PUBLIC DEBT

The applicable regulations are 31 CFR 323.2. They state that apart from records pertaining solely to internal management the records "pertain to the purchase and ownership of Government securities and transactions in connection therewith." The further provide: "These records ordinarily will be disclosed only to the owners of such securities, to their executors, administrators or other legal representatives or to their survivors, or to investigative and certain other agencies of the Federal and State Governments, to trustees in bankruptcy, receivers of insolvents' estates, or to Federal and State courts, where proper order has been entered requesting disclosure of information." The regulations explain that the records are held confidential as to other persons "for the reason that they involve private financial affairs of individuals, organizations, and others who purchased Government securities in the belief that in so doing their affairs would not be exposed to public scrutiny." A request for information "should be accompanied by a statement of the reasons why such information is requested and evidence that the person requesting information is entitled thereto."

12. OFFICE OF THE TREASURER

The regulations of this Office on records disclosure (31 CFR 351.2) describe the official records as including "paid checks and records thereof; retired obligations of the United States and records thereof; records relating to coin, bullion, and currency; and various accounting and other records relating to the functions of the Office of the Treasurer." Certain of this information is held confidential, the regulation states, "because it relates to personal financial transactions of individuals or corporations, or because the disclosure of the information would clearly be inimical to the public interest." A request for information "should set forth the interest of the applicant in the subject matter and the purpose for which the information is desired." The determination of disclosure will be made by the Secretary, the Under Secretary, or the Fiscal Assistant Secretary.

13. INTERNAL REVENUE SERVICE

The regulations on disclosure of tax returns are based upon provisions in the Internal Revenue Code. Under 26 U.S.C. 6103(a) the bulk of tax returns shall not be open to inspection except by Presidential order. Subsection (b)(1) permits proper officers of any State to have access to returns or abstracts thereof of any corporation. Subsection (b)(2) provides that the designated representative of any State body or commission charged with the administration of the tax laws of the State may have access to all income tax returns but only if the purpose is to aid in the administration of State tax laws or to furnish local tax authorities with information for tax administration purposes. Written request of the Governor is required. Subsection (c) allows stockholders owning more than 1 percent of the outstanding stock of a corporation to inspect the annual income return of such corporation. Subsection (d) provides for the furnishing of any data of any character contained in or shown by any return to the Committee on Ways and Means of the House of Representatives, Committee on Finance of the Senate, the Joint Committee on Internal Revenue Taxation, or a select committee of the Senate or House authorized to investigate returns or a joint committee so authorized by concurrent resolution, sitting in executive session.

The regulations issued pursuant to Executive orders are as follows:

Under 26 CFR 301.6103(a)—1, certain tax returns are open to inspection by a taxpayer making the return and by certain others including the taxpayer's ad-

ministrator, executor, or trustee, by partners, corporate officers, receivers, or trustees in bankruptcy, and by heirs, next-of-kin, or beneficiaries having a "material interest which will be affected by information contained in such returns" (subsec. (c)).

Properly authorized State tax officials and tax officials of the District of Columbia and Puerto Rico may inspect estate, gift, unemployment, and certain excise tax returns filed in an IRS district within or including that State or political entity, if for tax administration purposes. If filed in another district, the returns may be inspected if identified with particularity (subsec. (d)).

Officers and employees of the Treasury Department may inspect tax returns where their official duties require it, but inspection by anyone not in the Internal Revenue Service for reasons other than tax administration must be on application in writing by the head of the bureau (subsec. (e)).

The head of another executive department or other Federal establishment or one designated by him may be granted permission to inspect an income and other tax return in connection with a matter officially before him, but the request must be made by the head of the department or agency and must state the reason why examination is sought (subsec. (f)).

Where necessary in the performance of official duties, U.S. attorneys and Justice Department attorneys may be granted permission to inspect income and other tax returns, but their requests must state why the information is desired. Where inspection is to be made by a Justice Department attorney, the application must be signed by the Attorney General, Deputy Attorney General, or an Assistant Attorney General (subsec. (g)).

Under section 301.6103(a)–100 et seq. and the Executive orders which these regulations implement, seven governmental agencies, and specially authorized committees of Congress are permitted to inspect certain types of returns necessary to carry out particular Government functions. In every case the inspection is to be authorized or requested by the chairman or other Government head and to take place with the approval of the Secretary of the Treasury or Commissioner of Internal Revenue, and the information obtained is to be held confidential except to the extent necessary to carry out the purposes of inspection. The Government entities covered by these regulations are the following:

The Department of Health, Education, and Welfare with respect to income tax returns as needed in the administration of the Social Security Act, as amended (subsec. (a)–100).

Committees of Congress authorized by Executive orders to inspect those returns specified in a resolution adopted by the committee in accordance with the rules of the appropriate House of Congress (subsec. (a)–101).

Securities and Exchange Commission with respect to corporate and individual income tax returns and statistical transcript cards as necessary in gathering statistical information to carry out functions under the Securities Exchange Act, as amended (subsec. (a)–102).

Advisory Commission on Intergovernmental Relations with respect to income and other taxes for the purpose of making studies and investigations leading to recommending methods of coodinating and simplifying tax laws and administrative practices (subsec. (a)–103).

Department of Commerce with respect to income tax returns for the taking of such data as the Secretary of Commerce may designate (subsec. (a)–104).

Renegotiation Board with respect to income tax returns for the taking of such data as the Chairman of the Board may designate (subsec. (a)–105).

Federal Trade Commission with respect to income tax returns of corporations as an aid in executing the Federal Trade Commission Act (subsec. (a)–106).

Board of Governors of the Federal Reserve System and the Federal Reserve banks with respect to the information return made by a commercial bank concerning loans and commitments to foreign obligors under the Interest Equalization Tax Act (subsec. (a)–107).

14. BUREAU OF THE MINT

The regulations of this Bureau governing disclosure of official records are contained in 31 CFR, Cum. Supp. 92.23. This section provides that the official records of the weight and value of gold and silver deposited with the mint and of other mint matters are confidential because they contain information of a

confidential nature concerning the commercial and industrial affairs and activities of individuals and enterprises and because to permit general inspection of these documents would violate public and private confidence. However, these records are available for inspection by depositors of gold and silver who may inspect documents relating to their deposits and by persons properly and directly concerned, upon furnishing a court order in pending litigation, or with the written consent of a person authorized to inspect the documents under the regulations. Records are also available upon official requests of Federal or State governmental agencies or officers thereof acting in their official capacities.

15. BUREAU OF NARCOTICS

The distribution of information held in the Bureau of Narcotics is governed by a number of Federal statutes and the regulations issued thereunder which are cited and described in the response of the Bureau to questions 6 and 7 of the subcommittee's questionnaire. Because of the extensiveness of this material it is not reproduced here. It should be noted that interpretations of the narcotics laws and regulations are furnished to the general public on request and particular compilations of the laws and regulations are furnished to professional persons. Further, interpretations concerning drugs are furnished to the drug industry. The records and files of the Bureau with respect to violations of the narcotic laws are held confidential for good cause and because certain criminal files are classified and require secrecy in the public interest.

16. U.S. COAST GUARD

The Coast Guard has general regulations on the disclosure of records and additional regulations on disclosure relating to particular statutory activities. The general regulations are contained in title 33, CFR, subpart 1.10. This subpart provides that official records and documents, except those classified as "confidential" by reason of military necessity or for other good cause, "will be made available for examination by persons who have legitimate and valid reasons for seeking access to such records."

Title 46, CFR, subpart 3.10 provides for the disclosure of information regarding shipment and discharge of merchant mariners. Section 3.10–1 states that upon inquiry information will be released "as to the dates and ports of the commencement and termination of all voyages by merchant vessels for which shipping articles are signed before shipping commissioners." However, other information contained in shipping articles or logbooks required to be kept by the Coast Guard will be released only to a limited extent. Under section 3.10–5 the application for this information must identify the applicant and, if he is a representative of another, must specify the nature of the representation and attach proof when required. The application must set forth the interests of the applicant in the subject matter, the purpose for which the information is desired, and whether it is intended for use in prosecuting a claim against the United States. Section 3.10–10 governs the obtaining of information by representatives of any party. Section 3.10–15 specifies the particular persons, such as the master, owner, etc., who may obtain information from shipping articles. This includes any officer of the United States, or of a State, Territory, or political subdivision, or the District of Columbia acting in the course of his official duty. Section 3.10–25 provides the same specifications of persons who may obtain information from official logbooks. Logbooks may, in addition, be examined by a member of the crew, a passenger, an underwriter, or an authorized representative of such a person who was connected with the particular voyage for which information is sought.

Title 46, CFR, subpart 136.13 provides for the disclosure of records relating to marine investigations. Information as to the time, place, and general subject matter of investigations will be released upon inquiry except when such information is confidential for security reasons. Other information relating to such investigations will be released to a limited extent. Under section 136.13–5 the applicant must be identified and his representative, if any, must provide proof of his designation. The applicant must set forth his interest in the subject matter, the purpose for which it is desired, and whether or not it is intended for use in prosecuting a claim against the United States.

Title 46, CFR, subpart 137.50 provides for the disclosure of information in connection with the suspension and revocation proceedings with respect to any license, certificate, or document issued to a person by the Coast Guard. Information is available upon inquiry as to whether an investigation of a specified com-

plaint is in progress or that charges have been preferred, or that an investigation has been closed, and as to scheduled times of hearings and the substance of charges. Information disclosed at public hearings before examiners may be released upon inquiry so long as the cases have current public interest. There is to be maintained at headquarters a file of the Commandant's decisions on appeal or review and a file of the decisions of examiners, and in the district commander's office, a file of the decisions of the examiners in that district. Copies of such records may be obtained by persons properly concerned because of litigation or other collateral interests in the proceedings. Such persons and the appellant may obtain a copy of the complete hearing transcript. Appellants are specifically entitled to free copies of these records as a matter of right. As in the other regulations, the applicant must be identified, specify the material desired, state the reason for the request, and whether or not the information is intended for use in litigation involving the United States.

17. U.S. SECRET SERVICE

The records of the Secret Service are of two types: those held confidential and those available for inspection by members of the public upon request. The types of records in each category are set forth in section 3 of the document on "Organization and Procedure of the United States Secret Service" published in 16 F.R. 10861, October 25, 1951. This section provides that records containing reports, directions, and determinations pertaining to criminal investigations, protection of the President and criminal law-enforcement activities and records pertaining to contraband material confiscated pursuant to law are held confidential as disclosure would aid law violators and reduce the effectiveness of law-enforcement operations. The records available to the public are those pertaining to public education activities relative to counterfeiting and the theft, forgery, or fradulent negotiation of Government checks and records of inquiries from the public relative to the application of the criminal laws enforced by the Secret Service.

18. THE COMPTROLLER OF THE CURRENCY

The regulations of the Comptroller of the Currency with respect to disclosure of information (12 CFR, Cum. Supp., 4.13), identify the publications of that office which are available to the public or to financial institutions subject to his jurisdiction and provide for the availability of unpublished information. Unpublished information is available to persons properly and directly concerned upon request for examination of the information in accordance with the procedures set forth in the regulations. These procedures are described in the Comptroller's response to question 6 of the subcommittee's questionnaire. Section 4.13(b) of the regulations provides that the information coming to the Comptroller as a result of his supervisory, investigative, and examining functions is held confidential for the reasons specified. Confidential information is defined as information in reports of examination and inspection of national banks and other financial institutions and in eight other categories set forth in that subsection. The Comptroller makes confidential information available to certain Government agencies, and a copy of the report of examination is made available to the bank or company concerned for its confidential use only.

Mr. KASS. Mr. Smith, are there any employees in the Department of Treasury whose payrolls are withheld from the public?

Mr. SMITH. Payrolls?

Mr. KASS. Salaries paid.

Mr. SMITH. Not to my knowledge.

Mr. KASS. Could you check that and supply it for the record?

Mr. SMITH. Yes, I will be glad to. I do not know of any.

GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., April 9, 1965.

HON. JOHN. E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. MOSS: During my testimony on March 30 on H.R. 5012 and related bills before the Subcommittee on Foreign Operations and Government Infor-

mation of the House Committee on Government Operations, I was asked to provide information for the record on two subjects. The first was the definitions used within the offices and bureaus of the Treasury Department of "persons properly and directly concerned" to whom matters of official record would be made available under section 3(c) of the Administrative Procedure Act. Information on this matter is supplied in the attached detail memorandum. The second subject was whether there were "any employees in the Department of Treasury whose payrolls are withheld from the public." The answer is none.

I trust that this information is adequate for the subcommittee's purposes.

Sincerely yours,

FRED B. SMITH, *Acting General Counsel.*

Mr. KASS. I have no further questions.

Mr. MOSS. Are there further questions?

Mr. GRIFFIN. No, Mr. Chairman.

Mr. MOSS. If not, we thank you.

Mr. GRIFFIN. Except the information that the gold balance statistics are not available for 3 months.

Mr. SMITH. I am not sure that is the right period. There is a time lag here.

Mr. GRIFFIN. It is interesting——

Mr. SMITH. Let me say this.

Mr. GRIFFIN. We might be in a much different situation than we think we are at any given time.

Mr. SMITH. No. The Treasury daily statements contain our balance, our total, but what I am talking about are the individual transactions.

Mr. GRIFFIN. I see.

Mr. SMITH. If we sell gold to France or if we buy gold from Turkey and so on, those—that information as to our transactions is published with a 2- or 3-month timelag.

Mr. GRIFFIN. I wondered as you spoke. I was under the impression that our balance was——

Mr. SMITH. Oh, no.

Mr. GRIFFIN. That the information was on a day-to-day basis.

Mr. SMITH. The balance is currently published at all times. I am sorry if I said that. I probably misstated myself.

Mr. MOSS. I do want to thank you for your testimony, and I am quite sincere in stating that it has been very helpful to us.

Mr. SMITH. Thank you, sir, and I appreciate very much the opportunity to tell you what we think.

Mr. MOSS. Thank you.

The committee will stand adjourned until 10 a.m. tomorrow morning.

(Whereupon, at 4:45 p.m. the subcommittee recessed to reconvene at 10 a.m., Wednesday, March 31, 1965.)

FEDERAL PUBLIC RECORDS LAW

(Part 1)

WEDNESDAY, MARCH 31, 1965

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2 p.m. in room 2247, Rayburn House Office Building, Representative John E. Moss (chairman of the subcommittee) presiding.

Present: Representatives John E. Moss, Torbert H. Macdonald, Robert P. Griffin, and Donald Rumsfeld.

Also present: Samuel J. Archibald, chief, Government information; David Glick, chief counsel; Benny L. Kass, counsel; Jack Matteson, chief investigator; Robert Blanchard, investigator; and J. P. Carlson, minority counsel.

Mr. Moss. The subcommittee will come to order.

The first witness this afternoon is Mr. Joseph Costa, New York City, representing the National Press Photographers Association. Mr. Costa.

STATEMENT OF JOSEPH COSTA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Mr. COSTA. Chairman Moss, members of the House Foreign Operations and Government Information Subcommittee, members of the subcommittee staff, gentlemen, it is my pleasure to appear before you at this hearing as the accredited representative of the National Press Photographers Association, the world's largest organization of visual news reporters. Our membership is drawn from virtually every daily newspaper and television station which maintains a news-picture staff, news magazines, news reels, industrial, scientific, and educational news publications.

The president and executive committee of our organization appointed me to accept your invitation to testify in the hope that my more than 40 years as a working news photographer, cofounder and 18-year chairman of the NPPA board, editor of the National Press Photographer, our official publication and, if I may say, battle-scarred veteran of the fight for freedom of the camera in news reporting could be helpful to this subcommittee in its deliberations on H.R. 5012 and all related bills.

In this role, I am here in behalf of my colleagues in photojournalism, to advocate and urge the passage of a true public records law at the

Federal level. No segment of the working press, more than news photographers, has been taught by bitter firsthand experience, the extent to which the so-called public information section of the Administrative Procedure Act of 1946, during its 18-year history, has been turned into a vehicle to withhold information from the public.

It is my understanding that the pressing need for a Federal public records statute has been documented by this subcommittee during the decade of its existence. Hopefully, the word-and-picture testimony presented here today will add effectively to that documentation.

With your permission, I should like to establish a broad base for the advocacy of a bill that will forever eliminate language that permits the enforcement of "ridiculous requirements" or that becomes a "shield of secrecy" or encourages abuses in the name of "good cause."

Chief Justice Earl Warren of the U.S. Supreme Court was quoted in an interview as stating:

> The complexities of life today demand a free and objective press if the people are to be informed and make responsible decisions regarding Government. I have great faith in the American people that if they have the facts they will make the right decision.[1]

In Pope John XXIII's encyclical, Pacem in Terris, he wrote and I quote again:

> * * * Peace on earth can only come * * * from observance of the "universal, inviolable and inalienable" natural law rights which include: "The right to freedom in searching for the truth and in expressing and communicating one's opinions * * * The right to be informed truthfully about public events."

We, of communications media, hold the conviction that those rights need to be respected and exercised by inquisitive newsmen, interested taxpayers, persons properly and directly concerned—all those persons having legitimate and valid reasons for seeking information from the Government.

To be more precise, in our advocacy of the bill H.R. 5012, and related bills, the profession I represent is urgently concerned with that part of section 161(b), which would make all the records of every agency, other than Congress or the courts, promptly available to any person.

Our concern is intensified by the repetitious and arbitrary raising of the "shield of secrecy" by the Interstate Commerce Commission, by its enforcement of a ban on all forms of visual reporting from proceedings which are nonjudicial in character. Yet it has invoked the American Bar Association's Canon 35, Judicial Code of Ethics, as its justification for giving "stronger roots to the weed of secrecy." Your committee's staff has been apprised of this situation. By the way, if I may interject and read to you an interoffice memorandum written by a cameraman to the news director of WBZ–TV in Boston about a decision of the ICC to ban news cameramen, and he wrote this:

> To: Ed Fouhy.
> From: Jack Chase.
>
> Just a note to let you know that in our attempt to cover the ICC hearings at the Hotel Bradford in Boston, we were not allowed to take our camera into the hearing room. Lester Conley, the hearing examiner, said no to my reguest for live camera coverage stating it was ICC policy, raised on a previous experience when sound film excerpts which he said were used out of context had been misleading and had caused some embarrassment.

[1] Editor & Publisher, Jan. 9, 1965.

These are the reasons on which the ICC apparently bases its judgment to ban news reporters.

There are those who argue that the word report alone suffices to make any event public—and the press "free." We disagree.

The effect of word imagery is based on common experience. If this does not exist, then we can rightly ask whether the man with pictures can and does provide common experience in them, so that the words have a richer and more precise meaning.

Do we not find impressive affirmative answers in the word-and-pictures coverage of Gemini and Ranger? And even the censored photo story of the Russian cosmonauts?

Words that mean one thing to the writer often mean something else to the reader. If word communication were a precise science, at least half the work of lawyers would not be necessary.

As long ago as 1941, members of the Attorney General's Committee on Administrative Procedure unanimously agreed that laymen and lawyers alike were "* * * baffled by a lack of published information to which they could turn when confronted with an administrative problem." The Attorney General's Manual has been subjected to as many interpretations as the number of agencies that looked to it for guidance.

The introduction of H.R. 5012, and related bills, and—indeed—these hearings, would have been unnecessary if word compositions or expressions were not subject to different interpretations by different people.

Permit me, therefore, to focus on "complete information" which cannot be assured by words alone; and to state the photo-journalists' position that no report can be complete if it is possible to enhance and clarify the meaning of the words.

Now the immediate objective of this presentation is to establish the correct relationship of pictures—of visual communications, if you will—to the word report. I am going to ask you to join me in an experiment. I will describe certain events to you verbally. I ask you then to compare your own mind's-eye picture—the image created by the word description alone—with a photograph of each scene. You alone will know how accurate or rich your first mind's-eye picture was, when compared to the photograph of the actual scene.

Mr. Moss. Is there objection to the request of the witness? Hearing none, the lights will be turned out.

Mr. COSTA. In the third round Firpo knocked Dempsey through the ropes. It was one of the most exciting moments in boxing history. This is how the camera saw it.

The word description: 87 children * * * 87 children and 3 nuns died in the Chicago school fire. A fireman, his face drawn and haggard, carries a boy from the building.

Here, in one picture is the whole story.

The word image: peering through the shattered windshield, the camera records the pain-distorted face of pretty auto crash victim as she waited to be pulled from the wreckage.

Now the actual picture.

General Dwight Eisenhower, Supreme Commander in World War II, learns that President Truman has fired General MacArthur from his command in the Pacific.

I ask you, gentlemen, are there words to match the eloquence of this picture? [Laughter.]

Again let me describe a chariot race in which fleas, not horses, provide the pulling power. An accurate idea of their incredibly small size can be gotten only by comparison with, well, a fingernail.

The four-engined C–54 leaped skyward, propelled from the short Alaskan runway by jato-assist bottles.

Now look at the actual scene.

The convicted murderer stands before the bar waiting to be sentenced. Now try to visualize how his expression changes from amusement to astonishment, then despair, as he hears the death sentence pronounced.

Now look at him.

Poised for "scrambling" the instant the alarm sounds, men of the Strategic Air Command are shown relaxing as they pass the night in the ready room.

Again, let me show you the actual scene.

Narcotics addiction is an unsolved problem among us. Heroin allows the junkie to escape life's uneven battle. It deadens his desire for wealth, strength, success—even for food. New York's junkies often take their shots on rooftops, where there is less chance of being spotted by the law.

Here is how they look in the actual photograph.

Concentrating on one patient at the Government's Lexington, Ky., narcotic facility, Dr. Glaser's face registers the seriousness with which he regards the problem. What manner of man is he? Shall the words describe him as youthful, tightlipped, bespectacled, tousled?

Well, take a look at him. How much more does this closeup photograph tell you about how this man dedicates himself to helping the patient solve her own problem?

The world-famous Indianapolis 500 auto races are notorious for tragedy, and the recurrence of tragedy, year after year, yet its fascination is irresistible. Let us reverse the procedure now and show the picture first.

Flames spread instantaneously down the track and seem to engulf a whole section of the grandstand in fiery disaster. Dave MacDonald's car hit a wall and burst into flame. Eddie Sachs plowed broadside into MacDonald's car and died in the smoldering ruin of his own cockpit. MacDonald died of burns 2 hours later. But three cars careened safely through the huge fireball—and spectators were spared any serious injury beyond smoke inhalation. This was the story that only words could tell.

The word report says forthrightly enough that an extraordinary assemblage of the world's "movers and shakers" converged on New York City to grapple with a staggeringly ambitious subject: solutions to the eternal human problem of war—or "Peace on Earth," a working title borrowed from Pope John XXIII's "Pacem in Terris" encyclical. What manner of men were they?

United Nations belittler, U.N. defender, delegates from the United States, West Germany, France, Belgium, and Great Britain. Let us see photographs of them in conference. No word report could have been complete without the pictures.

We live in an age of miracles, yet we live in a world in which so much is taken for granted. Photography itself is by way of being a miracle, perhaps even a series of miraculous accomplishments harnessed to a single purpose.

Photography, in everything we do, serves as a vital force in our daily lives. It is, all at one and the same time: teacher, persuader, seller, informer, shaper of images and opinion, a recorder of history.

Photography plays an invaluable role in crime prevention and detection, in medical diagnosis and healing, in the study of the extremes of outer space and the ocean floor, in unveiling the mystery of growing things, in revealing the secrets of the food and water that gives us life.

Photography is a reformer of mankind's industrial, economic, and social mode of living.

Through pictures we can better understand an overall scene, an event of happiness, a tragedy; yes, we can even understand people better if we are able to see them. Obviously then, in the field of communication, pictures are indispensable companions to the written word whether the event is a tragedy, a religious or political ceremony, a court scene, a scientific or technological breakthrough—or, as I said, just plain people.

Every President for the past 40 years has reiterated his belief in the importance of an informed electorate. Every public servant running for office, at some time or other in his career, inevitably dedicates himself to the importance of an informed people. Yet we are constantly faced with efforts of people in government, and in many other aspects of public life, who exert their every effort to deprive the public of information to which they are entitled.

At this very time we are experiencing perhaps the greatest turmoil in our Nation's history regarding the people's right to vote. Of what possible use is the right to vote if the electorate does not have the information on which to base intelligent decisions?

Surely no one can deny that we live in the most complex age in the history of the world. If our people are to be adequately informed, they must be completely informed through every means available to us with today's technology.

Scientists tell us that most of the things we learn, we learn through our eyes. Educators have found that they can teach students of every level, including the Armed Forces, faster, more efficiently, and completely, with visual teaching aids. Doesn't it stand to reason that we can inform our people about the world about them better, more completely, and more accurately if our news reports are a combination of words and pictures, rather than words alone?

Yet, although there are efforts being made at every level to restrict public information, there is far more discrimination against the visual report than there is against any other form of reporting.

Therefore, for all the reasons given in this statement, we respectfully urge the committee to do everything in its power that will help to eliminate the double standard in reporting information to which the people are entitled.

Gentlemen, I would be failing in my duty if I were not forthright in asking why, even here in a congressional investigation, word reporters are permitted to observe, interpret and report proceedings,

even to describing verbally their impressions of how the committee members and the witnesses looked and acted whereas visual reporters, whose pictures would permit the public to see for themselves, are banned.

The late Honorable Learned Hand, in the case of the *United States* v. *The Associated Press*, said:

> (The press) serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the first amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[1]

We respectfully submit that whether it is an ICC hearing or a congressional inquiry, the public is entitled to a complete report in both words and pictures.

News photographers must have access to news and news sources just as freely as word reporters in order to assure the availability of complete information in the public interest.

In closing let me repeat that we of the National Press Photographers Association support passage of a bill that will require each authority of the executive branch of the Government to "make all its records promptly available to any person."

In behalf of the officers, directors, and members of the National Press Photographers Association, permit me to express our appreciation for this opportunity to appear before you. And, in the name of all those I represent, from coast to coast, I want to publicly thank Congressman Moss for his 10 years of dedication and service to the cause of a truly informed public, and for his enlightened and highly successful efforts in bringing complete information to the American people, in both words and pictures. If there are any questions I would be more than happy to try to answer them.

Mr. Moss. Well, Mr. Costa, I want to thank you very much for the compliment and for the testimony.

Mr. Griffin, do you have any questions?

Mr. GRIFFIN. Well, Mr. Chairman, I do have a question for Mr. Costa. In view of your testimony and your concern about whether photographers may take pictures, I wonder if this bill permits anything that you are not able to do now? It makes records promptly available to anyone and, I suppose, to the extent that you want to photograph records, it would make them more available than otherwise. But what about taking pictures in various offices and agencies of the Government? Do you understand that this bill would allow you to do that?

Mr. COSTA. No, I have no such understanding. In fact, my interpretation is, sir, that it does not concern itself with pictures at all, and this is one of the things, about which we would like to see something done, if it is humanly possible.

Mr. GRIFFIN. I see.

Mr. COSTA. For example, the General Services——

Mr. GRIFFIN. I had the impression you were in favor of the bill and were satisfied.

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[1] Learned Hand in *U.S.* v. *Associated Press*, 52 F. Supp. 362, 372 (1943).

Mr. COSTA. No, sir; for the bill as far as it goes.

Mr. GRIFFIN. I see.

Mr. COSTA. For example, the General Services Administration bans cameramen from all Federal property all over the whole country, and you must realize that there are bound to be many important news stories to which the pictures can add a great deal of information, that the public is deprived of.

Mr. GRIFFIN. I am not being argumentative but in order to get into a discussion on the merits of your request let us consider the fact that a picture is often assumed to be proof positive of an event; yet it occurs to me that sometimes pictures can be very deceiving, depending upon the purpose that the photographer or editor wants to achieve.

I can recall a personal experience for example. In 1959 I co-sponsored a piece of labor legislation, and in the eyes of many people I was supposed to be some sort of a demon. I recall making a speech at a banquet in Detroit. In advance of the banquet there was a press conference and a number of photographers took a great many pictures. The only one used caught me scowling—I looked about as mean as I have ever looked in my life. That was the image that they wanted to portray of me.

That picture was used over and over again by that particular newspaper.

I suppose in House committee hearings there is concern as to whether the photographs will portray a balanced picture of what goes on in a committee hearing or will they show only the empty chairs or the Congressman when he happens to be reading a paper? If that is what the photographers or editors want to show, that is what they can show. What is your answer to this concern?

Mr. COSTA. My answer is a very forthright one. Pictures can be made to distort and not tell the truth. But we are dedicated to a free press and the principle that the news media editors try to give a balanced report. Words can distort every bit as much or more so than pictures.

It stands to reason, it seems to me, that if we are going to rely on public information reaching the people in the public interest, the more sources that the people have of getting that information, sir, the more accurate it is probably going to add up to just as Learned Hand said. While there are exceptions, just as in the legal profession, there are the ambulance chasers, and in the medical profession there are people who do things that are not right, I would be degrading myself if I stood before you and said that every editor in the country always does exactly the right thing.

Human nature is frail, to be certain, but I maintain, and we maintain, if the public can get the word report and see the pictures of the event or people to which they refer, in the majority of all the cases, they will come up with a more accurate understanding of the news event or the people, than they can by one or the other alone. That is the reason I showed here, in connection with the Indianapolis Speedway crash, that the picture could not tell information that the words did provide.

Mr. GRIFFIN. Mr. Costa, I am inclined to agree with you. I think it is well that your explanation and your point of view are in the record.

Certainly editors, both photo editors and the editors of the printed word, have a great deal of responsibility that goes along with their freedom. I think we both recognize that they try to give a balanced picture rather than a distorted one. Still the subject should be available, I agree with you.

Mr. COSTA. If I may add to what I just said, there is a continuous program within the media itself for improvement of our ethics, practices, and techniques. Only recently there was a long discussion in one of the professional publications about balanced reporting in pictures. It is the responsibility of responsible editors also to select pictures that show both sides of a story just as it is their responsibility to tell both sides of any story in words.

So, you see, we are always trying to improve. Just as your hearing here is aimed at improving, something that we are already living with, newspapers, the law, medicine, the professions, we too are always trying to improve, and we make progress slowly.

I might point out that in the Senate, at Senate hearings, pictures are permitted. I do not think you find newspapers or news media publishing pictures of empty chairs or of the Senators when their faces are distorted. I think those pictures that are published are generally aimed at giving a balanced report of the particular hearing.

Mr. GRIFFIN. I think there is a psychological tendency for a picture more than the printed word to be accepted as proof positive of a situation. People are critical of the printed word, and often compare the articles of various reporters, but I think a picture has a little higher standing in many respects——

Mr. COSTA. You are right.

Mr. GRIFFIN (continuing). And there is probably a little more responsibility involved on the part of the photographer and editor.

Mr. RUMSFELD. Would the gentleman yield? I, to some extent, feel the other way about a picture. I think most people at one time or another have seen a picture of themselves or of something that they saw with their own eyes that does not represent a balanced picture, whereas most individual citizens have never in their lives had anything written about themselves which was inaccurate, because most people have not had anything written about them, and they tend to accept the written word.

We had a situation yesterday in this hearing where the gentleman from the Treasury Department stated categorically that Mr. Jack Anderson's column was not accurate, it was wrong.

Now people read that and have no way to know this. But with a photograph, it seems to me, people recognize that possibility. I would like to say in conclusion that I am delighted to be here to hear your testimony, and I think that certainly the problems you put before this subcommittee are worthy of consideration, and certainly the area of picture reporting and picture information is one which should properly be considered.

Mr. COSTA. If I may add to this discussion, we conduct workshops at various times through the year in different parts of the country, and we have a publication which I edit, and the one thing we continuously admonish is that pictures carry a presumption of truth and, therefore, it is incumbent on the visual reporter when he has his film in his camera and, before he pulls the slide, he should ask himself, "Is this picture that I am about to take true or is it false?" This is a gospel

that we preach just as religiously as we can, because we are working for the improvement of the tecniques to bring better and more accurate information to the public in the public interest.

A news cameraman's salary goes on whether he gets a picture or not. He is not paid by the number of pictures he takes. He can go to an assignment and be turned down and go back to his office, and he is not reprimanded. We work for equality of visual reporting because we sincerely believe that the public is being deprived of a means of information which can add to the total report, and make newspapers and news reports more informative.

Mr. GRIFFIN. I have no other questions.

Mr. MOSS. Mr. Macdonald.

Mr. MACDONALD. I have very few questions, Mr. Costa. I appreciate your coming here. I know of your reputation and of the work you have done on behalf of your people.

One thing that is not clear in my mind is that except for the exclusion from the House side hearings of cameras and cameramen, how else do you think you are discriminated against, in what way are camera people or television people treated unfairly?

Mr. COSTA. I already mentioned the General Services Administration which bans photographers from all Federal property, Federal buildings.

Mr. MACDONALD. Well, it is not quite true because at least to my knowledge, and you correct me if I am not stating the truth, even though it is, I guess, a rule of the House promulgated by the leadership of the House going back to Mr. Sam, that no cameras were allowed in the hearing rooms, I have many times, having left a congressional hearing, seen cameras and camera people out in the corridors.

Mr. COSTA. I am sure you have. However, this is not so across the whole country. Because the Federal Judicial Council has approved the provisions in canon 35 of the American Bar Association, the General Services Administration has ordered cameramen out of Federal buildings, in order to keep them away from Federal courts.

These complaints come in to us from all over the country. If the committee wishes me to document some of these I will get the information together.

Mr. MACDONALD. I do not know about the committee, but I personally would like to, because while I sympathize with you, and I think, perhaps, if you were allowed into House committee hearings they might be more lively, et cetera, I think the opposite has been true where television has become increasingly important in getting their message across to the bulk of the people of America, that many people say that too much attention is paid to television.

If I were on the opposite side I would say that, perhaps, we had a couple of joint sessions of Congress not for the benefit of the news media by the written word but, perhaps, for the benefit of the people who watch television, so in some ways I think you are protesting a little too much.

I agree with you about the House hearings. But past that, I have not heard a valid point that you raise.

Mr. COSTA. May I point out that the occasions on which the show, if I may say so, is put on exclusively for television, are those occasions when the entire country is concerned with a President's state

of the Union message or some equally important story. However, I am not here speaking for live television. I am speaking generally for visual reporting, and I am more concerned with the report on film than I am concerned with the live electronic report.

Now, for example, here you have to have a tripod permit to photograph the dome of the Capitol with a camera on a tripod. Either if you are a valid——

Mr. MACDONALD. I would think that would be a very limited protest, because I doubt if there is much sex appeal for any photographer to take pictures of the dome of the Capitol.

Mr. COSTA. Of course; of course.

Mr. MACDONALD. There is very little news value that I can see.

Mr. COSTA. But you see the tendency might be to judge the rest of the country by what happens here. I am not being argumentative.

Mr. MACDONALD. I understand, and I am not either. We are just discussing this.

Mr. COSTA. But we get reports from members all over the United States who complain, that they were ordered out of a Federal building in their particular city because they had a camera.

Mr. Moss. Would you yield?

Mr. MACDONALD. Yes, of course.

Mr. Moss. This matter of the GSA's actions to ban photographers is one which has come to the attention of the committee on numerous occasions, and I believe that the last understanding we have with GSA is that photographers are permitted in all Federal buildings excepting in those areas where Federal courts have their quarters.

In other words, the Federal courthouse buildings or the combination of post office and court buildings, the areas, the floors, devoted to the courts, photographers are not permitted there, and that is because of the courts themselves rather than GSA.

We did have a couple of instances where GSA building managers attempted to go beyond the policies of the GSA, and to bar photographers from the buildings. When the complaints were received by the committee, we went immediately to GSA. Unless you have a very recent case, I think the policy is as reflected in the correspondence in the files of the committee. Photographers do have free access now except in the court areas.

Mr. COSTA. The latest instance, Mr. Chairman, that I recall from memory, and I do not want to be held to it, would be within the last year, but not within 6 months.

Mr. Moss. Well, within the last year we had a case, and that is where we reached this understanding with GSA.

Mr. COSTA. I see. Then I am glad to learn that because I think we can run a story about it in our magazine and let our members know about it.

Mr. Moss. I thank you for yielding.

Mr. MACDONALD. I do not want to prolong this, but just recently the GSA, which runs the Federal Building in Boston, had a student sit-in during the time of Selma, and there was no question that cameras and photographers were allowed in that building run by GSA. So I just use that—that is just 2 weeks ago, so I would think that is a correct statement about current practices of the GSA position.

But I go back to Mr. Griffin's statement, and I am happy to join with him; I think the old Chinese proverb, which I maybe misquote, but isn't it that one picture is worth a thousand words?

Mr. COSTA. May I—this is interesting—may I give you the correct interpretation. It is "one seeing is worth a hundred tellings," and it has been perverted over the years to "one picture is worth a thousand words," but the actual interpretation I am told by Chinese friends is, "one seeing is worth a hundred tellings."

Mr. MACDONALD. I bow to your erudition. I do not have that many Chinese friends. [Laughter.] But isn't the temptation, not on the photographers so much, but on the, I guess, photo editor very strong? If he happens to like a candidate for, say, such an important office as the Presidency, the news corps has to report what was said, and yet a photographer does not have to do anything except catch somebody, as somebody apparently did Mr. Griffin, in an off moment, and——

Mr. RUMSFELD. He did not say it was an off moment. [Laughter.]

Mr. MACDONALD. He said a thousand pictures were taken, and one was scowling. It must have been a Republican rally, I am sure. But in any event, isn't it very possible and, as a matter of fact, I know it is possible because I traveled on a presidential campaign, and depending on the area and the feelings of the paper in that area, the photographs of the candidate for Presidency of the United States, if it were in a friendly territory they always came out smiling and patting a child on the head, and if it was an unfriendly territory, I don't know if he would be scowling, but he would be chasing a dog away with a stick or something. And I just say that while I agree in theory with what you say, that because a photo is so concise but it also can give a very false impression, I mean somebody can be here at this hearings for hours and be smiling, and then raise their finger and point a finger at you, and it comes out that somebody is browbeating you, that the responsibilities that go with being a photo editor are even stronger than those of an editorial writer for a newspaper. Would you agree with me or not?

Mr. COSTA. They are, they are. But since Mr. Macdonald has raised this point, Mr. Chairman and gentlemen, I would like to comment on it, because I have had experience in this area myself, and I think it is tremendously important that we all understand it.

To begin with, the individual who views a picture views it subjectively. If he is traveling on the Presidential train he has a subjective view——

Mr. MACDONALD. Sir, I am not that old, I am sure none of us are.

Mr. COSTA. At any rate, may I tell you of an incident that happened when Mr. Roosevelt was campaigning for the last time that he campaigned through New York City. It was a miserable, rainy day. The cameramen were in the 14th car, an open car in the procession. I was one of them, and a New York Times photographer, a very dear friend, was with me, and the car was full of cameramen.

We toured the whole city, and when we stopped at the Brooklyn Navy Yard to receive flowers from the daughter of one of the workers there or when we stopped at another place and another place, by the time the cameramen left the 14th car in the procession and ran 14 car lengths up, the particular little ceremony for which they stopped was finished, and we got no pictures.

We finally got into the Kingsbridge Armory in the Bronx where the President was reviewing some Women's Army Corps recruits. His car drove in, and the lady commandant of this group sat in with him, and we grouped ourselves around the car to take pictures.

The New York Times man was directly behind me, and he said, "Joe, please, the minute you get your shot will you duck?" And I did.

I got a picture and I ducked, and while I was changing the plate, he got his picture. We used glass plates in those days. No sooner had he taken his picture when the President's car drove off. So we each had one picture. At that time I worked for the New York News, which was not supporting Mr. Roosevelt. In my picture he was not smiling, and if you will recall, his health had started to go, and he looked rather poorly.

When the New York Times man snapped his shot he was smiling or laughing at some remark made by the lady commandant. Now, the Times was supporting Mr. Roosevelt.

The next morning these two pictures were published. The next week Time magazine used these two pictures to prove that editors deliberately select the pictures that will enhance or degrade a candidate's image according to their own editorial point of view, the very thing you are saying here.

I submit that, by and large, for example, on your campaign trip, if I were covering that trip, I would find it pretty hard working under the crowding and shoving conditions of covering a campaign—which I have done many a time—to deliberately select attitudes and take pictures that make a candidate look good or bad. A cameraman has all he can do to just record anything that happens as it happens, and keep abreast of the moving procession as the situation develops.

I honestly think that this is exaggerated out of all proportion because we all view pictures subjectively.

Mr. MACDONALD. Just one last remark, Mr. Chairman, and then I will yield.

You spoke about WBZ–TV and Jack Chase writing you this letter.

Mr. COSTA. Not to me, sir; to his superior.

Mr. MACDONALD. I see; because I was going to say, he is a newscaster, I happen to come from that area, and the editor of this, Denny Whitmarsh, and I would think any protest to anyone would be coming from the editor of WBZ–TV, I am not doubting it but——

Mr. COSTA. I have this letter—of course——

Mr. MACDONALD. Secondly, I was wondering what sort of pictures he could take of any record that the ICC have?

Mr. COSTA. It was a hearing.

Mr. MACDONALD. Yes, of a hearing, that would be injurious to either side.

Mr. COSTA. It had to do with the New Haven Railroad bankruptcy, as I understand it. This is of great public interest at this time. Commuter railroads, particularly in the New York area, Long Island, New Haven, and others coming in from New Jersey, are very much in the news these days and, of course——

Mr. MACDONALD. They just OK'd a merger of the New Haven for freight.

Mr. COSTA. Yes, for freight; that is right. But apparently WBZ wanted to cover the hearing because of the great interest in the New Haven Railroad.

Mr. MACDONALD. What prevented them?

Mr. COSTA. Well, according to Jack Chase he talked to Mr. Lester Conley, the hearing examiner, who said, and I am reading from Jack Chase's memorandum to Ed Fouhy, who signed his letter to me as news director, and he said, "that Mr. Conley told him stating it was ICC policy based on previous experience when sound film excerpts which he said were used out of context had been misleading and had caused some embarrassment."

Mr. Moss. Would you yield again? I can clarify this. This, I think, illustrates the very complex nature of the problem the photographer has. It is a matter which I doubt can be reached by this subcommittee.

The subcommittee received a complaint and followed its usual procedure in attempting to develop the facts. The Interstate Commerce Commission cites statutory authority for exclusion of photographers. Let me read it:

The applicable provisions of the Interstate Commerce Act appear in section 17 and read as follows:

"The Commission shall conduct its proceedings under any provision of law in such a manner as will best conduce to the proper dispatch of a business and to the ends of justice. The Commission may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it shall conform as nearly as may be to those in use in the courts of the United States. All hearings before the Commission, a division, individual Commission or Board shall be public upon request of any party interested."

Now, the section of the portion of the statute which says that the Commission's hearings or proceedings, whatever their nature, shall conform as nearly as may be to those in use in the courts of the United States is, in the judgment of the Chairman of the Commission, the basis for their exclusion of photographers from those proceedings. I would say, reading the statute, that they appear to be acting in keeping with their authority. Canon 35 is their authority.

Mr. COSTA. Is their authority, that is right. And that is an example of a rule of a private organization that has the effect of law, which is a thing that we have been protesting for all these years.

Now, I do not know, I am not a legislator nor an attorney, but I appeal to this committee regarding this statute, if anything can be done about it, the ICC hearing is not a judicial proceeding. Whether anything can be done about it, I do not know. But I do think, when the public has an interest in a hearing such as is going on now about the New Haven Railroad, and they are deprived of seeing the faces of the people who are concerned with this problem and how they are carrying on their investigations and discussions, that it is an infringement of the people's right to know.

Mr. Moss. If the gentleman from Massachusetts will yield further, I would say that there are three items raised by your testimony that involve the jurisdiction of three other committees of the House. I believe that the Committee on the Judiciary would have to deal with any question of the Canon 35. I believe that the Committee on House Administration would have to deal with the matter of housekeeping here on the Hill unless that has been given to the Capitol Buildings Commission. I think it probably would be the Committee on House Administration.

The item we have just discussed. the action of the Interstate Commerce Commission, where they rely upon statute—and I think the

statute is clear on its face—would be a matter which would require the consideration of the Committee on Interstate and Foreign Commerce at any time they might have before them legislation which would amend the ICC Act. There is the problem of how to differentiate between their quasi-judicial role and their quasi-legislative role, and it is difficult to do so. The statute directs that they employ the same procedure in both areas.

Mr. COSTA. Mr. Chairman, we get down to the very thing we have been discussing about how people in government tend to make a rule and apply it to their own conceptions.

As I understand it, a letter written by Mr. Webb, who is Chairman of the ICC, directed to you on March 22, paragraph 4, he says that:

> Policy does not permit television, sound recording of the hearing without special permission of the Chairman of the Commission.

I should think that in a case of New Haven Railroad it would be considered to be of sufficient importance that the Chairman would give his permission.

Mr. Moss. Was that permission sought?

Mr. COSTA. I do not know.

Mr. Moss. Because there we go back to a minute of the Commission dated December 22, 1961, which reads as follows:

> Live, delayed, or recorded television or radio broadcasting of Commission hearings or the taking of pictures in the hearing rooms will not be permitted without special permission of the Chairman of the Commission.

So there the Commission has acted to authorize its Chairman to grant the permission, but it has to be requested.

Mr. COSTA. Yes, I really am not familiar, do not know the circumstances.

Mr. Moss. The complaint the committee received in this instance did not indicate whether the Chairman had been contacted. We sought, as we always do preliminarily, the statutory basis for the denial of access, and in this instance the agency was able to cite a statute.

I thank the gentleman for yielding.

Mr. MACDONALD. I think it would be a good thing to have many of our hearings here in the House subjected, if you want to use that word, to the all-seeing eye of the camera.

Mr. COSTA. Thank you, sir.

Mr. Moss. Are there further questions? Mr. Kass.

Mr. KASS. The problem of the photographer, the news photographer, is in many cases the problem of immediacy. The event is taking place, and he has to take the picture at that time or else the fire or whatever else that is happening is going to go out.

The court action, even given top priority, could not take place at the same time as the event is taking place. How would the bill, H.R. 5012, help solve the problem of the news photographer?

Mr. COSTA. H.R. 5012?

Mr. KASS. This bill, if enacted.

Mr. COSTA. I do not see that it would at all. I came here at the invitation of the committee to register our support for anything that furthers the cause of public information. In addition, I plead with the committee to think of the unity of the word and picture report in conveying public information, in all of its deliberations in the future.

Mr. KASS. But the court access provision, is that not satisfactory to the news photographers?

Mr. COSTA. I do not see how that concerns itself with pictures at all, and we are fully aware of the problem here with the Canon 35 business and the Federal Judicial Council policy.

Incidentally, I must say that there is a certain degree of inconsistency even though I quoted Mr. Justice Warren. He says, on the one hand, give the people the information and they will make the right decision. But as Chairman of the Federal Judicial Council he then endorses Canon 35, and all the restrictions there are on photography thus restricting public information, so it is not quite consistent.

Mr. KASS. I have no further questions, Mr. Chairman.

Mr. MOSS. Again I want to thank you, Mr. Costa, for the pleasure of having you appear this afternoon.

Mr. COSTA. Thank you.

Mr. MOSS. Mr. Larry Speiser. Do you have a statement?

STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. I do not have a prepared statement, Mr. Chairman.

Mr. MOSS. Mr. Kass.

Mr. SPEISER. I have a few preliminary remarks, if I may.

Mr. MOSS. All right, if you would.

Mr. SPEISER. I am Lawrence Speiser, the director of the Washington office of the American Civil Liberties Union, a member of the Bars of the U.S. Supreme Court, the State of California, and the District of Columbia.

I am here today to offer the support of the American Civil Liberties Union to H.R. 5012, a bill which would establish a Federal public records law by amending section 3 of the Administrative Procedure Act of 1946.

The aim of this legislation is to provide freedom of information, and it is designed to regulate the information policies of the various administrative agencies, departments and bureaus of the Federal Government.

We support the general aim and purpose of this bill. Our organization is of the opinion that access to the records of Government agencies by the public and the press is vital to the continued functioning of the democratic process. A free society can only exist so long as the public business can be conducted openly via continuing debate and consideration of national policies.

In the past, we have had some difficulties arising from the section 3 of the Administrative Procedure Act as it presently exists, notably the section relating, which permits the withholding of any matter relating, solely to the internal management of an agency.

The most continuing problem we have had in this area relates to the rules that guide investigators, principally security investigators, of the various departments of the Department of Defense.

In November 1962 a memorandum was sent to the Under Secretaries of the three services signed by Walter T. Skallerup, Jr., the Deputy Assistant Secretary of Defense for security policy. In it he —the subject of his memorandum was civil and private rights—and in it he set forth a very commendable policy to insure that during the course of

security investigations and interviews that the civil and private rights of the individuals being interviewed and also of others not be infringed.

For example, in the memorandum he stated:

> Inquiries which have no relevance to a security determination should not be made. Questions regarding personal and domestic affairs, financial matters, and the status of physical health fall in this category unless evidence clearly indicates a reasonable basis for believing there may be illegal or subversive activity, personal or moral irresponsibility or mental or emotional instability involved. The probing of a person's thoughts or beliefs in questions about his conduct which have no security implications are unwarranted.

The conclusion of the memo was to refer the matter to the respective departments to review their applicable regulations and instructions, and requested that they be furnished with whatever changes have been made in their regulations in order to comply with the policies set forth in the memorandum.

The memorandum commendably has attached to it the types of questions which should not be asked during security investigations or adjudications, such questions, for example, on religious matters as "Do you believe in God? What is your religious preference or affiliation? Are you anti-Semitic, anti-Catholic or anti-Protestant? Are you an atheist or agnostic? Do you believe in the doctrine of the separation of church and state?"

With respect to questions on racial matters, "What are your views on racial matters, such as desegregation?" In other racial matters like, "Are you a member of the NAACP or CORE? Do you entertain members of other races in your home? What are your views on racial intermarriage?"

And on through. There are questions on personal and domestic matters, on political matters, such questions as on political matters, "Do you consider yourself to be a liberal or conservative? Do you write your Congressman or Senator on issues in which you are interested or to obtain assistance?"

After becoming aware of this memorandum which, incidentally, was furnished by Mr. Skallerup with no hesitancy, he said that this was certainly in the public domain, I wrote to each of the three services to find out what their regulations were and whether they were in line with this policy memorandum of Mr. Skallerup. I have never received copies of the regulations. I have received replies from the three services, one from one of the services quite belatedly, but in every case they refused to give me copies of their regulations on the grounds that they were internal management guides, and since I have had a number of cases in which the policy of this memorandum has been violated.

Mr. Moss. I wonder if it would be possible for you to return on Monday afternoon?

Mr. SPEISER. Yes.

Mr. Moss. With a quorum call in the House, and probably a roll-call by the time we get back, it will be too late to resume the hearings.

Mr. SPEISER. All right (see p. 189).

Mr. Moss. The subcommittee will stand in adjournment until 2 o'clock tomorrow afternoon. I express my personal regrets.

Mr. SPEISER. That is quite all right.

(Whereupon, at 4 p.m. the subcommittee recessed, to reconvene at 2 p.m. Thursday, April 1, 1965.)

FEDERAL PUBLIC RECORDS LAW

(Part 1)

THURSDAY, APRIL 1, 1965

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:05 p.m. in room 2247, Rayburn House Office Building, Representative John E. Moss (chairman of the subcommittee) presiding.

Present: Representatives John E. Moss, John S. Monagan, and Donald Rumsfeld.

Also present: Samuel J. Archibald, chief, government information; David Glick, chief counsel; Benny L. Kass, counsel; Jack Matteson, chief investigator, and J. P. Carlson, minority counsel.

Mr. Moss. The subcommittee will be in order.

We are pleased to have as our first witness this afternoon Mr. Robert Benjamin, of New York City, and Mr. Chisman Hanes, of Washington, D.C., representing the American Bar Association. Mr. Benjamin, do you have a statement?

STATEMENT OF ROBERT M. BENJAMIN, REPRESENTING THE AMERICAN BAR ASSOCIATION; ACCOMPANIED BY CHISMAN HANES

Mr. BENJAMIN. Mr. Chairman, I just have a few initial remarks. We have no written statement. Then I will introduce Mr. Chisman Hanes, who is chairman of the Committee on Public Information of the ABA Section of Administrative Law. He will present some suggestions we have with respect to the text of the bill and talk briefly about related matters. Then after that either or both of us would be glad to answer questions.

Mr. Moss. Fine; you may proceed.

Mr. BENJAMIN. I would like to say initially as chairman of the Special Committee on Code of Federal Administrative Procedure, which is charged with representing the American Bar Association before the Congress in respect of legislation in this field, that we are very much encouraged and delighted with the progress that is being made in the field. We have known the chairman's strong interest and effective interest in this field over a good many years, apart from your having been kind enough to come out and address the Section of Administrative Law in San Francisco in 1962. We have followed what has been done with the amendment of section 22 in 1958.

We have been working also with the Senate Subcommittee on Administrative Practice and Procedure of their Judiciary Committee, and in that relation I testified on S. 1666 of the 88th Congress in October of 1963 and again on S. 1663 and 1666 in July of 1964, and I would like to refer to some of the comment we made then.

A good deal of what we thought desirable has been done since in the Senate staff bills, the bill introduced recently by Senator Dirksen, and Senator Long, especially in combining in one section all the exemptions which initially had been scattered between the different subsections of S. 1666. I would like now to pass the stand on to Mr. Hanes after simply saying how pleased we are to take part in this effort, your effort to bring something to pass in this extremely important field.

I think it is encouraging that the newspaper people are here on the same afternoon that the bar is, because I think we share strongly the feeling of the importance of getting something done that will really work in this field and of getting rid of the language that so far has been availed of by the agencies more as an excuse for noncompliance than as an exhortation to compliance with the public interest.

Mr. Moss. I would like to express my appreciation to the American Bar Association and to many members of the bar who, during the past 10 years, have contributed a great deal to the work of this committee and made it possible for us to move ahead.

I thank you for your appearance this afternoon. You may proceed.

Mr. HANES. Thank you, Mr. Chairman and members of the committee.

As you are probably aware, Mr. Benjamin's Committee on the Code of Federal Administrative Procedure is the body that is authorized to speak for the bar association on legislation in this area. The administrative law section, of which I am a member, is authorized to work in an advisory capacity with Mr. Benjamin's committee. Mr. Benjamin very kindly asked me to outline a few suggested changes that we have in the bill which we believe will be clarifying and will perhaps help toward the attainment of the purposes of the bill.

We are completely in accord on these changes, and after I am through, Mr. Benjamin may want to add some comments on individual changes himself.

In subsection (a) of the bill as now drawn the first sentence is a repeat of the first sentence in 5 U.S.C. 22. The last sentence of 5 U.S.C. 22, which was added in 1958, has been deleted.

It seemed to us that it might be desirable to restore that sentence which would read:

This subsection does not authorize withholding information from the public or limiting the availability of records to the public.

Just to avoid any implication that this deletion might authorize some withholding, we think it is desirable to put the sentence back in, and it is consistent with subsection (b) and the subsequent provisions of the bill.

Mr. BENJAMIN. May I interpolate briefly as this goes along?

Mr. Moss. Certainly.

Mr. BENJAMIN. Of course we recognize that you have got that language in the beginning of subsection (c), but we have a suggestion for other language there.

Mr. HANES. Right.

Mr. BENJAMIN. I think the idea of restoring it to (a) is not because logically it is necessary, but because as a matter of controversy, somebody without any justification can always get up and say, "You have taken this out. Now, what was the 1958 amendment that has gone out." I think that was said the other day.

Mr. MOSS. That is correct.

Mr. BENJAMIN. It is so easy to overlook that you switched it somewhere else, and we think it is more sensible to avoid controversy by leaving it where it is going on from there.

Mr. HANES. If we restored that, I might jump over to the beginning of subsection (c). With that restoration it seems to us it would be better draftsmanship to change the first 2½ lines of subsection (c) which now read, "This section does not authorize withholding information from the public or limiting the availability of records to the public except"—to delete those and to insert in lieu thereof, "The provisions of subsection (b) shall not be applicable to."

Now, going back to page 2, lines 1 and 2, we would suggest the deletion of the word "published" at the end of line 1 and inserting after the word "rules" the words "which shall be currently published in the Federal Register." The publications provision in section 3 of the present Administrative Procedure Act I do not think would be broad enough to cover the publication of all the rules that this present bill covers. So therefore it seems to us that it would be well for subsection (b) to carry its own publication requirement—for this bill to carry its own publication requirement.

In line 3 on page 2 at the end of the sentence which ends with the word "person," we think it would be desirable to insert "for inspection and copying." If a person were authorized to receive the records, he should be able to inspect and copy them.

Now, line 3, page 3, the words "national defense or foreign policy." It seems to us that it would be perhaps more consistent with the purposes of the bill to substitute "national security," that national security is really the criterion for the exemption under any Executive order that would be issued by the President, and that it embraces everything that properly should be included in national defense and foreign policy.

Mr. MONAGAN. You mean you would leave out "for foreign policy."

Mr. HANES. We would leave out also "defense" and for both "national defense or foreign policy," we would substitute "national security."

Mr. MONAGAN. For both?

Mr. HANES. For both.

In line 7 on page 3 the exemption which deals with trade secrets and commercial or financial information as now written contains the phrase "obtained from the public." We are a little confused by that phrase "obtained from the public." There might be some implication in that that only trade secrets or commercial information obtained in a census or by some means which is of general application would be subject to the exemption.

I think it is the intention of the committee and the staff to exempt any trade secret or commercial or financial information which is of a privileged or confidential character which is acquired either from

one party or from a group of parties. So we would suggest instead of "from the public" the insertion of the words "from a nonagency source."

Then in that same subsection, in line 17 at the end of the subsection we would suggest the deletion of the period and then after "institutions" the addition of the following:

: *Provided,* That records received from another agency which are exempt in hands of such other agency under this subsection shall continue to be exempt in the hands of the receiving agency. Nothing contained herein shall be deemed to prevent the discovery of documents in judicial or administrative proceedings in accordance with applicable rules of law.

Now, the proviso which we first suggest it seems to me just carries out the intent of the bill. The mere fact that a record is transmitted from one agency to another does not change its exempt or nonexempt status. If it is exempt or nonexempt in the hands of one agency, and if it is transmitted over to another, it should retain the same character.

The additional sentence which provides that "nothing contained herein shall be deemed to prevent the discovery of documents in judicial or administrative proceedings in accordance with applicable rules of law" seems to us important because in judicial proceedings or administrative proceedings where a private party is involved, that private party under the applicable rules of law might be entitled to have produced by an agency certain documents which are exempt in these eight categories. He might be entitled to have them produced for the specific purposes of his case, and the discovery rules under the Federal Civil Rules, or any other applicable provisions of law, should remain as they are. But we felt that this sentence ought to be put in there to make that clear.

Mr. KASS. Excuse me, Mr. Hanes. Do you have an additional carbon copy of that?

Mr. HANES. Yes, I do.

Mr. KASS. Thank you very much.

Mr. HANES. Mr. Benjamin has just reminded me that we overlooked one insertion in subsection (b) in line 20 on page 2. In the sentence which begins "As used in this subsection", we should also insert "and subsection (c)", so that the term "agency" would be defined for subsection (c) as well as subsection (b).

Mr. BENJAMIN. May I interpolate one thing. This language we have about changing hands from one agency to another derives from the ABA proposed code which in the 88th Congress was S. 2335 and we expect to be introduced again. That is one part of that—several things we have said are reflected in S. 2335. I would just like to mention it on appropriate occasions, because it is not exactly like S. 1336 or the old 1663. It has played a considerable part in the revisions from time to time of S. 1663 and 1336, and I think it is useful for anybody, including this committee, who is dealing with this general subject to look at that bill also as one of the sources of suggestions. This happens to be one of them.

You find that, among other things, printed in the comparative print that the Senate subcommittee staff got out last April.

Mr. HANES. Our final suggestion has to do with the present section 2 of the bill. It seems to us it might be appropriate to try to make the repeal provision somewhat more precise. The provision of law

to which it would have application is the present section 3 of the Administrative Procedure Act, and consequently we are suggesting that the present section 3 of the bill that is before you be deleted and that in lieu of that we insert two new sections.

One section would amend subsection (b) of section 3 of the Administrative Procedure Act to make it conform with the provisions of this bill. That subsection is now subject to the exemption provisions which are contained in section 3, namely, "any function of the United States requiring secrecy in the public interest or any matter relating solely to the internal management of an agency." Of course that is not consistent with the exemption which we have here.

Subsection (b), which is subject to those exemptions, now reads that "Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

Now, in order to make that conform, we would suggest that we add a new section 2 to this bill which would provide:

SEC. 2. Subsection (b) of section 3, chapter 324, of the act of June 11, 1946 (60 Stat. 238), is hereby amended to read as follows: "(b) Every agency shall publish or, in accordance with the requirements of section 161 of the Revised Statutes of the United States (5 U.S.C. 22)—

which is this section—

"make available, all final opinions or orders in the adjudication of cases and all rules."

Additionally we would suggest that a new section 3 be added to repeal subsection (c) of the present section 3 of the Administrative Procedure Act, because we believe that subsection would be inconsistent with the bill that we have before us.

Mr. Benjamin, would you like to sum up?

Mr. BENJAMIN. No. I think that Mr. Hanes has covered what we had to suggest, and as I said before, either of us would be glad to answer any questions.

Mr. MOSS. Mr. Kass?

Mr. KASS. Mr. Hanes, I want to thank you for this excellent analysis of the bill and the suggested changes.

Mr. HANES. Thank you.

Mr. KASS. Mr. Hanes, in the 19-year history of the Administrative Procedure Act, since 1946, has the public information section, section 3 of that act, been a true public records law in your opinion?

Mr. HANES. It has not in my opinion, Mr. Kass, but I think that Mr. Benjamin is well documented on this subject because he has been working on an amendment of that section for many years. I think—and I am going to ask him to comment on it—I think it is true that the fact that it has not been a true public records law has been documented time and time again by the Hoover Commission and by the hearings that were held on section 1663 last year and by the work of this committee itself since 1955.

But Mr. Benjamin might like to add something to that.

Mr. KASS. Mr. Benjamin?

Mr. BENJAMIN. I would think that the primary source of the answer to that question is the work of this subcommittee, or at least as important a source as any. And I should think a most important source.

I think it is quite clear that since the Administrative Procedure Act has been in force, it has been used more often as an excuse for not furnishing public information than as imposing an obligation to furnish information where I think it should be furnished. That is, I doubt that any information has been furnished except for publication in the Federal Register that would not have been furnished anyway if the Administrative Procedure Act had not been adopted, and I think it has been used as an excuse, that and the old section 22 were used as excuses for not furnishing information which, if they had not offered the surface excuse, might have been furnished.

Mr. KASS. Mr. Benjamin, I had refrained earlier from asking you any questions because you said your doctor told you not to work.

Mr. BENJAMIN. Oh, that is all right, I feel fine today.

Mr. KASS. I hope these questions will be more enjoyable than work.

Either Mr. Benjamin or Mr. Hanes, do you then think that an amendment to section 5, United States Code, title 22, the housekeeping statute, would be, for the purpose of establishing a Federal public records law, the better place for such a law than in the Administrative Procedure Act?

Mr. BENJAMIN. I think there are some advantages to including it in the Administrative Procedure Act.

Mr. KASS. As a cross-reference?

Mr. BENJAMIN. Yes, because whether it is adopted as this first, otherwsie I think it is less awkward to put it in a new Administrative Procedure Act than to repeal parts of the present Administrative Procedure Act, and I think the rest of section 3 of S. 1336 or S. 1663 of the last Congress in the Senate have other things to do with public information which are also important, and I think there is logic in having them all in one section. But this seems to me the most important feature of S. 1066, I guess it is, in this Congress, which was S. 1666 in the last Congress. This is the mot important feature of it. I am informed it is 1166.

Mr. KASS. For the record, S. 1666 referred to was the bill passed last year by the Senate to amend section 3 of the Administrative Procedure Act.

For the record also, S. 1160 was the bill introduced this year by Senator Long to amend section 3 of the Administrative Procedure Act.

Mr. BENJAMIN. There are a few minor differences in the new bill and the bill that passed the Senate last year.

Mr. KASS. Yes, sir; there are.

Mr. BENJAMIN. But they are not of great consequence.

Mr. HANES. Mr. Kass, I just want to say, supplementing what Mr. Benjamin has said, that while we think that the provisions of this present bill, which would replace subsection (c) of section 3 of the Administrative Procedure Act, are most important, it does seem to us that there are some advantages in having in the same bill complete provisions with regard to publications and complete provisions with regard to making available agency opinions and decisions, which would be in the first two sections of an amended section 3 of the Administrative Procedure Act.

Mr. BENJAMIN. I do not think either of us wants to let that go without saying that we would much rather have a separate bill like

this, if there is any delay in the progress of S. 1166 in this Congress.

Mr. HANES. Right.

M. BENJAMIN. I mean this accomplishes the major part publication in the Federal Register, rules publication is pretty good as it is now. This is the major change to be accomplished, and I would not want anything we say to act in the slightest as a drag on the progress of this bill either in the House or in the Senate.

Mr. KASS. Mr. Benjamin, one of the reasons that the bill was introduced as an amendment to 5 U.S.C. 22 was that the Foreign Operations and Government Information Subcommittee under the chairmanship of Congressman Moss sent out a questionnaire asking all of the agencies, departments, boards, and commissions in the Government—approximately 102—whether 5 U.S.C. 1002, section 3 of the Administrative Procedure Act was applicable to them. Despite the language of the Attorney General's Manual on the Administrative Procedure Act saying that section 3, the public information section, is applicable to every agency in the Government, many agencies have informed the subcommittee that, since they do not make rules and are not adjudicatory agencies, the section does not apply to them; and, therefore, there is no Federal public records law applicable to them.

Mr. BENJAMIN. Well, I hope that would be changed by the adoption of S. 1336, for example, or a like bill in the House.

Mr. KASS. And this is why the language of H.R. 5012, this present bill, makes it clear that the word "agency" is to include each authority of the Government other than Congress and the courts.

Mr. BENJAMIN. Yes.

Mr. KASS. Mr. Benjamin, 2 days ago the subcommittee took testimony from Assistant Attorney General Norbert Schlei, and he referred to the problem that this bill, in his opinion, was unconstitutional.

Could you comment on that problem?

Mr. BENJAMIN. Yes.

I read Mr. Schlei's testimony. While he talked about the Executive privilege, he also said that the only way it could be really well exercised would be to leave each agency to deal with its own problems because they were the only ones that knew about it.

Now it seems to me that a very important part of this whole question of Executive privilege is the answer to the question who determines when it is to be exercised. Under President Kennedy that was quite clear as the chairman developed in his talk in 1962 to the American Bar Section of Administrative Law; it was the President's decision.

I do not believe there has yet been any announcement by President Johnson about what he is going to do about this. I would hope he would follow the same line.

Certainly it would seem to me that if the President himself exercises judgment on what is an appropriate occasion for the exercise of Executive privilege, it would be most highly unlikely that he would exercise it in any instance that is not in effect covered by these exemption provisions of subsection (c) as they now stand in H.R. 5012. If he did exercise it in a more far-reaching way, it is also perfectly clear to me that then there arises a question for the courts as to where that exercise of Executive privilege stands.

That being a constitutional right of the President's, it is perfectly clear also that nothing in the statute can limit whatever his constitutional powers are in that regard, and any public information bill would necessarily be in recognition of the fact that the final question of whether the President's powers go further must be left to the future. But to try to draft a bill that over the years would always fit all the instances in which an informed President might want to exercise the Executive privilege would be an absolute futility, it seems to me. There would be no chance of drawing such a bill, and I see no reason to take that defeatist attitude and not the best we can in trying to foresee the categories of things to which the exemptions should apply as this bill has done.

Mr. Moss. It seems to me after 10 years of rather careful consideration of this problem that there is never difficulty in finding it in the public interest to withhold for good cause found. There is a tent large enough to contain everything.

I am not too concerned if the President exercises a judgment.

Mr. BENJAMIN. No, and we are of course delighted to see that phrases like "in the public interest" or "for good cause" are not in this bill, nor were they in S. 2335 or the Senate bills.

These get down to deal with particular reasons for allowing nondisclosure in specific kinds of cases where that is justified.

Mr. Moss. It has been suggested we should go back to "public interest" or "for cause." But actually, we could change it and say "for any reason," could we not?

Mr. BENJAMIN. Just about——

Mr. Moss. And achieve the same result?

M. BENJAMIN. I once heard a comment by a man named Schumpeter, who was the last Minister of Finance in the Austrian monarchy, and who was a convinced monarchist, the only one I have ever heard carry this out philosophically. But he had a remark which was that every statesman, when he prays at night, say "Pray God save my country and to that end keep me in office."

Well, it is very much the same thing when it comes to deciding what the public interest is when somebody wants to interfere with what you are doing a little bit by asking you to disclose it.

Mr. Moss. Mr. Monagan, do you have some questions?

Mr. MONAGAN. Thank you, Mr. Chairman.

I certainly subscribe to the second portion of Mr. Schumpeter's statement, from a personal point of view.

I do want to compliment the American Bar Association, of which I am a member, on your appearance here today. I think it is a fine, public-spirited function, and I am glad that the public can understand that the association is engaged in activities such as this which are not immediately related to fees or perquisites of the members of the bar. Also, your suggestions I think have been very helpful and will aid us in going over this bill.

There is just one point. On page 3, line 3, Mr. Hanes, you suggested putting in "security" instead of "defense", and also leaving out "or foreign policy".

My question is, Would that not make this somewhat more limited, because "security" does have the connotation of being connected with "defense"? Might there not be matters of foreign policy, such as trade

or other nondefense areas that would be excluded if we changed this language?

Mr. HANES. You mean, Mr. Monagan, such matters would be excluded from the exemption; is that right?

Mr. MONAGAN. Right.

Mr. HANES. I think that is possible, and we debated considerably as to whether we should make this suggestion. Last year when we met with the staff of the Senate subcommittee, and subsequently when Mr. Benjamin testified on S. 1663, we had made this suggestion.

At that time we were told by the counsel for the Senate subcommittee that it was his feeling that the present language was more restrictive than national security.

Now, I think we could debate that at length as to which is less restrictive or more restrictive. We do not have a strong feeling, at least I do not, and I believe Mr. Benjamin would echo this, that we do not have a strong feeling about this particular suggestion. But it did seem to us that the subject matter which is primarily intended to be included in the exemption is that which relates to national security.

Mr. MONAGAN. That may very well be.

Mr. HANES. Yes.

Mr. MONAGAN. And I just wanted to clarify your thinking.

Mr. HANES. I can conceive of circumstances in foreign policy when there might be something that for the advantage of the country should be subject to exemption that would not be included within national security.

But, basically, I think what we are getting at is the national security.

Mr. BENJAMIN. I would like to add to that that what we are talking about here is the permissible content of an Executive order, and I think it is well to be somewhat general in talking in those terms.

We are assuming now that the President will exercise the Executive privilege to say that this is exempt from disclosure, and there are certainly things that are referred to generally as internal security, for example, which he might well want to include, and which I would be the last to say he would be arbitrary in including. Therefore, I do not like to be quite as limiting, quite as much as of limitation on the presidential powers as suggested by these two categories which I think do not quite cover the field that he might well take into account.

Mr. Moss. I would suggest that the amendment proposed does broaden it rather than limit. The counsel for Treasury, in an appearance before the committee, recommended that it be broadened by changing "defense" or "foreign policy" to "security". We discussed it at length then because the present Executive order 10501, which was originally issued by President Eisenhower, relates to defense, and authorizes, of course, the three categories of classification and the procedures for protecting information.

We were actually drafting a bill in conformity with that Executive order. But I think that the security does broaden here, because certainly the security of the Nation is more than just protecting it from any overt action.

Mr. MONAGAN. Oh, yes.

Mr. Moss. It is the financial security, the well-being of the Nation.

Mr. MONAGAN. I think we have covered the point anyway.

Thank you.

Mr. BENJAMIN. I am interested in knowing that the Treasury has made this suggestion, because I get a little weary sometimes of being set up, the American Bar Association, by some of the agency witnesses as if we were concerned only with our clients. In some cases you might think they were saying that all we were trying to do is to make trouble for the agencies, and I would like to point out, as I did in an article in law and contemporary problems about the ABA program, that very often our suggestions are in the agency interest, and this is an instance; I mean the suggestion here is obviously not to get at more documents.

We are making a suggestion to make it perhaps more likely that something will be exempted by presidential order. But it seems to us, it seems to me at any rate, that that is a reasonable agency concern, and where there are reasonable concerns, we try to pay attention to them.

There is also a reference in this article of mine to the English experience of making reports available that has not been available before, and suddenly finding that there had been considerable improvement, according to one of the official witnesses, in their public relations.

I think the agencies quite often overlook that, that some of this remedial legislation really helps them in helping their public relations, and in the end they will be better off and accomplish more than if they were successful in their complete opposition to a lot of this.

Mr. Moss. I think there is great truth in that, and have frequently urged the agencies to consider the fact that they could improve their image by being a little bit more candid and a little freer. Frequently when they are trying to cover up by holding tight to the information, all they do is succeed in making an issue where one really did not exist. A little bit of fear perhaps, but that is about all.

Mr. Monagan and I are going to have to go over and respond to this rollcall. The committee will recess. We will get back as quickly as we can. It should not be more than about 15 minutes.

Would it be possible for you to remain so that when we get back Mr. Kass can ask a couple of additional questions?

Mr. BENJAMIN. I should think so, yes.

(Recess.)

Mr. Moss. The committee will resume.

Mr. Kass, you had some additional questions.

Mr. BENJAMIN. May I, before we begin, introduce Mr. Joseph B. Hyman, who does not need an introduction, I am sure. He has been working with the committee of which I am chairman, most usefully. He got lost looking for room 2147 instead of 2247.

Mr. Moss. This building is one where many are being lost today, including Members of the House.

Mr. KASS. Mr. Hanes, H.R. 5012, section (b), gives an individual who has been denied information by an agency of the Government the right to go into court and seek judicial relief to obtain that information.

Do you think, as a representative of the American Bar Association, that this would cause any problems for the courts? Do you favor this provision?

Mr. HANES. Well, I might point out, and I believe this is correct, that when Mr. Benjamin testified earlier, and when we met with the committee staff, we suggested that the judicial remedy be of a general nature that would have application beyond the public information provisions of section 3 of the Administrative Procedure Act and that section 3 not contain a separate, special judicial remedy.

Now I realize this bill is being considered separately and apart from the rest of the changes in the Administrative Procedure Act, and you would have to include a judicial remedy here if you intend to make clear that it is available.

I am not quite certain I understand, Mr. Kass, whether you are asking whether there should be standards spelled out in here which would be employed by the courts, or whether you are asking whether or not I think the judicial remedy would create a substantial voume of litigation.

Mr. KASS. This is the thrust of the question.

Mr. HANES. Yes.

Mr. KASS. The last part. The agencies have come up and stated that they felt the bill, if enacted, would in effect clutter up the dockets of the court.

Do you think that this would be a problem?

Mr. HANES. It would be my guess that it would not increase the volume of litigation in the courts substantially. I think in most cases, once the bill were enacted, information that was desired would be made available.

In the beginning there would probably be some test cases which would test the specific exemptions in the act. But I would not think it would create any major volume of litigation.

Mr. BENJAMIN. I think that is correct.

I think our experience in New York might be relevant. In New York almost any administrative agency proceeding, whether or not there is a formal hearing requirement, is reviewable by the courts; if there is no hearing requirement, by a proceeding in the nature of mandamus to review. And theoretically there are hundreds of thousands of agency determinations that are subject to review if there is merit to them.

But we have not found at all that that has overburdened the courts. The same argument was made where we recommended in S. 2335 that there be a proceeding to enjoin, a court proceeding to enjoin an agency proceeding clearly in excess of jurisdiction, which is very much like the old proceeding growing out of the writ of prohibition that we have in New York.

Again, while the agencies in opposing our proposal here say that the courts would be swamped, it certainly has not been found to be true in New York under the available proceeding in the nature of prohibition. I do not think it would be here. I think once the thing is spelled out, people generally acquiesce.

For one thing, it takes so much more effort to constantly litigate that I think the tendency ultimately is to stop it where you are not getting anywhere, and I think gradually at least, if not to begin with, the lines of action would be so clear here that there would not be anything to go to court about.

Mr. KASS. Mr. Benjamin, this bill has removed the criteria that persons must be properly and directly concerned, and substituted for that criteria the nature of the information itself.

Do you agree with this criteria?

Mr. BENJAMIN. No, I agree with the change.

Mr. KASS. With the change?

Mr. BENJAMIN. I think the criterion was a mistake, and in the same general direction we have tried in our legislation, as has the Senate committee dealing with it, to get rid of some of the extremes of the doctrine of standing to sue. I think, generally speaking, the question should be, what are you trying to review and not, who is trying to review it.

You get so caught up in technicalities on finding out who is affected and this and that, that you get again a great waste of time, and second, denial of any relief to somebody who ought to have it.

Mr. KASS. I have no further questions, Mr. Chairman.

Mr. MOSS. Mr. Rumsfeld.

Mr. RUMSFELD. I would like to apologize for my absence during a portion of your testimony because of the debate on the floor of the House, and just make sure that I understand what your previous testimony was.

Is it correct to say that you have indicated your conviction that the bill as before you is constitutional?

Mr. BENJAMIN. I would put it this way: I would say yes, but then I would say that the question of constitutionality is always one of the application of a statute, and it may very well be that something that is not spelled out here may be within the constitutional executive privilege of refusing information. But I think it would be a waste of time to try to forecast what the details of that are, and I think the bill would certainly be constitutional in almost all, if not all, of its applications. And if it is held to be constitutionally inapplicable to a particular attempt of the executive to rely on the executive privilege, that is not a criticism, a legitimate criticism of the bill.

It seems to me any good piece of legislation always presents that possibility around the fringes of its application, and that is quite proper that it should.

Mr. RUMSFELD. I thank you, and I might say I certainly agree with what you have said.

A previous witness indicated that because of this question of executive privilege, that this bill in his words should contain reference to executive privilege.

Now at that time I believe I made the comment that because this concept of executive privilege would flow from the Constitution, I could not see why any such provision should be put in or even would be desirable to have in. Is this your conclusion also?

Mr. BENJAMIN. Yes, I think it is perfectly obvious that the executive privilege is there, whatever the limits are that the courts will set out, and the legislative history will make it clear that the Congress had that in mind. But to try to spell it out any more would be futile, I think.

Mr. RUMSFELD. I quite agree, thank you.

Mr. MOSS. Gentlemen, I want to express my thanks and that of the subcommittee for your very constructive suggestions and your helpful interest in this legislation.

Mr. HANES. We want to thank the subcommittee.

Mr. BENJAMIN. We want to thank the subcommittee for giving us this opportunity to take part.

Mr. MOSS. Our next witness is Mr. John Colburn, editor and publisher of the Wichita, Kans., Eagle and Beacon, representating the American Newspaper Publishers Association. Mr. Colburn is an old friend of the subcommittee who has been most helpful from the very beginning sessions back in 1956, I believe.

Mr. Colburn, do you have a statement?

STATEMENT OF JOHN H. COLBURN, EDITOR AND PUBLISHER, WICHITA (KANS.) EAGLE AND BEACON, REPRESENTING THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. COLBURN. Thank you, Mr. Chairman.

My name is John H. Colburn. I am editor and publisher of the Wichita (Kans.) Eagle and Beacon. Today I represent the American Newspaper Publishers Association (ANPA), an organization of more than 920 daily newspaper members with 90 percent of the total daily newspaper circulation in the United States.

ANPA advocates favorable action on House bill H.R. 5012. This measure to require Government agencies to make "records promptly available to any person" is of vital public interest.

Certainly we were delighted to see the testimony of the distinguished gentleman from the American Bar Association, and I think constructive suggestions for improving this legislation even further.

Most of my 35 years as a reporter, foreign correspondent, and editor have been dedicated to keeping the public informed as to how Government affairs are conducted. Since World War II especially, I have been more and more concerned by efforts of Government agencies to deprive the people of legitimate information, which they need to properly exercise their role as responsible citizens.

Before I became a member of the ANPA Federal Laws Committee, I had the privilege of serving as chairman of the Freedom of Information Committees of the American Society of Newspaper Editors and the Associated Press Managing Editors Association. I am personally aware, as the chairman noted, of the excellent work done by Congressman Moss, his subcommittee and staff of experts, which has certainly been an excellent service in exposing example after example of unjustified Government secrecy in the conduct of the people's affairs.

Senate passage last year of S. 1666, the "Right to know" bill, reflected a growing conviction among Members of the Congress that such legislation is necessary. It also reflected a determination to recognize the concern among informed people that Government secrecy has exceeded proper bounds.

It is gratifying to our ANPA membership to note the strong bipartisan support already accorded the legislation you are considering today.

In our view, the amendments needed to implement an effective Federal public records law are badly needed. They are long overdue. This is amply demonstrated by the sorry record of experience with the secrecy loopholes in section 3 of the Administrative Procedure Act since 1946.

Let me emphasize and reiterate the point made by others in the past: Reporters and editors seek no special privileges. Our concern is the concern of any responsible citizen. We recognize that certain areas of information must be protected and withheld in order not to jeopardize the security of this Nation. We recognize legitimate reasons for restricting access to certain other categories of information, which have been spelled out clearly in the proposed legislation.

What disappoints us keenly—what we fail to comprehend is the continued opposition of Government agencies to a simple concept. That is the concept to share the legitimate business of the public with the people. It is not a new concept. It was the basis for enactment of the Administrative Procedure Act in 1946. Senator McCarran, chairman of the Committee on Judiciary, in reporting the measure to the Senate, put the concept in these words:

> The section (sec. 3) has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance.

This simple concept would take much of the mystery and the secrecy out of Government operations. It was needed in 1946 because Federal regulatory agencies had abused their power through arbitrary, capricious, and oppressive action, action that was protected then by a policy of secrecy and still is protected today.

But what happened?

The results under section 3 were far different from that conceived by its framers. Instead of opening channels of information, section 3, as interpreted in practice, did precisely the opposite. The Senate Committee on the Judiciary, in its 1964 report recommending passage of S. 1666, noted that section 3, now "is cited as statutory authority for withholding of virtually any piece of information that an official or an agency does not wish disclosed."

Please note that this is not a complaint of some newspaper organization or public group. This is the conclusion of a responsible and respected committee of Congress. It is concerned with the need for a better informed public.

It is significant that the committee indictment went on to say:

> Under the present section 3, any Government official can, under cover of law, withhold almost anything from any citizen under vague standards—or, more precisely, lack of standards—in section 3. It would require almost no ingenuity for any official to think up a reason why a piece of information should not be withheld (1) as a matter of "public interest", (2) "for good cause found", or (3) that the person making the request is not "properly and directly concerned". And even if his reason has not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available.

Here is ample reason, based on careful evaluation of testimony and research, why amendments are needed. Our citizens are being deprived of fundamental rights. As Government has grown bigger and more complex, information manipulation and control has become more sophisticated. Access to news sources, reports, findings, department rulings and opinions, comes under tighter restrictions.

A gigantic information screen, that can be penetrated only by time-consuming diligence or connivance, shields Government departments and agencies.

This screen of secrecy is a barrier to reporters, as representatives of the public—to citizens in pursuit of information vital to their business enterprises—and is a formidable barrier to many Congressmen seeking to carry out their constitutional functions. Many loyal, conscientious Government employees share our concern. They recognize the right of a taxpayer to know how his money is being spent; to know how public business is conducted; the reasons for decisions that affect the lives, businesses and future of our people.

A the Senate Committee on the Judiciary found in 1946 and found again in 1964, and as this subcommittee has reported in the past, there is no justification for most of the secrecy. If permitted to continue, this policy of secrecy will lay the foundation for a totalitarian bureaucracy, that will be an even greater threat to public welfare.

This subcommittee I hope will share our concern for the future as well as the present. Well-educated citizens already tend to regard problems of Government as too technical and too complex to follow closely. Their apathy has grown with the more intense manipulation and control of information and the frustrations of trying to cope with Government redtape.

Donald N. Michael, a social psychologist and a resident fellow of the Institute for Policy Studies here in Washington, makes some pertinent points about the future in a new book, "The Next Generation." He notes that our concerned young people and adults will continue to feel frustrated and inadequate in the face of complexities and secrecies. He foresees a mounting trend toward developing policies through a technique of rationalization, which may be based more on technological factors than on wisdom. These techniques of rationalization can have good and bad consequences. At their worst, Dr. Michael says, they could lead to a garrison state.

(Parenthetically, we might point out that in the hearings on Senate bill S. 1666, the "right-to-know" bill, Government agencies appeared to utilize rationalization rather than wisdom to justify policies denying access to information.)

Some time ago in a paper presented to a symposium at the Battelle Memorial Institute in Columbus, Ohio, Dr. Michael, who is an expert in the study of cybernetics, raised other questions about how computer techniques may affect democratic processes. These same questions also concern the public interest in how Government decisions are reached.

"Roughly, the situation to be faced," said Dr. Michael, "is that social problems to be met will require the increasing application of computers by the Government to clarify the problems and opportunities, and to design and implement effectively the needed programs for social betterment."

He notes that often defense and foreign policies are formulated through analysis of data processed by computers and that the basis for these decisions are "only dimly apprehended by the informed public and totally beyond the comprehension and often the interests of the general public."

Then Dr. Michael asks, "How, then, will the interested layman be able to find out what 'models' were used that provided the 'facts' or interpretations on which the policy is based?"

These are vital public questions as to how Government decisions are reached. They will grow in importance as so-called "thinking ma-

chines" are used more and more in decision-making processes. Such questions make it all the more imperative that in the future there be greater access to information in our Government agencies. The new technology is not limited to agencies charged with making defense and foreign policy. It is being utilized also by the agencies concerned with education, welfare, highways and natural resources, agencies that are not entitled to secrecy protection on the grounds of security.

Who is responsible for the computer programing?

Who is responsible for the selection of raw material fed into the computer?

Who is responsible for the analysis that goes to our policymakers as a study report or policy recommendation?

These questions concern social and political scientists, other informed citizens, the press, and they puzzle many Members of Congress.

But there are more obvious cases involving denial and manipulation of information that have nothing to do with new technology, with security or any other legitimate reasons. The pattern is clear from reams of previous testimony. Earlier, I mentioned barriers faced by Congressmen, as representatives of the people. Let's take a look at the Congressional Record for April 21, 1964, by two Members of Congress with offices just down the hall from this hearing room.

A member of the House Subcommittee on Defense Appropriations, Congressman William E. Minshall, of Ohio, expressed dismay concerning changes made in Department testimony under the guise of security. After rechecking the original transcripts that were locked in the subcommittee safe, Mr. Minshall said:

> More times than not the only security involved was the political security of the present administration. It was political censorship, not national security, that was the guideline in determining what should be left for you to read in the final printed copies of the hearings. The printed hearings only hint at what Secretary McNamara actually said about the interlocking of our defense and foreign policies.

Congressman Minshall contended further that half of Gen. Curtis LeMay's testimony was censored, not because of any security data that was disclosed but, because "his remarks did not happen to agree with Secretary McNamara's views."

Out in Wichita we are somewhat prejudiced in favor of the Boeing Co. We have felt, on the basis of the McClellan committee findings, that the people would have been better served—and their tax dollars better utilized—if Boeing had received the contract to build the TFX, or what is now know as the new F–111 plane. Mr. McNamara and his able press controller—and he is very able at manipulating the news—Arthur Sylvester, gave the public and the press a real "snow job" to support the decision to award this contract to General Dynamics.

Congressman Melvin Laird of Wisconsin, whose office is right next door, pinpointed the problem of news manipulation in the TFX affair with this statement during debate on defense appropriations:

> Regardless of the kind of statement which has been issued, I have a confidential memorandum from Arthur Sylvester dated March 5, 1964, in which he dictates policy in the Department of Defense regarding the TFX * * * He dictates what the Navy, the Air Force, and their contractors must say about the TFX and its development.

Congressman Laird inserted in the record the memorandum issued by Sylvester. It is rigid control guideline making clear that the

public would be given no information on troubles being experienced with the TFX ship. You get, in other words, only what the Defense Department wants to show up as favorable news; and nothing that concerns examples of faulty judgment or worse, political influence.

The Defense Department is not the only culprit. Other administrative and regulatory agencies follow similar policies, as the Moss subcommittee has reported in the past. These agencies publicly avow great interest in the public's right to know, but in practice they use every conceivable excuse to deny the public information.

There is an ironic note to this widespread agency policy of restricting the right of the citizen to find out how the public business is conducted. The irony is that while Mr. Citizen finds it more difficult to surmount the walls of bureaucracy, the agents of Government pry more and more into the lives of the private citizen and his business.

Many agencies have adopted a system of "snooping espionage." Some use bugging devices and other esoteric products of our new technology. The operators of these devices have violated the privacy and individual liberties of citizens and Government employees suspected of "leaking" legitimate information to responsible people.

The Department of Justice in the past 10 years has undertaken the responsibility of protecting individual and civil rights in certain areas of our society. However, as the legal representative of Government departments it has consistenly ignored the citizen's rights and, in fact, and again this week has continued to oppose efforts by the public to learn more about agency operations.

Congress has consistently sought to broaden access to information, but the Attorney General's office has just as consistently advised Government agencies, in effect, to impose a policy of secrecy. These policy guidelines come from the Attorney General's manual, which advised in part that "the great mass of material relating to the internal operation of an agency is not a matter of official record."

For example, access to budget information on how the taxpayer's money is spent is denied on the grounds of the Attorney General's interpretation that this is merely an internal "budget procedure." The manual advises that each agency can be the sole judge of whether a person has a legitimate interest in inspecting official records. This has led to such ridiculous rulings as that by the Controller of the Currency denying a private citizen the right to examine blank—yes, blank—forms used by his agency.

Now the Department of Justice again contends that the court enforcement provision of the proposed Federal records law is unfair. Why? Because this provision would put on the agency the burden of proof to show why it restricted access to specific items of information.

Under the present arbitrary policy of secrecy it is absolutely necessary that there be some remedy outside the executive branch of Government. Due process of law is the obvious remedy. This proposal that you are considering this afternoon would arm the district court with injunctive and contempt power to make available information that is not specifically restricted by this legislation. This is reasonable and fair for all concerned, as previous witnesses from the bar association pointed out.

Inevitably there will be areas of legitimate doubt and misunderstanding as to whether certain information should be released. But

the question should be settled by due process and not by some bureaucrat's whim.

The Department of Justice philosophy seems to be in sharp contrast to that of the American Bar Association, that the burden of proof should lie with the citizen, and not the agency, is understandable in a totalitarian system. There the people are servants of the state.

The Department of Justice philosophy is an absurd contention in a democratic system where the people are the masters and the state the servant. All citizens must have the right of legal recourse. Once this fundamental right is denied, then we do move closer to the garrison state.

In summary, what we are advocating is the right of the individual citizen to have access to accurate and freely available information about the Government of the United States. Eight legitimate categories of information are exempted from the disclosure requirements. These cover the vital areas of national defense and foreign policy, documents related solely to internal personnel rules and practices of agencies, personnel and medical files, privileged trade secrets, commercial and financial information, memorandums dealing with matters of law or policy, and investigatory files compiled for law enforcement. We do not take issue with these provisions.

We also want to emphasize that the legislation does not give the mischievously curious individual a "fishing license" to dip into government files for secrets about his neighbor's business or about policies that would aid a potential enemy.

You may be told that reporters are looking for scandal to sell newspapers. Only a small percentage of our total newspaper circulation in this country is based on casual sales. Our products are delivered morning and afternoon to the homes of U.S. citizens, who must be better informed if they are to fulfill their responsibilities as citizens. We do not seek sensationalism. We, as newspapermen representing the public, seek facts. Concealment of legitimate facts by government agencies often can be more detrimental to our welfare than their disclosure, as was pointed out in the testimony earlier this afternoon.

We are interested in good government, in better government, and the protection of every citizen's rights.

Good government in these complex periods needs the participation, support, and encouragement of more responsible citizens. Knowing that they can depend on an unrestricted flow of legitimate information would give these citizens more confidence in our agencies and policymakers. Too many now feel frustrated and perplexed.

Therefore, it is absolutely essential that Congress take this step to further protect the rights of the people, also to assure more ready access by Congress, by adopting this disclosure law.

ANPA strongly favors enactment of the legislation, but we also recognize that it will impose on our reporters and editors a greater responsibility to keep the public more fully informed. Five years ago, Lyndon Baines Johnson, as Vice-President-elect, made this statement in speaking to the convention of the Associated Press Managing Editors Association in Williamsburg. These are his words:

> In the years ahead, those of us in the executive branch must see that there is no smokescreen of secrecy. The people of a free country have a right to know about the conduct of their public affairs.

There is no reason to believe that, as President, Mr. Johnson has changed his view. It is a view that was shared by the late President Kennedy, who said:

> Within the rather narrow limits of national security the people of the United States are entitled to the fullest possible information about their Government, and the President must see that they receive it.

Thus, gentlemen, in conclusion:

"No smokescreen of secrecy, the fullest possible information"—these are pledges to the people from our Nation's leaders. Congress can support the executive branch in keeping faith with the people by enacting an effective disclosure act to replace a "smokescreen of secrecy."

Mr. Moss. Mr. Rumsfeld.

Mr. RUMSFELD. I have no questions, Mr. Chairman, other than to say it was a very forceful statement.

Mr. Moss. I want to express my pleasure for your appearance and for your support. I would like to take the opportunity to restate something I have on many occasions tried to make very clear.

This committee—no member of this committee—has any desire to require information to be made available if it would be damaging to the security of this Nation. Over the years, in dealing with the press, I have seen no evidence of any movement in the press to require that type of disclosure. I think the record of the American press in cooperating with Government to protect very sensitive areas in times when such protection was necessary in the interests of our security has been an excellent one, one to which the press can point with pride. Their performance during World War II under voluntary conditions was outstanding.

Again, Mr. Colburn, we thank you for your statement and for your support.

Mr. COLBURN. Mr. Chairman, I would like to make just one footnote comment to that excellent point that you made, and that is, I think that in our work together over the years in tracking down some of these items that may have been borderline or even perhaps violated certain areas of security, it has been our finding that these have been leaked by Government people in both administrations, Democrat and Republican, for personal influence or to influence some act of Congress, and in that case these people were responsible and not the press.

Mr. Moss. I think the leak is a good bipartisan tool of propaganda effectively employed for many years.

Mr. COLBURN. Yes.

Thank you very much.

Mr. Moss. Our next witness is Mr. Richard Smyser, who is chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association.

Mr. Smyser.

STATEMENT OF RICHARD D. SMYSER, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE OF THE ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION

Mr. SMYSER. Mr. Chairman, I have a statement.

Mr. Moss. You may proceed.

Mr. SMYSER. I am Dick Smyser, managing editor of the Oak Ridger, a newspaper in Oak Ridge, Tenn., and chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association.

The Associated Press Managing Editors Association believes, as might be expected, in freedom of the press. But it is no accident that the name of the committee of that organization of which I am chairman for this year is the "Freedom of Information" Committee. The choice of name is quite deliberate.

It might be even more appropriately titled the "Public's Right To Know Committee." For "freedom of the press" and "freedom of information" are simply means, not ends. The end is protection of the "public's right to know."

The press—and the term is used broadly to include all media that gather and disseminate the news—is the public's chief source of information about its Government. Therefore, the "public's right to know" cannot by guaranteed without "freedom of the press."

Too often, however, we think of "freedom of information" as something important only to the economy of a newspaper. I agree, and my publisher agrees even more intensely, that the economy of a newspaper is important. However, this is not the primary reason why APME hopes that House bill 5012, and the companion bill in the Senate, will be adopted by this session of Congress.

Rather, APME would like to appear a champion for a public right rather than a lobbyist for a private privilege, this notwithstanding the fact that last year's similar bill, Senate bill 1666, had become well known within the trade as "Sweet Sixteen Sixty-Six."

We hear much these days about "big Government." All partisan arguments aside, it is true. Our Federal structure is growing rapidly. Its size, functions, and, inevitably, its powers are expanding yearly.

We do not argue the merits of this growth. APME does, however, feel strongly that this trend makes it more and more imperative that information about the Federal Government be made increasingly available.

For, as the Government grows, it becomes proportionately more important that the public be kept aware of what it is doing. It also follows that the larger the government, the greater the chance of it becoming incomprehensible, inaccessible to the public.

Ours is still a system of checks and balances. Therefore, as the balance of government weighs more and more heavily on the Federal side, the check of public awareness must be sharpened.

There is acertain basic rightness in the giving of information. It reflects a faith in the goodness of truth and the essential wisdom of a concensus of the public. It is the hallmark of honesty, positiveness, confidence.

There is a certain basic wrongness in the withholding of information. It manifests a mistrust, a lack of faith in the ability of the public to examine the facts and come to a reasonable conclusion. It is the badge of cynicism, pessimism. It is the habit of those who patronize—who assume for themselves some sort of privilege status. It is quite often the mask for corruption.

But aside from the moral grounds for the public's right to know, there is also a very practical ground for candor, especially in Federal Government operations, but also in government at all levels.

My newspaper has had some little experience with the Federal Government. Oak Ridge, Tenn., is probably the country's most federalized city outside the District of Columbia.

In Oak Ridge's very early days there was, necessarily, very little "freedom of information." It was, of course, one of the most secret operations undertaken by any nation ever. But secret or not, this did not inhibit the rugged east Tennessee mountain men from speculating as to what was going on down there at the "project," as it was termed by the natives.

The story is told of the farmer who commented to one of the residents of nearby Norris, to whom he regularly brought eggs, "I don't know what the Government's makin' down there, but from all the stuff they're building, it seems to me it'd be a lot cheaper to just go out and buy it."

This gentleman, obviously, did not have the benefit of "freedom of information." Therefore, he was not able to make a valid judgment on his Federal Government. And this it seems is more than just a good story. It illustrates the basic point I would make—that the more information the public has about its own Government, the more valid will be its judgments, the more effective then can be Federal operations.

Of course, it was imperative in those early days of Oak Ridge—1943, 1944—that neither this particular east Tennessee farmer nor anyone else have full "freedom of information." It was vital that they not know that what they were building down there at "the project" were huge facilities to make the tiniest quantity of U^{235}—something that the Government could not just go out and buy.

And perhaps the whole secret of Oak Ridge is an example of how well a proper military secret can be kept, even with a free press. For indeed, there are many stories told of voluntary censorship which the press particularly in the immediate Oak Ridge area, accepted and followed on request of Government officials during those hectic early times of the nuclear effort.

There was a whole city and industrial complex built within months where before there had only been farmland. And yet the secret was exceedingly well kept. History is full of such evidence of a free yet responsible and patriotic press. All the years of World War II provide instance after instance of how well voluntary censorship works. Indeed, freedom of the press is an inducement to responsibility as it creates an atmosphere of mutual trust.

The situation relative to information in Oak Ridge has, thankfully, changed. For now while, to be sure, there are still many vital atomic secrets, secrets our newspaper would never want to infringe, there are also many areas of nuclear information that are consciously available to all.

More than that, in Oak Ridge I believe we have had a unique information experience in the community's transition from a city completely owned and operated by a Federal agency to one with the highest percentage of individual home ownership anywhere. We also now have a thriving, vibrant self-government. The Oak Ridge has been given considerable credit for aiding with this unprecedented transition.

I mention this not primarily as a chamber of commerce-type plug for Oak Ridge or my newspaper, but rather to point out that one of the big reasons this massive transition has worked well was because the public involved was given maximum information all during the process.

The Atomic Energy Commission, citizen groups and news media, working together, usually in harmony, told, often in the minutest detail, each step of the extremely involved arrangements for selling a whole city's housing within a matter of months. And, most familiar with the situation agree that it just could not have happened had not citizens been so completely and promptly informed.

What does this have to do with House bill 5012?

Just this. There is every reason for House bill 5012 to be thought of as legislation aimed at assisting Federal agencies to do a better job—this in contrast to the generally accepted notion that this and similar bills are designed primarily to assist the press, and through the press the public.

How help the agencies?

Simply as H.R. 5012 is an inducement to these agencies to make fullest information available to the public. The fuller the information available, inevitably the better understood will be the agencies' programs, policies, and purposes. And once understood by the public, then these policies, programs, and purposes are inevitably strengthened.

This may sound like a rather grand oversimplification of an overoptimistic view. Rather, it is a very realistic view and it has been proven time after time. The great public concensus—so long as it is a well-informed concensus—has historically shown itself to almost always ultimately be on the side of wisdom, else how does a democratic society progress, survive?

In two very current instances this philosophy has proven itself. The U.S. Information Agency, all during the recent unpleasantness in Selma, Ala., told the story promptly, fully throughout the world.

Why this unpleasant chapter of U.S. history related to the peoples of other nations by our very own national information facilities?

Why not?

It happened. It is truth, fact, reality.

Second, it was being told and is still being told by many other nations' information agencies—or, more properly, propaganda agencies. And it was being exploited to the maximum, as are all of our current racial problems, by the Communists.

Essentially, of course, the USIA and its Voice of America is a public relations more than a strictly news agency of the United States. Its purpose, avowedly, is to advance the best interest of the United States through the giving of information to those in other countries.

However, as many a good public relations man, or at least what I think of as a good public relations man, will vouch, the best way to advance the best interests of the United States, or whatever nation, company, or organization, is simply to tell the truth, give the news, make the truth, the news, available readily.

It is a misguided philosophy to assume that either distorting or withholding information will do you client good. Inevitably such practices backfire. Just tell the people, fully, factually, promptly.

Tell them when it is good. Tell them when it is bad, or at least open the channels of information so that they may find out for themselves.

Trust the people with the truth and they will seldom betray your trust. Mistrust them, deny them the truth, and you will reap what you sow.

Tell the truth yourself before someone else has a chance to step in and mislead and gain credence for their misleading in that you have been negligent, less than frank.

In the long run, the self-admission of the United States about Selma will pay dividends. For indeed, although many parts of the story are painful, many other aspects show America at its very best as it struggles, within itself, for justice.

The other example is that of the recent U.S. space shots, particularly the live television pictures from Ranger 9 as it zoomed down on the moon on March 24.

Seldom before has the individual citizen felt so much a part of a Federal program. Undoubtedly there is now a well of public support for the space effort like seldom before, simply because so much information has been fully, freely available.

Two exceptional events have been cited here. However, the same principles are applicable to why the Agriculture Department should tell fully the situation relative to farm surpluses or the Federal Communications Commission should make available its records on the allocations of television or radio channels and frequencies.

We have attempted here to make primarily a positive rather than a negative case for freedom of the press, freedom of information, the public's right to know. However, the negative may help complete the argument.

For if one asks, "Why should the public be given every last detail about a Federal agency's workings?" then one must also ask "Why not?"

Because the agencies feel that dispensing information is distracting, takes too much time?

Because the agencies feel that they are entitled to some measure of administrative arbitrariness?

Because the agencies feel that full access will reveal instances of incompetency, even corruption, and therefore, distract and discredit the agency's work?

None of these are valid arguments. Indeed all, as they may reflect attitudes of some agency administrators, are powerful arguments for insisting on fullest information. For such attitudes must surely be counteracted.

Information should be restricted because the uninhibited giving of information may endanger military secrets or diplomatic tactics?

Of course such information should not be given, and H.R. 5012, as do all responsible freedom of information proposals, clearly excepts "matters—specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

Present laws on Federal information are inadequate because they are attuned to the philosophy that the public and the press must make a case when they feel that information is being withheld. H.R. 5012 would change this misdirected emphasis. H.R. 5012 would provide that the obligation is on the agency rather than the public seeker of

the information. The agency should do the explaining, and in Federal court if necessary, when it chooses to withhold. The public and the press should not have to apologize for or justify its asking.

The Tennessee Press Association has a slogan that I would quote here: "What the people don't know will hurt them."

Indeed, it is so very true. But what the people do not know about the Federal Government will ultimately hurt the Federal Government and its officials too, for of course, the two are inseparable. The Federal Government draws its powers from the governed. And the governed are only governed as well as they give.

The Associated Press Managing Editors Association, therefore, through its Freedom of Information Committee, wholeheartedly commends those Congressmen, such as Representative John Moss in particular, who are champions of the public's right to know. And APME commends them specifically for the drawing of H.R. 5012 and earnestly urges its passage.

Enactment of this bill, APME is convinced, will help guarantee maximum public awareness of its Government and, therefore, better government.

I have spoken here primarily of H.R. 5012. All that I have said, however, is equally applicable to the Senate bill of Senator Edward Long to establish a Federal public records law. APME was most active last year in working for passage of Senator Long's S. 1666.

I would close by quoting APME's current president, George Beebe, managing editor of the Miami Herald. In a recent letter to his fellow Floridian, Representative Dante Fascell, he wrote:

> There has never been a period in our history when it is so vital that the people know what is going on in their country and the world. Disturbing indeed has been the trend to close more and more doors and records to the press, although there are few instances where this privilege has been abused. There is not a responsible editor in the Nation who does not willingly practice self-censorship in matters of national security. There is not an editor who would argue against suppression of news affecting national security. But news sources are drying up that have nothing to do with security, and to which you and I and everyone should have access. As president of the Associated Press Managing Editors Association, an organization made up of the leading editors of the country, I commend your courage and aggressiveness in introducing this important bill.

On behalf of the APME I thank you for this opportunity to express the organization's position on this important pending legislation.

Mr. Moss. Mr. Rumsfeld.

Mr. RUMSFELD. I would certainly like to thank the gentleman for his very fine statement, and concur in what he has said. I would also make this comment in passing, that we have just received your testimony, the Associated Press Managing Editors Association. We have heard from Mr. Colburn, American Newspaper Publishers Association. We have heard from representatives of the Press Photographers Association, and in each case what has been said about the need for the public to know in our system of government has been forceful and very appropriate and correct.

The thrust of the proposal coming before this committee, as the testimony has, has been toward the desirability of Government making available information.

There is a reverse thrust. There is a great burden also on your association, on the press throughout the country, and the press pho-

tographers throughout the country to report fairly and responsibly, and as thoroughly as possible.

Naturally it is not surprising that there has been very little mention of this in these statements. I would say that with the availability of more information from government, puts an even greater burden on those of you in your field, and there would be a great responsibility to report accurately and as thoroughly as is humanly possible.

Mr. SMYSER. I would certainly agree with that. I would perhaps mention that within the APME, the organization that I represent, freedom of information is only one of the committees. It has about eight others that are directed specifically toward the very fine point that you make, toward more responsibility, more effectiveness in fairly and fully reporting the news, and I think this is true of the other organizations, too.

Mr. RUMSFELD. Thank you.

Mr. MOSS. I want to say that I think your statement was a most excellent one. Certainly it illustrates quite clearly the need to keep the press well informed if the press is to be equipped to voluntarily cooperate in periods of crisis, and it has always given such cooperation.

I think we have another problem, all of us, in Government and in the press—that is how to handle this great mass of information, which grows every day—Mr. Colburn mentioned the use of computers in solving many of our problems. In my State I believe that my government has recently given some pilot contracts to some of the aerospace industries, to encourage them to employ their know-how and their talent to aid in the solution of problems. We are going to be doing a lot of programing into computers. We are going to come up with answers, and none of us are going to understand them too clearly.

If we have everything available, it is going to be difficult to understand. Where our primary business is keeping informed, it is going to be difficult to keep informed. Already in many disciplines in this Nation and around the world the problem is how to store and retrieve information, how to keep on top of it. And yet we expand government, not only in responsibilities in science as we increasingly tend to fund research, but within the past week we enacted here one major program in the House and we are going to have another one in another week or two that require closer cooperation from each citizen, and we all know how very difficult it is to get the public attention.

As a candidate for office, I am always amazed at how frequently my name appears in print and how many people never heard of me. And so to a public somewhat lethargic, where we try to get attention, and to inform, it is vital that those media employed in disseminating information to them have available every detail consistent with our security, and consistent with the real needs of our Government for withholding—reasons which I think are possible of definition. I hope we can do it with this bill.

I want to thank you for your appearance and for the cooperation of your APME Freedom of Information Committee over the years.

Mr. SMYSER. Thank you very much, sir.

Mr. MOSS. The subcommittee will now stand adjourned until 2 p.m. tomorrow afternoon.

(Whereupon, at 4 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Friday, April 2, 1965.)

45-213—65—pt. 1——9

FEDERAL PUBLIC RECORDS LAW

(Part 1)

FRIDAY, APRIL 2, 1965

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2 p.m. in room 2247, Rayburn House Office Building, Representative John E. Moss (chairman of the subcommittee) presiding.

Present: Representatives John E. Moss, John S. Monagan, and Donald Rumsfeld.

Also present: Samuel J. Archibald, chief, Government Information; David Glick, chief counsel; Benny L. Kass, counsel; Jack Matteson, chief investigator, and J. P. Carlson, minority counsel.

Mr. Moss. The subcommittee will be in order. Before we hear from our first witness this afternoon, I would like to insert in the record a letter which I have received, as chairman of this subcommittee, under date of April 2, 1965:

THE WHITE HOUSE,
Washington, April 2, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I have your recent letter discussing the use of the claim of "Executive privilege" in connection with congressional requests for documents and other information.

Since assuming the Presidency, I have followed the policy laid down by President Kennedy in his letter to you of March 7, 1962, dealing with this subject. Thus, the claim of "Executive privilege" will continue to be made only by the President.

This administration has attempted to cooperate completely with the Congress in making available to it all information possible, and that will continue to be our policy.

I appreciate the time and energy that you and your subcommittee have devoted to this subject and welcome the opportunity to state formally my policy on this important subject.

Sincerely,

LYNDON B. JOHNSON.

The letter is in response to one—and I have supplied copies to representatives of the press present here at this time and copies are available to anyone who wants them—I addressed to the President on March 31 of this year.

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
March 31, 1965.

HON. LYNDON B. JOHNSON,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: The use of the claim of "Executive privilege" to withhold Government information from the Congress and the public is an issue of importance to those who recognize the need for a fully informed electorate and for a Congress operating as a coequal branch of the Federal Government.

In a letter dated May 17, 1954, President Eisenhower used the "Executive privilege" claim to refuse certain information to a Senate subcommittee. In a letter dated February 8, 1962, President Kennedy also refused information to a Senate subcommittee. There the similarity ends, for the solutions of "Executive privilege" problems varied greatly in the two administrations.

Time after time during his administration, the May 17, 1954, letter from President Eisenhower was used as a claim of authority to withhold information about Government activities. Some of the cases during the Eisenhower administration involved important matters of Government, but in the great majority of cases executive branch employees far down the administrative line from the President claimed the May 17, 1954, letter as authority for withholding information about routine developments. A report by the House Committee on Government Operations lists 44 cases of executive branch officials refusing information on the basis of the principles set forth in President Eisenhower's letter.

President Kennedy carefully qualified use of the claim of "Executive privilege." In a letter of February 8, 1962, refusing information to a Senate subcommittee, he stated that the "principle which is at stake here cannot be automatically applied to every request for information." Later, President Kennedy clarified his position on the claim of "Executive privilege," stating that—

> * * * this administration has gone to great lengths to achieve full cooperation with the Congress in making available to it all appropriate documents, correspondence, and information. That is the basic policy of this administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*

As a result of President Kennedy's clear statement, there was no longer a rash of "Executive privilege" claims to withhold information from the Congress and the public. I am confident you share my views on the importance to our form of government of a free flow of information and I hope you will reaffirm the principle that "Executive privilege" can be invoked by you alone and will not be used without your specific approval.

Sincerely,

JOHN. E. MOSS, *Chairman.*

I think that this correspondence represents a continuity in policy which should provide for the greatest cooperation between the Executive and the Congress, and in my judgment it represents the proper scope of executive privilege.

We are very pleased to have as our first witness this afternoon, Mr. Creed Black, managing editor of the Chicago Daily News, and chairman of the American Society of Newspaper Editors Freedom of Information Committee.

As chairman, I would like to acknowledge the many contributions made by ASNE's work with this committee, from the very first step we took after being chartered back in June 1955. In an entirely strange area to me, I was able to turn to the chairman of ASNE's Freedom of Information Committee, Russ Wiggins, editor of the Washington Post, for some very wise, instructive counsel. I appreciated it then, as I have appreciated working with each chairman, including the man who will now give the committee the benefit of the views of his organization.

Mr. Black, will you introduce the other gentlemen accompanying you?

STATEMENT OF CREED BLACK, MANAGING EDITOR, CHICAGO DAILY NEWS, AND CHAIRMAN, AMERICAN SOCIETY OF NEWSPAPER EDITORS' FREEDOM OF INFORMATION COMMITTEE; ACCOMPANIED BY WILLIAM P. ROGERS, COUNSEL; AND EUGENE PATTERSON, EDITOR, ATLANTA CONSTITUTION, COMMITTEE MEMBER

Mr. BLACK. Thank you, Mr. Chairman. With me today are our counsel, Mr. William P. Rogers, and Mr. Eugene Patterson, editor of the Atlanta Constitution, who is a member of our Freedom of Information Committee, and who will be the next chairman of this committee.

I appreciate your comments, sir, about the FOI Committee of the ASNE, and I might reciprocate them, for this committee has found very helpful the work of your own group.

I appear here today simply as the latest in a long line of editors representing this organization who have worked with the committee, and who have, throughout this time, been very interested in legislation aimed at the problem we are discussing.

I'm sure you've known and worked with a number of these men. This is still a relatively new committee, as unbelievable as it may sound, in the ASNE. It goes back to the time when Mr. Basil Walters, of the paper I now represent, the Chicago Daily News, became its first chairman.

Since then, I'm sure you've had contact with Mr. James Pope, of Louisville, Mr. Wiggins, whom you've named, Mr. Herbert Brucker, of Hartford, Mr. Eugene Pulliam, of Indianapolis, and Mr. John Colburn, whom I think you heard yesterday, as a representative of the ANPA.

We have expressed our views so many times that I think they are well known to this committee; they are on the record, and rather than burden you today with another statement, I thought it might be more helpful for us simply to restate our views informally, particularly in relation to what has been said here earlier in these hearings.

We are especially interested in the statement made the first day by Mr. Schlei, and I would, just briefly, like to comment on his position in restating the position that the ASNE has strongly taken in respect to legislation of this kind.

Mr. Schlei, in his prepared remarks, confined himself to rather general and broad statements, and so I would like to do the same in responding. He said, early in his statement, that the basic thrust of this bill—

> is to eliminate any application of judgment to questions of disclosure or nondisclosure, and to substitute therefor a simple, self-executing legislative rule which would automatically determine the availability to any person of all records in the possession of all agencies, except Congress and the courts.

The position of the ASNE is that the legislation now being considered does nothing of this kind. We feel, rather, that it narrows the discretion, and properly so, which the administrative agencies could exercise.

One of the lessons that has become increasingly apparent to us in experience with the Administrative Procedure Act in particular is that too much discretion was left in the hands of the individual agen-

cies. You are familiar, I know, with the book by Dr. Harold Cross the definitive work on this whole subject "The People's Right To Know." Written under the auspices of our organization, it was published in 1953. It was written, obviously, a little before that, when the Administrative Procedure Act was still fairly young.

Dr. Cross, however, in this book, which now goes back more than a dozen years, made the statement that unhappily, as soon as the act was adopted, erosion of its ideals set in.

That erosion, as we all know, and as this committee has heard, continued. The powers that were bestowed under this act for withholding information have not been used as judiciously as we think the framers intended them to be used. We feel the ambigious phrases in the act provide, as I have indicated earlier, too much discretion, not too little, and we feel that the legislation of the general type which is being considered here does not provide any automatic solutions or determinations as Mr. Schlei indicated, but rather narrows the discretion. Even within the exemptions which are listed in the bill, there is still some discretion.

Secondly, we think that it brings into the picture a third party to adjudicate, when there are questions about the judgment and the discretion which are used. We think it is unrealistic, under our present situation to have any officeholder in the executive department all the way down the line decide that information which he has and which somebody wants should not be released and then be in a position of presiding over any appeal from that decision.

We think the clause here which provides for court review of any such decision is sound and one of the basic parts of needed corrective legislation.

The second position stated by Mr. Schlei in what he called a basic thesis is that there are no formal words that can protect the public interest well enough; that the fault is not with the draftsmanship of this proposal, but with its approach. With this position, we disagree very fundamentally, and we think this gets to the philosophic heart of the question before this committee.

Our own position is that the Administrative Procedure Act and the other laws which are on the books have been inadequate in one important respect, and that is recognizing—writing into law—the public's right to know. The fact is that in the present situation, as we see it, the burden of responsibility for public knowledge of government affairs is fundamentally misplaced. It shouldn't be up to the American public, and the press is simply their representatives, to fight daily battles just to find out how the ordinary business of their government is being conducted. Rather, it should be the responsibility of their employees, who conduct this business, to tell them.

Now, this committee has heard many times of the inadequacies of the Administrative Procedure Act. We know how it has thwarted, oftentimes, rather than helped in the disclosure of information. But for all of its weaknesses, it has been stronger in respect to certain interested parties, as they are described in the legislation than as a public information section, as it was originally called.

Again referring to Dr. Cross, he found back in 1953, in the early history of this act, that it was too restrictive in limiting the availability of information to persons "properly and directed concerned."

It's not enough to open a proceeding and records only to litigants and their counsel. Dr. Cross stressed this as one of the basic defects of the act when he wrote—

> It is far from clear that the act adequately takes into account the matter of public information in the sense of the right to know, which ought to be stressed in the general public, that mass of citizens who may not meet the description of persons properly and directly concerned in administrative proceedings in that public's chosen organs of information.

That appeared, as I say, in the book published in 1953. In 1959, when he took a new look, he concluded, "Whatever its usefulness to parties to administrative proceedings and their attorneys or to a few specialists or lobbyists, it is an abject failure as a means of freedom of information for the public."

In this respect, I think it might be noted that the Federal Government is trailing far behind the States in this kind of "right to know legislation." Public records legislation, as we see it on the books today, dates back only to about 1945 in the States. That is roughly the time that the Administrative Procedure Act came into being, but today 37 States have open record statutes of some kinds on their books.

Finally, I would say that we agree with Mr. Schlei that of course it is difficult to define precisely, to set out in specific language, in complete detail all the Government information that should be divulged and all that may properly be withheld.

We are not wedded to the specific language of this bill. We appeared in testimony before the Senate committee when similar legislation was being considered there. We know the objections that were taken into account. We know that this committee has heard various views on modifications which might be made. We recognize that even when language which these committees can think would take care of these situations as comprehensively as possible is written, there are going to be situations which still have not adequately been prescribed for in every detail. But, as I indicated earlier, there are provisions in this legislation for resolving those questions by a third party and while it is not possible to legislate in every detail the kind of language that would tell you exactly and precisely what is to be withheld and what is to be divulged, we do think it's possible, as Mr. Wiggins has said, in his book on this subject, to describe the spirit, the climate, the atmosphere that ought to pervade the government of a country that is democratically ruled. "All the employees of government, elected and appointed, ought to be imbued with the feeling that the government does indeed belong to the people who therefore have a right to know about all its transactions except for those expressly reserved to accredited persons by law or regulations."

In the belief that legislation with the intent of this before us would encourage such a climate, I encourage its favorable consideration.

Thank you.

Mr. Moss. Well, thank you, Mr. Black. And I want to say that I am not wedded to the language of this bill, but I am wedded very strongly to the objectives of the bill. We are going to attempt to get the views of all interested parties, proponents and opponents, and those in the middle, and see if we can't come up with something that represents substantial progress in recognizing a public need. At this time I will recognize Congressman Rumsfeld.

Mr. RUMSFELD. Thank you, Mr. Chairman. I certainly want to join the other members of the subcommittee in welcoming all three of these distinguished gentlemen to the committee today.

I am certainly proud to have a prominent resident of the 13th District to join us. I have one or two questions.

Do you feel that this bill adequately describes the climate that you feel should exist in government?

Mr. BLACK. Well, let me say first——

Mr. RUMSFELD. Or better yet, do you have specific suggestions for language revisions in the draft of the bill?

Mr. BLACK. Well, let me say first in responding to your remarks, that I am glad to see the Congressmen from my own district taking interest in legislation of this kind. I think the legislation goes far in the right direction. Whether you can say "adequately" is something that I think will depend on the final bill you draft. I think the important thing is that it turns the situation around and puts a responsibility on the agencies to justify their suppression or withholding of information.

The problem now—as has been pointed out by a number of people in the past, including Congressman Moss—is that the legislation which is on the books often has done just the opposite of what it was intended to do. Instead of disclosing information it has been used as a means of stifling information. The provisions in the original act have been cited as a basis for withholding. The housekeeping statute situation was pretty well cleared up as a major obstacle, but then so many times the provisions of the Administrative Procedure Act, which were intended to make information available have been used for just the opposite.

I think there are perhaps more qualifications in here than ideally most newspaper editors would like to see. On the other hand, we recognize the justification of some of—or most of—the claims for exemptions that are made here. The important thing, I think, is that you do have some recourse, or you would have under legislation of this kind, which is not presently available.

Mr. RUMSFELD. You read the Department of Justice's testimony here, and, of course, the essence of that was, No. 1, that such a bill could not be drafted. It simply could not put words on paper to cover the circumstances, and No. 2, that if the bill was drafted, it was unconstitutional. You've addressed yourself to those two points somewhat. I wonder if you could comment on something that came up subsequent to that testimony about press photos and the desirability of permitting greater freedom of information in terms of press photos, which is not specifically covered in this bill.

Do you feel that this is an area where the Government denies access to premises so that photos can be taken, which is somewhat in the same area, but not directly in point, because the opportunity to take a picture isn't really a public record as such.

Mr. BLACK. I don't see that really as a part of this problem. It is a large problem in itself, but it relates primarily to the courts. We have had the same problem in connection with some of the administrative agencies which have quasi-judicial authority, but that is another question which I think should not be involved in this legislation.

Mr. RUMSFELD. The only other point I would like to comment on; it's been suggested that there would be a rash of nuisance suits or nuisance requests or frivolous requests for great volumes of material, and in this connection, it was discussed that some sort of reasonable user's fees would possibly be appropriate and conceivably might reduce the number of frivolous requests for information. Do you have any thoughts on the concept of user's fees?

Mr. BLACK. Well, I don't see the possibility of a rash of nuisance suits as a very real threat, and I think before you impose any user's fee, it would be advisable to have some experience. It's possible that it may be a nuisance to some agencies or officials who would rather not divulge this information at all, but looking at it from the standpoint of the public, I don't think that anybody who doesn't have a legitimate interest in these records is going to the trouble or the expense of bringing a suit just to be a nuisance.

The term, I guess, is relative, and it depends on whether you are an official who doesn't want to be bothered or whether you are a representative of the public who has a legitimate interest in some records which are being denied. But I can't see any ordinary citizen or organization spending a lot of time or a lot of money going around prying open records just to be doing it. I think that people would have a legitimate interest before they asked to see it, and certainly, before they go the full route of bringing a suit.

Mr. RUMSFELD. Thank you, Mr. Chairman.

Mr. MOSS. Mr. Griffin.

Mr. GRIFFIN. I want to join, Mr. Black, in welcoming you and those who are accompanying you to our hearing.

Mr. BLACK. Thank you.

Mr. GRIFFIN. And this, fortunately, is one of those matters where there is bipartisan support of this legislation. I think, following along the question that Mr. Rumsfeld asked, we have, in this bill, the requirement that all records be made promptly available to any person, and we have had criticism from some of the witnesses that maybe this is too board. There has been a suggestion that it should be limited to any citizen, and, of course, the witnesses from the departments have asked that it be limited to any person who has a proper interest or something of that nature. I take it that you feel that it should be this very broadest language, or do you have any comment on that aspect of the——

Mr. BLACK. I think it should be as broad as it can reasonably be made without inviting any particular problems which perhaps have been called attention to here in previous testimony but which doesn't occur to me at the moment. I think that one of the problems of the present legislation, as I said, is this reference to interested persons or the proper persons.

This leaves too much discretion and leeway in the hands of the agencies to decide who has a proper interest. Our position is that a citizen of the United States—and this is his Government—has a proper interest in knowing what is going on.

I might say that this has been one of the experiences that has occurred in States in the adoption of open record legislation. I can recall that I was with a newspaper in Tennessee when legislation of this kind was first proposed there, and there were all sorts of dire warnings

about opening up all the records to people who were going to be coming in, riffling through them all day just for their gossip value or curiosity. But these predictions never materialized. It just doesn't work that way. People are not going to take the time and the trouble and particularly the expense that we are talking about here in going all the way to the point of bringing a suit in matters they are not interested in, and I think that basically the citizens of the United States have a right to information unless it's something which for very sound reasons should be withheld.

The exemptions which are listed in this present legislation as now proposed cover most of those which could reasonably be justified, and beyond that I think you should make it as broad as possible in letting the people have access to information. After all—as Dr. Cross pointed out in his book—Congress has been able to legislate in the past in pretty clear language on what information it thinks should not be made public, and now a further attempt is being made. With this kind of legislative provisions and judicial review, we are not going to have a lot of abuses or nuisances or any other problems from citizens overrunning the files of the Government.

Mr. GRIFFIN. Both the witness from the Department of the Treasury and the Justice Department, Attorney General's Office argued strongly that this legislation would be unconstitutional. You have very able counsel at your side there to consult with, who is in a somewhat different position than he was a few years ago. I wonder if his advice and counsel that—with his advice and counsel that you are satisfied that this statute now is constitutional.

Mr. BLACK. Yes, I think it's constitutional. I think that the issue raised by the Attorney General's Office in testimony in these hearings was rather extraneous. We are not talking here, really, about executive privilege, as I see it. We are talking rather about the public's right to certain information.

Executive privilege, as President Johnson pointed out in the letter which was read here by Chairman Moss at the start of the hearing, is something that he alone is going to exercise. The thing we are concerned about is having every officeholder and bureaucrat in every agency across the country also exercising his own executive privilege.

I don't see it as a constitutional question. I think, after all, the very existence of the Administrative Procedure Act as it now stands on the books pretty well eliminates that question of whether it's a constitutional issue. In that act there are certain exemptions. The legislation before us at this time is a refinement and modification of the legislation now on the books, but I don't see that it makes changes that would pose a fundamental constitutional question.

Mr. GRIFFIN. Thank you very much, Mr. Black.

Mr. Moss. Mr. Kass.

Mr. KASS. Mr. Black, there is a current controversy raging between the press and the bar on the right of the Justice Department and other agencies involved in law enforcement to withhold information relative to pretrial publicity.

Exemption No. 7 in the bill would exempt from disclosure investigatory files compiled for law enforcement purposes, except to the extent available by law to a private party. Do you, as spokesman for the ASNE, feel that this is a wise exemption?

Mr. BLACK. Well, again, I think that to some extent this is like the question of photographs. It's such a broad question in its own right—this whole matter of pretrial publicity—that I wouldn't want to get too deeply involved in it here. But so far as I know, newspapers have not asserted the right to get investigatory files of the kind which would be exempt under the legislation proposed here.

Mr. KASS. Mr. Black, wouldn't that statement that you made that newspapers would not be interested in getting these files apply to all these exemptions but primarily such things as state and military secrets?

Mr. BLACK. I think so. I don't think newspapers have ever complained about legitimate security classifications, for instance.

Our big complaint has been when such legitimate classifications are used as a basis for withholding information which really doesn't merit that kind of classification.

Mr. KASS. Thank you, Mr. Chairman.

Mr. MOSS. Well, I want to thank you very much.

Mr. RUMSFELD. Mr. Chairman, could I ask a question of Mr. Rogers before——

Mr. BLACK. Mr. Rogers——

Mr. RUMSFELD. If not, fine.

Mr. BLACK. Well, it's up to him. He is here as our counsel, and if he wants to field a question, fine.

Mr. RUMSFELD. Let me ask you, then——

Mr. BLACK. Ask me, and I will consult with him.

Mr. RUMSFELD. In Mr. Schlei's testimony, and Mr. Griffin mentioned this tangentially, he referred to the 1958 amendment which the President signed only upon assurances that the amendment did not upset or diminish any power of the Executive privilege which he derived from the Constitution.

I don't recall that circumstance, but it strikes me that such assurances on the part of the President weren't necessary. Certainly, something passed by the Congress could not really diminish anything that flows from the Constitution to the President, and by the same tken, the gentleman from the Justice Department then stated on page 9 in his testimony that if we entered this area, if the Congress did, in fact, enact a bill, it would have to specifically refer to the concept of Executive privilege.

It seems to me that this is not correct, and I would think that Executive privilege would exist from the Constitution to the extent that it does exist, if it does exist, completely apart from anything we do in this bill.

Is this your understanding?

Mr. ROGERS. I think you should say yes. [Laughter.]

Mr. BLACK. Yes. [Laughter.]

Mr. RUMSFELD. I thank both of you.

Mr. MOSS. I would like to say that I find most intriguing as a subject for thought and study, the little statute passed in the second Washington administration. Here were all of the men who were contemporary to the creation of the Republic and the framing of its Constitution where intent could probably be pretty well established by discussions. Congress gave to the Executive the authority to prescribe rules and regulations for the custody, use, and preservation of

records. It was an idle act, if all records were covered by inherent executive rights, a necessary one if they were not. Apparently at the time it was the consensus that it was necessary, and agencies operated under that authority for many years. I think it's one of the best bits of law we can pick up to support a congressional right to prescribe these rules and regulations.

Mr. RUMSFELD. As a cosponsor of this bill, I certainly agree with you.

Mr. Moss. I am told that was the very first session of Congress, so at the beginning we exercised that right. We certainly have grandfather rights in this field of legislation.

I want to thank you, Mr. Black and Mr. Rogers and Mr. Patterson for your appearance here today.

Mr. BLACK. Thank you, Mr. Chairman, for inviting us.

Mr. Moss. We will now hear from Mr. Dale W. Hardin, manager of the Transportation and Communication Department of the Chamber of Commerce of the United States. He is accompanied by Mr. Verne R. Sullivan, his assistant.

STATEMENT OF DALE W. HARDIN, MANAGER, TRANSPORTATION AND COMMUNICATION DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES; ACCOMPANIED BY VERNE R. SULLIVAN, ASSISTANT MANAGER, TRANSPORTATION AND COMMUNICATION DEPARTMENT

Mr. HARDIN. Since this is the first expression on the record by the Chamber of Commerce of the United States on this subject, I do have a prepared statement that I would like to read, with the chairman's permission.

Mr. Moss. You may proceed.

Mr. HARDIN. I am Dale W. Hardin, manager of the Transportation and Communication Department of the Chamber of Commerce of the United States. With me today is Verne R. Sullivan, assistant manager of the Transportation and Communication Department. We are appearing in support of H.R. 5012.

The Transportation and Communication Committee, through its Subcommittee on Communications, initiated the national chamber's position on this bill. It is a 62-man committee, composed of representatives of all modes of transportation and communication, including magazine and newspaper publishers, radio and television broadcasters, and the general business public.

The committee has studied the testimony taken last year on a similar bill in the Senate and it has discussed the proposal at some length as well as making inquiries as to its effect on some segments of the business community.

H.R. 5012, as we understand it, would:

1. Require every agency of the Federal Government to make all its records promptly available to any person;
2. Identify eight specific categories of sensitive information which are to be protected from disclosure;
3. Permit persons seeking Government information to file suit in a U.S. district court to have an agency produce records improperly withheld; and

4. Give the district courts power to punish agency officials for contempt if they refuse to disclose the records.

In other words, the bill would provide the right of access by the public to all nonsensitive areas of Government information.

A free flow of information from and concerning all branches of Government at all levels is a right of the public and is essential to our democratic society. The freedom of the Nation depends on an electorate well informed by a free press, as guaranteed by the Constitution. It is a responsibility of Government to protect and preserve this constitutional guarantee by a policy of full disclosure of information.

Except for matters clearly affecting national security or otherwise covered by statute, all business of Government should be fully disclosed to the public and the burden of proof must rest with Government in every instance to justify withholding any information.

This is a set of principles adopted by a membership vote at our annual meeting in April 1964, and reaffirmed by the board of directors as recently as February of this year.

The national chamber has not, so far as I know, been wrongfully denied any information it has sought. However, in the interest of assuring the free flow of information so necessary if we are to have a well-informed public, we believe that broad, but effective, guidelines must be laid down. Certainly the examples cited by some witnesses are inexcusable.

The injury that may derive from the denial to the public of legitimate information is of more importance than any purpose that might be served by withholding information for such reasons as concealing embarrassing mistakes or irregularities.

We believe H.R. 5012 will help to make more effective the principles approved by national chamber's members, and we are therefore glad to endorse it and to urge its enactment.

Mr. Chairman, we appreciate this opportunity to express our views on this proposal. If there are any questions, I would be glad to try to answer them for you.

Mr. Moss. Thank you.

Mr. GRIFFIN?

Mr. GRIFFIN. No questions.

Mr. Moss. Mr. Rumsfeld?

Mr. RUMSFELD. I would be curious to know if the chamber has in recent years had occasions when they were unable to get information that they felt they needed to become well informed on a particular problem or activity or subject and then communicate with the chamber members on that?

Mr. HARDIN. There haven't been any that I know of myself. I checked with a few of the people in the national chamber offices. I don't know of any personally.

Mr. RUMSFELD. Thank you.

Mr. Moss. Mr. Kass?

Mr. KASS. Thank you, Mr. Chairman.

Mr. Hardin, the bill specifically exempts from disclosure a number of sensitive items of information, among them trade secrets and commercial or financial information obtained from the public and privileged or confidential information. Do you, as a representative of the

chamber, feel that this adequately protects information which business throughout the country gives to the Government for the various purposes that the Government may desire?

Mr. HARDIN. In this connection, Mr. Kass, we asked a couple of the trade associations that are members of the national chamber whether this bill would have any detrimental effect on them, insofar as it relates to material that they are required to file with Government agencies and departments. The two associations that we heard from stated that in their opinion this would not prejudice the protection afforded to business in trade secrets or properly confidential matters. These were trade associations speaking for their members in response to our specific question. So in my judgment, the bill appears to offer adequate protection.

Mr. KASS. Thank you, Mr. Hardin.

No further questions, Mr. Chairman.

Mr. Moss. Mr. Hardin, I want to thank you and Mr. Sullivan for your appearance and support of this legislation. Thank you.

Mr. HARDIN. Thank you.

Mr. Moss. Our next witnesses will be Mr. Julius Frandsen and Mr. Clark Mollenhoff, chairman and vice chairman of Sigma Delta Chi's Committee for Advancement of Freedom of Information.

STATEMENT OF JULIUS FRANDSEN, CHAIRMAN, SIGMA DELTA CHI'S COMMITTEE FOR ADVANCEMENT OF FREEDOM OF INFORMATION; ACCCOMPANIED BY CLARK R. MOLLENHOFF, VICE CHAIRMAN

Mr. FRANDSEN. Mr. Chairman, aside from my capacity as chairman of the Sigma Delta Chi's Freedom of Information Committee, I am here also as the Washington manager of United Press International. If I may, before we proceed to the Sigma Delta Chi statement, I would like to present a very short statement if behalf of UPI.

As you know, UPI is an American corporation engaged in the collection and dissemination of news throughout most of the world.

Since the day of its inception as United Press Associations in 1907, UPI has been a leader in combating all manner of barriers to the free flow of news—whether by exclusive contractual relationships, peacetime censorship, or, in the area with which H.R. 5012 comes to grips, the withholding of U.S. Government information at the source.

UPI does not presume to comment on the legal concepts of the bill at hand or the scope of the eight specified exceptions, although some of the latter would seem to be susceptible to rather broad interpretations.

The management of United Press International, however, has directed me to say that it fully supports the objective of the bill, which as we understand it is to promote the freest possible flow of Federal Government information consistent with national security and those individual rights that must remain inviolate.

Our editor, Mr. Earl J. Johnson, expressed hope that the bill could have an affirmative preamble to the effect that it is the intent of Congress that the maximum of public business—and of course, Government is public business—be conducted in public.

I do not know whether the legislative format permits such a declaration, but I would like to commend his suggestion to you.

That is my statement on behalf of United Press International.

Now, on behalf of Sigma Delta Chi, let me say first that Sigma Delta Chi, despite its partially Greek name, is not a fraternal or a social organization; it is a professional society of 17,000 active members. We are engaged not only in the newspaper business but in all forms of communications—broadcasting, magazines, and so on.

Sigma Delta Chi has been, I think, the leader for many years in campaigning in the States for enactment of open records and open meeting laws.

As I believe Mr. Black noted, there are now 37 States that have at least relatively satisfactory open records laws and 29 States that have open meetings laws, and we are very hopeful that the legislative season in the States this year will bring at least 2 or 3 or more of those along.

So, with our longstanding interest in this, we are, naturally, greatly pleased that this committee is now working on getting an appropriate Federal law. I would like, also, to express at this time our great admiration and thanks for the work of the chairman of this committee and the other members and your staff, Mr. Chairman, for the great help that you've been to all of us over these several years now, in the work that you've done.

Now, as you mentioned, I have with me the distinguished Washington correspondent, of the Cowles publications, Mr. Clark Mollenhoff, who has been active in this field for many years, and he is prepared to discuss a statement which has been filed with you on behalf of the national president of Sigma Delta Chi, Mr. Ralph Sewell, who could not be here.

This statement was prepared by Mr. Sewell in collaboration with Mr. Mollenhoff.

Mr. Moss. Well, I am very pleased to recognize Mr. Mollenhoff. It's been my privilege to work very closely with him as chairman of this committee during the past 10 years, and I recognize that in undertaking the role of the spokesman here, he is qualified not only as a journalist, but also as a member of the bar, and it is always a pleasure to welcome him to the committee.

Mr. MOLLENHOFF. Mr. Chairman, it's good to be here. Sometimes one wonders how much progress we have made in the past years in these areas, but I guess we make a little progress from time to time.

This statement is for the Sigma Delta Chi, and it is not my personal statement, which would probably embrace a few other things. We are in favor of the legislation introduced by the chairman, and the legislation introduced by Senator Long. It clarifies the right of the public to information, and when it stays within that framework, we are for it.

We urge passage of this bill, even though at the same time we urge that the committee take a closer look at some of the language covering exceptions.

We are particularly pleased with those sections of the legislation that are designed to make it possible for the citizen or representative of news media to go into the Federal court to force the production of information that is not covered by one of the eight exempted areas.

This has been something that has come up in the courts a good many times in the past few years, and there are a number of examples where persons in Government or people dealing with the Government have been unable to obtain information simply because there was no mecha-

nism for obtaining it, and certainly, the news media has no mechanism until such time that you get that through.

Of course, it would be preferable if there were no exempted areas of information and if this legislation could be drawn to force all government to be handled in the open. We are realistic about the need for some exemptions, but believe that the list of exemptions should be as small as is possible and as specific as possible.

If the categories of exemptions are spelled out in too vague a manner, we know from past experience that there will be great danger that some bureaucrats will use these new laws to make broad new claims of a legal right to unjustified secrecy.

While we understand the arguments behind each of the eight exempt areas, we wish to point out at this time that it is likely that there will be abuse and distortion of these exemptions unless the legislative history is so clear that it cannot be misinterpreted. This would be a good time to recall that the so-called housekeeping statute, 5 U.S.C. 22, was not intended to be a law to authorize the withholding of information from the press or the public. However, a survey by House and Senate committees a few years ago demonstrated clearly that officials of the executive branch of Government were taking a few phrases in that law and twisting them into misguided legal opinions authorizing the withholding of Government information and documents.

Regardless of the intent of Representative Moss and Senator Long in introducing this legislation, we know that it is possible that this legislation can be warped into something not intended by the men who introduced it. It will take considerable diligence on the part of the Congress, the public and the press to avoid misuse of the proposed legislation being discusssed here today.

There will always be a few political figures who wish to stretch or distort the law to hide their crimes or mismanagement. There will always be some bureaucrats who will take the view that the Government agency that pays their salaries has become their personal property, and is not subject to examination and criticism by the public, Congress or the press.

With that reality in mind, let us examine each of the categories of exception.

Certainly we could not quarrel with a provision that permits the withholding of information when it is deemed essential for the protection of the national defense or foreign policy. However, even as we agree that this secrecy is needed, we should understand that the claim of "national security" has been used to hide crime and mismanagement in the past. All of us can remember some incidents when national security demanded that there be no discussion of certain information when disclosure tended to embarrass an administration. However, we have seen the same type of information distributed freely by a President, a Defense Secretary, or a Secretary of State when it served the political purposes of the incumbent administration. This is the reality of history that should be kept in mind as we discuss this particular exception to the open information philosophy of the legislation.

The second exception relates to the internal personnel rules and practices of an agency of Government. There are many personnel cases, and there are some rules and practices that probably should not be made a matter of public discussion. However, this appears to be a

broad exception that could be stretched to hide all types of arbitrary and unfair activities in the handling of Government personnel.

I might say on this point, a woman came to me who was employed by a Government agency, and she was examined, given a physical examination, and then she was discharged a short time thereafter. She was never told why. Her lawyer and doctor tried to obtain access to this personnel material to find out what was wrong with her and so they could meet it. She was put into a position where she was being arbitrarily discharged, and she was never able to come to grips with this. This is the kind of cruel situation where this woman was up to my office week after week, month after month, asking help on her case. Her lawyer told her that it would be a very expensive venture for him to try to carry a fight for access to her records and she didn't have the money.

I say this is cruel, where a rule which is intended for a good purpose, to protect the Government employee, is distorted into a protection for the bureaucracy. I might add that there are a good many of the same cruelties inherent in the handling of the Otepka case by the State Department at the present time. This is another case where an agency of the Government is using secrecy to protect itself in the handling of Government personnel.

The third exception deals with protecting those matters which are "specifically exempted from disclosure by statute." This is less susceptible to any general misinterpretation since the withholding is under specific statutes.

The fourth exception deals with "trade secrets and other information obtained from the public and customarily privileged or confidential." This provision would seem to follow an agreed area, but the phrase "customarily privileged or confidential" could certainly be interpreted broadly by the bureaucrat who has a motive for wanting to broaden the area.

The fifth exception would exempt "intra- or inter-agency memorandums or letters dealing solely with matters of law or policy." Even if this is closely restricted in its application, it can be used to hide a great deal of information dealing with legal opinions and policy. It is often the erratic policy papers or the cleverly worded legal opinion that is the key document in such controversies as the tax scandals, the Dixon-Yates scandal, the stockpiling scandals, or the Billie Sol Estes scandals. The danger of the broadest secrecy flowing from this exception should be apparent to anyone who has examined the details of these scandals. The argument that all agency business cannot be carried on "in a goldfish bowl" may have some merit from a standpoint of efficiency. However, it is a short step to the philosophy that secrecy promotes efficiency, and that therefore secret government is something that should be promoted. It is precisely that philosophy that we are trying to end by supporting the pending legislation.

Exception 6 is for the purpose of protecting "personnel files, medical files, and similar matter, the disclosure of which would constituted a clearly unwarranted invasion of personal privacy." We have no quarrel with the exception if administered within the spirit of the report issued by the Senate Judiciary Committee last year, but we are aware of how this so-called protection of personnel files has been

twisted in the past. The secrecy is for the purpose of protecting the individual Government employee from embarrassment and from "unwarranted invasion of personal privacy." Yet, the secrecy on personnel files has often been used to the detriment of the individual Government employee who has been barred from seeing his own file, and has been prevented from letting his own lawyer or doctor examine his personnel files. It is well to keep some of those more unfortunate experiences in mind as classic examples of what should not be done in administering the exceptions.

There is no quarrel with the exemption for "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." This exception No. 7 has justification, particularly when there is a limitation in time of application.

However, I say again, this can be made too broad in its application, and there were some questions by Mr. Kass earlier relative to this whole matter, how it would affect the material that was released at the time that a man is indicted, or other matters of this type.

Exception 8 deals with the insuring of a secrecy on reports submitted by financial institutions to the Government agencies responsible for regulating and supervising these financial institutions. This would appear to be a reasonable exception to assure the banking institutions that the information submitted on a confidential basis to a regulatory authority will not be distributed publicly to the detriment of the firm submitting the material.

Of course, there are instances when the whole problem of reports must be made public—as in the current McClellan subcommittee investigation of the events surrounding the closing of the San Francisco National Bank, and also of events dealing with the First National Bank of Marlin, Marlin, Tex. However, this information should be secret until such unusual circumstances exist that require a full review of all acts by Federal bank examiners and all information submitted by bank officials.

We realize that it would be impossible to draw legislation that would be a certain safeguard against all of those tendencies toward excessive secrecy that prevail. We hope that the warnings we have given on possible misuse of this legislation will be helpful, and will alert the Senate and the House to make the strongest possible legislative history in opposition to the philosophy of broad withholding.

It is the opinion of Sigma Delta Chi that this legislation should state clearly that nothing in its language shall be authority for withholding any information from the properly authorized committees of the House and Senate. If this legislation spells out clearly the right of Congress to obtain even the information in the eight excepted categories, then there will be assurance that the proper committees of Congress will have a specific statutory authority to examine any information being withheld to determine if it is actually within the eight categories listed in this legislation.

Sigma Delta Chi is in agreement with what you are trying to do with this legislation, and we are hopeful that it will achieve the goals it is designed to achieve. However, the value of this legislation will not be known until we see how it is administered. It is the responsibility of each of us to observe it carefully to make certain it does what it is intended to do—to create a more orderly government with less secrecy.

Mr. Moss. Thank you very much.

Mr. Griffin?

Mr. GRIFFIN. I am particularly interested in the suggestion about an amendment spelling out the right of Congress to have access even to the information that has exemptions. It certainly is clear that this bill would not, in any way, limit the right of congressional committees to information.

As stated by the chairman, the executive has stated over and over again, as this proceeds through the legislative process, I think we ought to give some consideration to possible amendment of the bill.

Mr. Mollenhoff, there was a witness here the other day for the Mediation and Conciliation Service, pleading for a special exemption for them, saying that they operated in the capacity of something similar to a lawyer and client, and that in order for them to perform their function they had to keep information from the public. They operate, of course, in trying to arbitrate as a conciliation service between labor and management in negotiations and so forth.

I wonder if you have any quarrel with that situation?

Mr. MOLLENHOFF. Where they make decisions, where any agency makes decisions, those matters that affect that decision, unless they involve national security or some of these trade practices and the like, should be on the table. During the process, I don't get into any fuss with any of the agencies on the process during the decision period. This is like when the Defense Department is making a decision on a contract. They can't have someone come in for any agency and examine, even where national security is involved, come in at every point where they are making a determination of the contract, look over their shoulder to see every paper that comes across the desk. That isn't what your legislation is intended to do. Your legislation is intended to make all the pertinent information dealing with any Government decision available at some subsequent stage, as I understand it.

Mr. GRIFFIN. Take the situation of the steel negotiations coming up, or the big automobile companies involved in negotiations, and in the process the mediator tries his best to gain the confidence of both sides, and the only way he can gain that confidence is to assure each side that what he is told will be kept in confidence and any information that they give him, may give him, about their profits and so forth, to assure him that their claim of what they are saying is justified. And he may go back, and without divulging that information, try to convince the other side that the other side is dealing in good faith, and all types of things like this.

The parties would hesitate to divulge this information if they thought it was going to be made public at any time by the mediator.

Mr. MOLLENHOFF. Frankly, I don't really buy that all the way. I think that they are assuming they are getting all kinds of secret information. I don't think that either the union or the management is giving to this mediator some of this supersecret material upon which their future hinges, which must be kept secret. They are both playing a game.

I am just not very sympathetic with it. He is there for a purpose, and there is a period of time when he is negotiating where I don't think he should be forced to come in before a committee of Congress. If he has a quasi-judicial capacity at that stage, when he is negotiating, he

shouldn't be forced to come before this committee or any other committee and divulge auything that takes place. But 2 weeks afterward I think he should come before this committee or any committee, because it wouldn't be the first time there was fraud, or deception, or improper activity in such operations.

They are not above the law any more than anyone else.

Mr. GRIFFIN. Of course, if there were some reason to believe that there were any fraud or something of that type, I don't think there would be any question but that the committee of Congress ought to be able to investigate that Agency of Government like any other agency.

But the question of whether all of this should be made public is a difficult one.

Mr. MOLLENHOFF. They are supposed to be dealing with each other in good faith.

Mr. GRIFFIN. Yes.

Mr. MOLLENHOFF. They are supposed to be relying upon facts that they can support, and they are not supposed to be dealing in any way that would really embarrass them if their hand really showed, either.

If there is some kind of trickery that they want to cover up in this matter, if our people who are engaged in these negotiations are involved in some kind of trickery that they don't want to show, because it would be embarrassing to the Agency or one of the parties, I wouldn't be a party to covering it up or arguing for it in any respect.

Mr. GRIFFIN. It is a game that they play; there is no question about it. The orginial demands made, and the position that the management takes in the first instance, and what they will eventually settle for and all these things, it is a game; there is no question about it.

Mr. MOLLENHOFF. I don't think it should be hidden any more than what is in the court record, in a court case. But in most cases, even what the judge takes before him in chambers, would be available here or would be available to reporters at a subsequent stage, except in rare cases.

Take, for example, the Hoffa trial in Chattanooga, or something like that, where you had the assassination plot and all this type of material. It would have been highly prejudicial had it come out in public during the trial. They took it in chambers. When the trial was over with, they laid it on the line. It was all there. It was highly embarrassing to a lot of people.

I don't think that these people in the mediation service, conciliation service—merit exemption from the law. I just don't bleed for them at all. If they handle their job properly, with the idea that what they do may become subject to public scrutiny, I think they will probably operate in a better fashion.

Mr. GRIFFIN. No further questions, Mr. Chairman.

Mr. Moss. Mr. Reid?

Mr. REID. Thank you, Mr. Chairman.

Mr. Mollenhoff, I would like to compliment you again on your statement. It is most interesting about 2 years ago, and I hope we can start to make a little progress.

I quite agree with one of your opening comments, with regard to the highly repugnant and continuing Defense Department directive. It would be my hope that this subcommittee would take a clear, forthright, unequivocal position again, and more firmly, directing and requesting the Department of Defense to rescind that directive which I think does affect access to the news and indeed can be a censorship of news at the source.

With regard to the several points you raised, I would like to ask you quickly three questions, if I may.

In exception No. 2, related solely to internal personnel rules and practices of any agency, do you have any suggestions for different language there?

Mr. MOLLENHOFF. The only thing that I would suggest there is this: That there might be some language which would say this is solely for the protection of the Government employee. This isn't for the protection of the bureaucracy. I have never heard anyone make the argument—well, once in a while—I will take that back. But I have never heard it argued in any spoken form that this was for the protection of the bureaucracy so they wouldn't have to divulge what they were doing with their employees.

It has always been put forward on the other side. The Truman directive relative to personnel files in 1948 was all with the premise that you were protecting the individual Government employee. Certainly, when it is taken in turn clear around the other way, it is wrong. I think something could be put in this provision to make it clear that it is for that purpose.

Mr. REID. I take it the point you are making, which is a good one, would apply with equal force to exemption 6?

Mr. MOLLENHOFF. Yes. In the medical files. In fact, one might even write in a specific provision that these files should be made available to the individual employee and his properly designated lawyer and doctor, because these are people who have a right to examine these files.

Mr. REID. The other question you raised, I think, of particular pertinency, was No. 5. The question, of course, is "solely with matters of law or policy," that they could be a bushel basket to cover quite a few signs.

Do you have a suggestion as to how that could be redrafted?

Mr. MOLLENHOFF. Probably more limited. Of course, this will run into a real fuss within the agency, because they want it as broad as possible. They will kick up a real fuss over this.

I would limit that, really, to those matters where the Government is a party to a suit from the outside.

Mr. REID. Also, it seems to me, if it is a matter affecting national defense or something, that is one thing. If it is just bureaucratic bungling, that shouldn't be shielded.

Mr. MOLLENHOFF. Yes. Even if you would get only a couple of little changes in here, the one thing that really will be the saving thing in this whole matter will be spelling out the right of Congress. The Congress has that right as I view it now. I am sure it has that right as the chairman of this committee and most members of this committee view it.

However, when one gets into the executive branch one finds different views. The gentleman who was a short time earlier sitting in the chair that I am sitting in was a member of the executive branch and he then had a distinctly different viewpoint on many matters when he was in the executive branch than he had in the period prior to that, and I assume that he has now.

And the only time he was wrong was when he was in the executive branch. [Laughter.]

There is a tendency on the part of the executive branch, and the lawyers for the executive branch, to look at themselves as advocates for the executive branch, and to stretch the law as far as possible. That gentleman, as a lawyer, did that. He was for the executive branch at that stage.

We have to guard against that. From the standpoint of the committees, I think that here, regardless of which side of the aisle one is on, at any specific time, that there has to be more of a view to guarding the rights of Congress. Because if you have a right to access, then we of the press can have a right to access. Even though three-fourths of you may get bound up with the political party in power at some stage, there is always the chance that a few of you will be in there pitching to get the material free for us.

Mr. Moss. Will the gentleman yield?

Mr. REID. Yes.

Mr. Moss. I think that the comment you just made illustrates the fact that this is not a partisan question. It never has been; it isn't today. It is a political question, God knows, but not partisan.

On the matter of the access of the rights of the Congress, don't you think we would limit, if we had to point to a statute as the basis for the congressional right? Haven't we clearly, at least as clear as you can, haven't we a constitutional right to any information we require in the discharging of our duties as legislators?

Mr. MOLLENHOFF. I agree with you completely on that, Mr. Chairman. And one might handle this through the legislature and run into someone saying you have limited yourself because you only said you had this.

However, you might, in the legislative history, make this absolutely clear.

Mr. Moss. I would make it very clear.

Mr. MOLLENHOFF. This is one of the things you can't repeat too often in the light of much that we hear from the other end of Pennsylvania Avenue in recent years. You must keep in mind that some of the times, when you have been able to get information from the other end of the avenue, on crucial matters, where there were big political fusses involved, it has been only because there was a specific right and you do have specific rights spelled out for the Joint Committee on Atomic Energy, the Joint Committee on Internal Revenue, the House Ways and Means Committee, and the Senate Finance Committee, they have the right to access to tax returns spelled out specifically for those committees, even though those are generally denied to Congress.

In the case of the AEC, in the Dixon-Yates case, establishing the facts, there were two or three committees that had an interest in some aspect of that particular transaction.

The other committees were unable to get access to the information. The only committee that was able to get the access was the Joint Committee on Atomic Energy.

One can't overlook the fact that specific statutory authority can be mighty helpful. If you have it spelled out, and in the executive branch, I know some of the lawyers never look at the legislative history. They look around and find one little phrase that indicates that they might be able "in the public interest" to hide public business than they figure that their own political interests are the public interest and proceed from there.

I think there would be a great deal gained by putting something in your reports, making it absolutely clear that you believe that the Congress has a right to everything.

Mr. Moss. I wouldn't want to base a congressional right on statute. I think it is inherent. We can continue, in the gray areas, to try our strength with the executive.

Mr. Mollenhoff. The Court has been actually pretty clear on this subject over a long period of time. Somehow the word doesn't get around in the executive branch. *McGrain* versus *Dougherty*, coming out of the Teapot Dome scandals are absolutely clear. It had been a little hazy. And a number of cases in recent years, have supported the right of Congress to full access, even where the basic decision of the Court raised some question about the jurisdiction of the House Un-American Activities Committee. The Court raised some questions, but this was not where it involved inquiries into Government. This is where it involved inquiries into people outside of Government, and it raised questions there as to whether the committee was operating within its jurisdiction, whether it had been made absolutely clear to the witness that that witness was answering the question that was pertinent to the inquiry.

Within the same decisions they said "But, of course, if these questions were being asked of a governmental official on governmental operations, they should be answered."

I say I still think the Court stands above the Justice Department legal opinions, whether written in the Truman administration or the Eisenhower administration, Kennedy administration or Johnson administration.

Mr. Reid. Mr. Chairman?

Mr. Moss. Mr. Reid.

Mr. Reid. I have one final question. The language in the bill, the top of page 2, makes pretty clear the proposition that every agency shall, in accordance with public rules, et cetera, "make all its records promptly available to any person."

And subsequently, paragraph (c): "This section does not authorize withholding information from the public."

Do you think it would be helpful in the general language of the bill to put in—and this is an idea, not the language—something dealing with the public's affirmative right to know, and try to make clear the idea that politics and bureaucracy should not be confused with security?

Mr. Mollenhoff. I think that is the only problem. Some of that language in the bill is excellent. You should, if anything, merely reiterate and make stronger the language in the report that goes along with it as part of the legislative history.

I make reference to this area, a specific thing with regard to the personnel files. If one can button that down solely for the protection of the governmental employee, even these records made available to the employee himself, his properly authorized lawyer or doctor.

What I am getting at is this—and I have seen a little of this in the executive branch as well as the legislative: The facts of the matter generally are that the public is ahead of government, and properly so. The tendency of government is to withhold, often, rather than to make available.

It sems to me that the burden should be on making it available, and that there ought to be some idea in here, perhaps in the language of the bill, that you can't just withhold it under the general heading of security when what you are really talking about are political or personal or embarrassing situations, not really matters of security.

I think—and I haven't looked at the legislation saying where this should be, but it certainly wouldn't hurt to have in there that the burden of proof shall be upon the government when it withholds. The chamber of commerce said today, and I was delighted to see the chamber of commerce—I think this is the first time that they have been involved here as witnesses on this type of legislation and there has been some reluctance sometimes in the past relative to those business practice areas.

Mr. REID. Thank you.

Thank you, Mr. Chairman.

Mr. MOSS. Mr. Rumsfeld?

Mr. RUMSFELD. Thank you, Mr. Chairman.

I certainly want to thank both of these prominent and very experienced members of the press. I was particularly pleased, Mr. Frandsen and Mr. Mollenhoff, that the comments you have made have been to the point and included some specific instances of withholding which I think is very valuable to have in the record, and also your suggestions as to improvements in the bill.

I quite agree that the public's business should be conducted in public if our system is going to function. I am also disturbed about this particular provision on national defense and national security. This being the era of the concensus, it would seem that that which might disrupt the the consensus conceivably could in some people's minds endanger the solidarity of the U.S. position and, to that extent, conceivably jeopardize our national security.

In previous testimony it was mentioned that some testimony before a congressional committee by, I believe, General LeMay, was classified. The conclusion was that the only conceivable reason for such classification was not that it was secret or classified or it would endanger national interest, but that it was in conflict with the administration's position.

I think that lacking some provision to the effect that the burden of proof would be on the administration, the bill as it stands really wouldn't solve the problem.

Mr. MOLLENKOFF. I think it is going to be very confidential with regard to the national security area to limit it much more than you have in the bill. That is about all you can do with that. From there on out, it is a matter of responsibility of Congress to supervise in those areas where security is stretched. This committee has done consider-

able work in this field in the past, and some other committees have gotten into it. I don't think any of us have done enough in this area. But there have been some committees even in the Defense Establishment that have been set up during the Eisenhower administration, I thing it was the Coolidge Committee. This was set up within the Defense agency itself and it was in 1956 or 1957. They made a report relative to the overclassification and the tremendous cost that there was in overclassification because of the difference in storage costs when you overclassify a document, and the type of safes and locks you have to provide and the types of guards and everything. They reported this overclassified paper was piling up not because of real security, but simply because someone wanted to hide something that might be a little embarrasing, or it was found more convenient to just put a security stamp on it than not put a stamp on it.

This Coolidge Committee, which was within the executive branch, was highly critical of what had taken place in this area. This committee also wrote some reports that touched on this.

Mr. GRIFFIN. Would the gentleman yield?

Mr. RUMSFELD. Certainly.

Mr. GRIFFIN. In view of the couple of questions and responses, there may be a question as to where and how we place the burden on the Government to sustain its action in denying information.

The record ought to indicate clearly, I think, that in the bill itself, lines 11 and 12 of page 2, that once the question is brought into court that the agency does clearly have the burden to sustain its denial of information——

Mr. MOLLENKOFF. That is one of the most important things in the bill, I think, from the standpoint of the mechanism we would have here for the first time to get into court on these things. There have been a number of instances where newspapers have tried to get into court and were merely knocked out because there wasn't the mechanism available.

Mr. Moss. I would like to say that on this matter of the classified nature of testimony of a general officer appearing before a congressional committee, I think that the executive department may advise the committee of its desires in classification. But I think the commitee has the right and the responsibility to persist on its own.

In this subcommittee in 1956, we explored rather carefully the questions of whether the executive could require the Congress to have its staff cleared by the executive for access to information. It was my position they could not.

These things the executive may advise the Congress on, but the Congress is also an independent and coequal branch of Government.

We may or may not recognize a clearance by an executive department. But once we give them the authority to clear, and to determine our classification, we have given them the authority to control our staffs, and I don't think we can ever afford to do that.

Mr. RUMSFELD. As a practical matter, from my limited experience it would seem that there has been general acceptance when the agency comes down and says this is classified; there is no question; there is no pursuing of it as to whether or not it should be classified. I think we have developed a bad pattern.

Mr. Moss. I think it is a major error on the part of Congress.

Mr. RUMSFELD. I think you have made a good point.

Mr. Moss. We wrote into the statute, the basic statute originating the National Aeronautics and Space Administration, a clear policy for free information to the American public. As you recall, just a few weeks ago we filed a report reflecting the investigative hearings of this committee last year criticizing the Space Administration for its failure to carry out the responsibilities placed on it by law and, in fact, delegating them to the Defense Department.

Mr. RUMSFELD. I think this is a good argument for better staffing by congressional committees. If we stopped the witnesses every time something was classified in our committee, and pursued it as to whether or not it properly should have been classified, we wouldn't get much work done.

Mr. MOLLENHOFF. Mr. Chairman, let me say that there two classic cases: The firing of MacArthur and the TFX investigation from the standpoint of procedure to get around this. Those cases demonstrated a really effective check. In the firing of MacArthur, you had two committees on the Senate side that met together to take up the investigation. All of the testimony was taken in executive session because there was a great deal of classified material.

Then you had this testimony cleared by the Pentagon the same day, but you had both Democrats and Republicans there to make sure that it wasn't warped one way or the other in the clearance.

The same thing was true in the TFX investigation. McClellan's committee held hearings behind closed doors on a new weapons system, and yet that same day that transcript was cleared and it came back so that we had access to a cleaned-up transcript at the end of the day. There was the check there of Democrats and Republicans who could raise their complaints if they thought something was improperly deleted from the transcript.

I say this is probably the ultimate in fairness.

Mr. Moss. My point is that it is the congressional responsibility. They can take the advice of the Executive, but they are not bound by it.

Mr. RUMSFELD. I have a question that relates to the subject that has not been brought up at all in this series of hearings we have been holding.

One hears from time to time about circumstances where members of the press—and I suppose other people, lobbyists, Members of Congress, and others—receive information from employees of the executive branch of the Federal Government under circumstances where the individual receiving the information is well aware that he is not to have that information, and it comes as a favor to the individual whether for friendship (some quid pro qua) or simply because the employee has an axe to grind. I don't know how widespread this is. I would be curious to know if you could give us some feel for it.

Mr. FRANDSEN. Mr. Chairman, I certainly don't have any knowledge of any cases in which information was obtained for money or gifts.

Mr. RUMSFELD. For friendship?

Mr. FRANDSEN. Maybe other people do, but I don't know of any.

But, obviously, when there are areas of contention going on within an agency, and information is perhaps not available now—to the extent that it would be if this legislation is passed—certainly people

who are arguing for one policy as against another, and think their side is not getting any public attention because the boss is on the other side, and the information that has leaked out is all on one side—of course, very frequently, those people are going to provide some information to the reporter that they perhaps know, and I think it would be dreadful if any effort were made to overcome that by this bill. I hope that nothing in this bill would ever be construed as meaning that only the records will be available after they are approved.

Mr. RUMSFELD. My point was that when someone sets a speed limit too low, it is frequently broken, or as in prohibition, it simply turns out to be unenforcible; it is very frequently violated.

I was wondering if by providing a bill such as this there would be less of the type of thing going on.

Mr. FRANDSEN. I wouldn't think so.

Mr. MOLLENHOFF. I don't think it would make any difference. I might say, this is thoroughly proper in my view. I have a constant flow of information coming to me from people in the executive branch of the Government who call me and say they have information, and it will be their job if they oppose the position of the people on top. They don't give it to me to use for a story immediately. I don't take it and write it just because they tell me this. But I use it as a tip, and sometimes I use it myself; sometimes I investigate up to a committee of Congress. I am doing this almost every day, and I am going to keep on.

At any time where they get to the point where they put the lid on, so these people are afraid to talk, I am going to be concerned. And that is the very thing that I am concerned about in this directive of Sylvester's over at the Pentagon. This is a directive that is intended to make sure that they know every person who talks to a reporter. And I have heard a lot of reporters over there who complained a great deal about this to start with, who haven't complained too much recently. They say: "Well, it is there, but they are not enforcing it very much; or a lot of people are talking to me anyway and they just don't report to Sylvester."

This is fine. But the rule is merely being violated. This doesn't mean that Sylvester can't impose that rule, because that rule still stands as an order by an Assistant Secretary of Defense that can be used as grounds for disciplining any person in that Department who is caught not reporting that he talked to a reporter.

I say I want to get around that type of thing and I am going to do it every day of the week.

Mr. RUMSFELD. Certainly the passage of a bill along the lines we are considering here today would put the employee in a position, and the agency in a position, and you in a position——

Mr. MOLLENHOFF. Have you read the Otepka case? You ought to read it.

Mr. RUMSFELD. I know about it.

Mr. MOLLENHOFF. Here is an effort by an executive agency to bar the Congress from testimony that was pertinent. This man delivered three documents to a Senate committee that were highly pertinent, and he is being fired for it, and this is, again, one of those cases of stretching an order.

The three documents that he delivered only proved that his superior gave untruthful testimony. He committed the crime of not going to his superior and say: "See, boss, I want to take these three documents up that will prove that you were untruthful under oath."

The committee on that said—I might say, is unanimous that this man had the responsibility and the right when his own integrity was in question, to produce the records that proved he was telling the truth—to produce the records that proved that his superior was not telling the truth.

However, our State Department takes an entirely different position on this, and is pressing forward to try to fire this man even today. At the same time the State Department still has in its employ one of the men who lied under oath.

Mr. GRIFFIN. They haven't promoted him yet, have they?

Mr. MOLLENHOFF. No, but that will come. [Laughter.]

Mr. RUMSFELD. I want to thank both of you, and also to congratulate you on the excellent job you continue to do in your field.

Mr. GRIFFIN. I think that we probably have to recognize, though, that in the first couple of lines, on page 2, you say "Every agency shall, in accordance with its published rules, stating the time, place, and procedure to be followed, make its record available."

That insofar as the agency setting up procedures, I suppose even along the lines that Sylvester has set up, this bill as it now is written isn't going to affect that.

Mr. MOLLENHOFF. I think that's correct. I would think that in your explanation of that you should make it clear that—I think your intent on this is that they shall say records will be available from 9 to 5 in room 304, and that you don't take them out, or if you want an extra copy you have to pay 25 cents for it.

I am assuming that is what you have in mind relative to the making of the records available, as would be the normal procedure over at SEC, any of the regulatory agencies where you just go there and examine the file or copy the files.

I would think that in your legislative history, again, this is not intended to limit access except to make it reasonable access within working hours and that——

Mr. RUMSFELD. If the gentleman will yield, that is an excellent point. I have come across situations where specifications on procurement matters have been made available, but they are quite lengthy and they have not been permitted to photocopy them, they have had to send someone in physically to copy these lengthy documents, which of course is tantamount to denying them access to them for all practical purposes.

Mr. Moss. I think that by the time this legislation is complete, that the history of the intent will be very clear. I think the whole tenor of the hearings here, any report, any debate, will make it very clear that the objective here is a much freer flow of information, and we are talking here of procedures to make promptly available records which the Government has.

The problem, as I observed the other day to the counsel for the Department of the Treasury, is that at the time of a legislative hearing the agencies are inclined to very narrowly interpret these exceptions, very narrowly. When they start to administer them, they interpret them very broadly.

If we could have a more consistent pattern of interpretation, it would make it much easier for us to do the job of drafting legislation that would anticipate problems.

I think that there is no question of the extreme difficulty in drafting language covering exceptions in the field of records.

For instance, ideally I would like to see the internal working papers made available following any official action, based upon those records. Once the action is taken, we should be able to examine the material that went into the decision.

I see no reason why that wouldn't be good policy. I don't think it possible at this time to go that far in drafting language.

I hoped that the appearance of the Department of Justice here the other day would have been in the vein of discussing these exceptions and constructively recommending changes to the committee. Regretably, that was not the type of testimony we received.

I am hopeful that we can go back now and perhaps get some thinking, that there is a little change in their views after they appeared before the committee, or while they were here before the committee.

Mr. Kass, do you have any questions?

Mr. KASS. Thank you, Mr. Chairman. Yes, I do. Mr. Mollenhoff, news to a newspaperman, to the press in general, is a very timely matter. How would the court access provision allowing the reporter who had been denied information to go in the court and file a suit really help him in getting the news for the purpose that he needs it?

Mr. MOLLENHOFF. From the standpoint of the specific story, probably not, because in the first place you would give away your story the minute you started filing suit.

From the standpoint of a lever, if it is there and if someone brings a suit, we all have an interest. Sometimes I think that we are too much to go alone on these things. If one does bring a suit and is successful, it helps the whole profession in this respect and makes the agency a little less inclined to withhold.

The same thing is true when something is withheld and we come up here to the Congress and manage through a committee of Congress to pull out the same material, even reluctantly, most reluctantly sometimes, that it makes the executive officials less likely to withhold at a subsequent stage.

Mr. FRANDSEN. May I comment on that?

Mr. KASS. Yes.

Mr. FRANDSEN. News, of course, by definition is timely. News is also not news until it is reported. Some of the best stories are about things that happened a year ago that you are just able to pin down now.

Mr. KASS. I was about to ask, in light of Mr. Mollenhoff's statement, whether you believe that a lot of needless litigation, as Mr. Rumsfeld asked earlier, would result if the court access provision were retained in the bill if enacted?

Mr. MOLLENHOFF. I don't think needless litigation——

Mr. KASS. Excessive litigation?

Mr. MOLLENHOFF. Litigation is expensive. I don't think newspapers are going to engage in any more litigation than they have to for access. And I don't think that you are going to have a lot of citizens around filing law suits.

You may have suits that are not justified. You have suits filed in the Federal courts, State courts, every day that are not justified. But I wouldn't look for this litigation to bring any great harassment of the Great Society.

Mr. KASS. You mentioned——

Mr. MOLLENHOFF. Or other society.

Mr. KASS. You mentioned earlier the problem that is raging now between the free press and the fair trial idea.

Mr. MOLLENHOFF. Yes.

Mr. KASS. Do you think that the bill adequately protects, on the one hand, the investigatory files that properly should be withheld pending the time the case is brought to trial and, on the other hand, the right of a newspaper, or the right of the public, to get information that they need?

Mr. MOLLENHOFF. There are certain types of investigatory files, the raw investigatory files, that really should not be made public. I see that when it serves the purpose of the administration, that some of those files are accumulated and distributed to some columnist and others.

Don Reynolds, is an example, which is the most recent memory. Here is a principle that was absolutely wrong. But because it serves somebody's purpose politically, this material from the Reynolds files was distributed from the Defense Department and the State Department investigatory files. It was not even substantiated information but merely rumor. That shouldn't be distributed by Government under any circumstances and information but should have access to it.

There are certain types of carefully evaluated reports that should be prepared and submitted within the department. They should not contain those things that are pure rumor and hearsay.

If they tend to be sloppy about that and get their rumor mixed up with the fact, that is the fault of the investigative agency.

This will be a matter of careful administration of report preparation. It is going to be a matter that will require close supervision by the proper committee of Congress to see how the agencies are administering this over a period of time.

Mr. KASS. Mr. Mollenhoff, you referred to a lady who came to you after she had been discharged, she and her attorney and the doctor couldn't get the record. What type of records do you feel should not be made available? What type of personnel records should not be made available to individuals, to the press, or to anybody else?

Mr. MOLLENHOFF. For example, I don't believe the loyalty-security thing should be made available to the press. I don't hold the Congress out of that, though, I think the Congress has been lax in letting the executive branch get by with holding that material away from it.

Mr. KASS. Excluding for the time being the right of Congress to get the information. I am talking about the executive——

Mr. MOLLENHOFF. The press shouldn't have the right to get loyalty files or the medical files of the individual. I don't think we should necessarily have the rating files of the individual, unless there is a specific reason.

We should have their salaries and their positions. That is about all we are really entitled to on the individual, unless there is a real reason for yanking someone back, demoting him a couple of grades, or the like. I think we should be given at least a summary of that reason.

Mr. KASS. Would a definition of personnel rules include, in your estimation, instructions to FBI agents, or instructions to Secret Service agents, as exempt from disclosure?

Mr. MOLLENHOFF. I think those should be exempt.

Mr. KASS. They should be exempt?

Mr. MOLLENHOFF. Yes. I don't think that that particular area is something that we should want to get into. The only time that that should be gone into is extraordinary circumstances where a proper committee of Congress would feel there is something wrong with the way it is being handled.

Mr. KASS. But as to the relationship between the executive and the public, they should not be given even that information?

Mr. MOLLENHOFF. No.

Mr. KASS. Exemption No. 6 states: "Personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." It was objected to by the Counsel for the Treasury Department. He objected to the word "clearly."

Do you feel, as a lawyer, that the word "clearly" is a problem?

Mr. MOLLENHOFF. It is a problem for them, because they want it fuzzily, so they can put on any kind of interpretation they want to. This is like saying the burden of proof is on them. That means something in the law, and they don't want the burden of proof. They want a nice, fuzzy word that they can interpret as they see fit.

I think "clearly" should stay in there, and I don't care what the Treasury Counsel says. I understand his problem. But it is not a problem that involves the public interest.

Mr. KASS. In reference to exemption No. 5, on inter-agency and intra-agency memorandums or letters dealing solely with matters of law or policy, many agencies have objected that they cannot clearly, if you will, separate on the one hand, those memorandums dealing solely with fact, and on the other hand those memorandums dealing solely with matters of law or policy outside the public reach.

How would you interpret that?

Mr. MOLLENHOFF. I think there is some question in my mind about putting questions of law and policy.

The idea here is that these agencies, dealing with the public, set their policy out so that the public knows what they can depend upon, and that whatever decisions they make are decisions that are made upon what is clearly published in the Federal Register, clearly available to the person who has any business with the Government.

There may be unusual circumstances which I can't think of offhand, where you don't put out the legal opinion.

I think that the business of covering legal fines gives them much too broad a sphere. When you go back to the tax scandal cases, you find legal opinions within the agencies were the whole root of the evil. They were ruling one way in one legal opinion and another way in another legal opinion, within a period of a few weeks or a few months.

Of course, I am getting into an area here where I think we are covered by tax laws. We are denied access to tax return information under section 55, and the legal opinion dealing with specific cases. That comes under another exception as specifically set out in law.

Mr. KASS. Mr. Mollenhoff, one further question. In your statement you said—

> There is no quarrel with the exemption for investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein. This exception No. 7 has justification, particularly when there is a limitation in time of application.

Mr. MOLLENHOFF. If the files all become available at a subsequent stage, it lessens the problem of misuse of secrecy. This would apply when it was an investigation where the Government had to bring things up to a certain point, and try the case without laying their whole hand on the table before trial.

Often as soon as that case is over with they can make this public. This is frequently the situation that you as congressional investigators run into. You have a case that you want to put on up here. They say we have that case in process of adjudication at the present time and we can't lay it on the line.

You abide by that. I would, and I think most people would, during that period of time.

But after they get that case settled, then there is no real reason for secrecy unless there continues to be an overriding reason that falls within one or the other exceptions.

Mr. KASS. In this matter there are certain Federal rules which allow for discovery and disclosure to the parties in question, for example, the attorney and his client. Should that information, once available to the attorney and his client, be given also to the general public? Or would there be a further time of application pending, maybe the completion of the lawsuit?

Mr. MOLLENHOFF. I would rather not get into that. I haven't thought that through from the standpoint of the mechanics of how that would operate. I would prefer not to get into that.

Mr. KASS. Thank you, gentlemen. No further questions, Mr. Chairman.

Mr. Moss. Are there further questions?

If not, I want to thank both of you gentlemen for your appearance here this afternoon.

Mr. MOLLENHOFF. Thank you very much.

Mr. Moss. The subcommittee will now stand adjourned until 2 p.m. on Monday.

(Whereupon, at 4:10 p.m., the subcommittee was adjourned, to reconvene on Monday, April 5, 1965, at 2 p.m.)

FEDERAL PUBLIC RECORDS LAW

(Part 1)

MONDAY, APRIL 5, 1965

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:10 p.m., in room 2247, Rayburn House Office Building, Representative John Moss (chairman of the subcommittee) presiding.

Present: Representatives John E. Moss, John S. Monagan, and Donald Rumsfeld.

Also present: Samuel J. Archibald, chief, Government Information; David Glick, chief counsel; Benny L. Kass, counsel; Jack Matteson, chief investigator, and J. P. Carlson, minority counsel.

Mr. Moss. The meeting will be in order. I'm very pleased to welcome as our first witness this afternoon my colleague, Congressman John Wydler.

STATEMENT OF HON. JOHN W. WYDLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. WYDLER. Thank you, Mr. Chairman. The statement I have to make today is going to be very short and brief, but I couldn't let this opportunity go by without making a statement to the committee, and it is in the form of a protest, I suppose, but I think it has a bearing on what your subcommittee is doing.

First of all, I want to say that I commend your committee on the efforts it is making in these fields. I think that, generally speaking, there is too much secrecy in Government matters. This is particularly true in the executive branch. Where the need for secrecy, whereas it is—secrecy is used for a cover, I believe, in many cases for matters which would be embarrassing and don't necessarily have to be secret in nature.

I think we in Congress may be guilty of it at times ourselves as well, and I have suggested that this is particularly true in regard to the files of those matters concerning ourselves which are the ones, naturally, that are kept by the House Administration Committee, and so forth, that I think that these files should be, of all files, made public so that no question of impropriety could ever be raised concerning them, but my real purpose for appearing here today is to bring to the attention of this committee, which is seeking, as I under-

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stand it, to get more information to the public in general. The treatment that I received—as a Member of Congress, I was afforded last year on the committee on which I served and on which I was denied a nonsecurity, nonsensitive matter, vital for proper consideration of an authorization request which our committee was studying. I found this most remarkable, because I found in general the Government agencies that I have dealt with will make available to me and have made available to me the files that they have concerning Government matters. This is true in both the General Services Administration and the usual authority, but in regard to the Space Administration, last year our committee was considering the question of the location of an electronic research center, and this question had created a great deal of heat, some political undertones and overtones, and in the course of the hearings a great many questions were raised, and I asked the agency to produce for me and make available to me their files concerning this question, and it was refused, and actually, the procedure that was followed was the committee chairman asked the agency head whether he wished to make these files available to me, giving him the choice of whether he wanted to do that or not.

The result of the whole thing was that the files—the access of these files were refused to me. I was never allowed to have the information, although a budget line item was contained in the budget concerning this very matter which I was supposed to pass on in my capacity as a Congressman.

Now, it appears to me that if the committee is to obtain any public type of dissemination, the first place where we should be able to get information is from our position as Congressmen, because we, in effect, in many cases, are the link between the public in general, and the executive branch of the Government. We are the people being told to get results for our constituents from this bureaucracy that they must face, and if we are going to be denied the access to this type of information, I don't see how the public is ever going to get the information, and I think this is a step in the wrong direction, and I have to say quite sadly, although I asked the Speaker of the House to intercede on this matter in my behalf because I felt my prerogatives as a Congressman were certainly being trampled on. I could not get him to even answer my request in one way or another, which disappointed me greatly, but I would like to say Mr. Chairman, that we should attempt to do something about this type of withholding of information that belongs to Congress and make sure that that part of our public information department is in order before we worry about the public in general.

It appears to me that that is our first order of priority. This is, in my opinion, completely improper denial of information, and I wanted to make it known to this committee. Whatever action they can take on it to see that such action doesn't happen in the future——

Mr. Moss. Well, I certainly appreciate your concern when confronted with a refusal of information you feel essential in your discharge of responsibilities as a Member of Congress. That it should be the Space Administration is very disturbing, in view of the fact that this committee was responsible for having section 303 included as part of the Public Law 85–568, which is the act creating the space agency. It was one of the first clear provisions, in an organic act,

making it very clear that the agency was to affirmatively undertake a policy of the widest spread of information. It provided also a disclaimer that nothing in this act shall authorize the withholding of information by the Administrator from the duly authorized committees of the Congress. I don't recall definitely, but did this committee receive a complaint at that time?

Mr. WYDLER. Mr. Chairman, I can't really say that I can assure you that I did, but I have only a recollection that I did write some correspondence to somebody on the committee in that connection, but I do not remember exactly.

Mr. Moss. We will check. I have no recollection of having received a complaint on this matter. Your committee, did it act to require the production of the information?

Mr. WYDLER. Well, actually, what happened in this connection was this: I made the request of the agency and they wrote me, in effect, and said they would not grant me this right as an individual Congressman, but, of course, they would be willing to meet a request of the committee. I thereupon made the request—I objected to that procedure, No. 1, but I thereupon made that request at a subcommittee meeting and was told that only the full committee could pass on it, and we thereupon took it up at a full committee meeting, and the chairman of the full committee refused to make the request on my behalf, but, of course, this was held under the most unusual circumstances. We had the head of the agency testifying before us at the time the chairman of the committee came into the subcommittee meeting and took a chair and they more or less agreed that I would not be able to see the files on that.

I personally never did see the relevance to the facts that I as a member of the committee wanted to see the files that I had to have a full committee to request to see them. There was never a vote taken on the matter. The chairman just indicated that he wouldn't request it and that seemed to end the matter there.

Mr. Moss. Subsection B provided that nothing in the act shall permit the withholding of information by the Administrator from the duly authorized committees of the Congress, and then, on page 23 of House Report No. 1770 of May 24, 1958, is this language:

> This section provides that all information concerning the new agency's activities shall be made available to the public, except information required or authorized by Federal statute to be withheld (such as trade secrets) and information classified to protect the national security. Nothing in the act, however, would prohibit the Administrator from furnishing information to the Senate and House and the various committees of Congress. It was the desire of the select committee to include in the bill a positive affirmation of Congress intent that the people be enabled to know what is going on in their Government, subject, of course, to national security restrictions.

And the discussions at that time spell out rather clearly the intent of the Congress that there be a maximum of availability of information to Congress.

Now, in the hearings 2 years ago, this committee was critical of NASA for its failure to accept responsibility for determining the scope of information which would be available to the public. It seemed to delegate that decision, at least, to the Department of Defense. In a report which was filed in the last month, we reiterated our criticism of

the agency for its failure to accept the responsibility for a positive information policy.

Mr. WYDLER. I can only assure the chairman that there was no question of natural security involved in this matter whatsoever, and, quite frankly, I am pleased to hear what the chairman has to say. Do I understand by that the agency should make matters in its files of a nonsecurity nature available to Members of Congress? Because this question is actually recurring to some extent this year. I find that when I make requests for certain documents, such as engineer's reports, the chairman of the subcommittee asks the agency whether they want to make them available to me or not, and I find it a remarkable way to try to get to the information of what the agency is really doing when they decide whether they will show you their records or not.

Mr. Moss. Well, section 303 of the act is rather clear:

> Information obtained or developed by the Administrator in the performance of his function under this act shall be made available for public inspection except (A) Information authorized or required by Federal statute to be withheld, and (B) Information classified to protect the national security.

Those are the two categories of exemptions granted under section 303 of Public Law 85–568, which is the act creating the space agency.

Mr. RUMSFELD. Mr. Chairman, could I make a comment here?

Mr. Moss. Certainly.

Mr. RUMSFELD. I happened to serve on the full committee and the subcommittee that Mr. Wydler is referring to, and I know him to be a diligent and hardworking member of that committee, and I recall this situation, and it certainly was my understanding that there was nothing of a security nature involved, and by the same token, there was nothing that would fall within the other exemption.

Do you, Mr. Chairman, know of any situation which would permit an agency of the executive branch of the Federal Government to draw a distinction as between a committee and an individual member? The comment was made by Mr. Wydler that they would not give it to him, but in the event that it was requested by the chairman of the full committee, it would be supplied. Is this your recollection?

Mr. WYDLER. "By the committee," they put it, but that is it in substance.

Mr. RUMSFELD. And the chairman indicated that he didn't want to request that information?

Mr. Moss. There are many, many precedents which could be cited where agencies have refused information to individual members but have agreed that they would make it available upon the request of the committee. Remember here, the minute we move into a contest between the executive and the Congress, we are in one of the gray areas of the Constitution. From the administration of General Washington on down, there have been occasions when Congress has requested information from the executive and it has been refused; not only individual Members, but committee have had refusals, and this continues, and in the bill before us now, this is not dealt with.

Mr. WYDLER. I understand that, sir.

Mr. Moss. I think we would make a mistake to try to spell out by statutes the rights of Congress. I think the rights of Congress are in the Constitution where we created three coequal branches. I would

always hope that they would be cooperatively coequal. Sometimes they tend to deal at arms length in a manner that would indicate that there are certain hostilities between the two, but this, again, is part of the pattern of many, many years. The committee is always interested in being helpful to any member. We can't guarantee that our efforts will succeed in producing the information. Again, we could cite precedents where we have been successful, and those where we have had rather remarkable failures, but at least the effort to be helpful will always be made for any Member.

Mr. WYDLER. It would be rather inconsistent to grant greater rights to the public in general than to Members of Congress or personalize Members of Congress, and this may very well be the situation you will find if the situation I have described is allowed to continue, because if we are going to leave it up to the agencies and just agency heads to make these decisions as to what they consider should be privileged, then, of course, our powers are really nil as far as any real investigation of them is concerned. They are the judges of what we are to be allowed to examine. We can obviously do nothing to examine thereafter.

Mr. Moss. Well, on occasions, the Congress has had to resort to rather extreme measures to get information. I recall when we created the Office of Inspector General in the Agency for International Development in an effort to bring about the production of information for the Congress.

By the legislation before us now we propose to spell out a public route, and leave it to the Congress to continue in using its own powers to try to accommodate with the demands of the executive. As I have said earlier, I think this would be a mistake to try to spell out by statute congressional right. I think that instead, we should firm up the public right and thereby strengthen the right of everyone who has a need for information.

Mr. GRIFFIN. Mr. Chairman, could I make a statement?

Mr. Moss. Certainly.

Mr. GRIFFIN. Well, I want to thank our colleague for coming before the subcommittee, and although I didn't hear all the statement, I understand the thrust of it, and I think he has made a good point. Surely, an individual Member of Congress must stand at least as high as the public, generally, and this subcommittee is concerned with making sure that information is available not only to the Congress, but to the public, and the President has advised this committee in writing that the so-called executive privilege of withholding information from the Congress will not be exercised except upon his own personal determination. I would suggest that if you have further situations like this that arise and you feel that they do not fall within the exemptions to which the chairman has referred to in the statute, that you file a written complaint with this subcommittee and I think it would be our usual procedure to make some inquiry into it.

Mr. WYDLER. I thank the chairman.

Mr. GRIFFIN. And hopefully, I think that would help you, as well as the purpose.

Mr. RUMSFELD. Mr. Chairman, one last thought. You might be interested in seeing, and I think the staff could supply you with a copy of this letter from the President concerning executive privilege.

I think after reading it you may come to the tentative conclusion that in the instance you have described the concept of executive privilege was invoked not by the President, not even by an agent of the President, but by a bureaucrat in that hearing. You may very well come to the conclusion that the treatment that you received was not consistent with the statements which are claimed by the President in this letter, and it might be well to document this case you've brought before the committee and bring it before this committee.

Mr. Moss. There is a law, you know, that permits a member of the House to file a privileged resolution, calling upon an agency to produce records. It then brings the matter before the House and permits the House to act on it, particularly if it is a matter not presently being considered by a committee.

Mr. WYDLER. Well, that is a good piece of information to have. Unfortunately I didn't have it at the time that I could have utilized it, obviously, because I would have. However, what I did do, I went before the Appropriations Committee, who is considering the appropriations for this item to tell them about the matter, but if I had known about this privilege motion—I thank the members of the committee very much for their time.

Mr. Moss. All right. Thank you.

The next witness is Mr. Walter Potter, publisher of the Star-Exponent, Culpeper, Va., and representing the National Editorial Association, and he is accompanied by Ted Serrill. You have a statement?

Mr. POTTER. Yes, I have, sir.

STATEMENT OF WALTER B. POTTER, PUBLISHER, CULPEPER STAR-EXPONENT, REPRESENTING THE NATIONAL EDITORIAL ASSOCIATION

Mr. POTTER. My name is Walter B. Potter. I am publisher of the daily Star-Exponent in Culpeper, Va. I am appearing for the National Editorial Association, of which I am a director and chairman of its legislative committee. I am accompanied by Theodore A. Serrill, executive vice president of the National Editorial Association.

Organized in 1885, the National Editorial Association is a trade association of hometown newspaper publishers and editors from all 50 States. NEA membership includes more than 6,600 newspapers, more than 5,800 of which are weeklies or semiweeklies and 800 daily newspapers. Forty-four State newspaper associations are affiliated with NEA. Headquarters of the association are here in Washington.

NEA strongly supports the public records bill you are considering. In 1963, when a similar bill, S. 1666, was receiving active consideration in the Senate, our association adopted a formal resolution in support of that bill, and recommended its enactment. Mr. Serrill and I testified in favor of that bill at hearings in October, 1963, before the Senate Subcommittee on Administrative Practice and Procedure. That bill, sponsored by Senator Edward V. Long, was passed unanimously by the Senate in 1964, with only minor changes.

I might add that at the time I spoke in support of this bill, I quoted Representative John E. Moss, the chairman here, and chairman of the House Government Information Subcommittee which has done so much for the cause of freedom of information, and gave an example of

this as testimony. He told how a public housing authority in Pennsylvania was investigated by the Federal Public Housing Authority, which kept its report secret, saying local officials could make the report public if they chose. In other words, the officials whose own conduct was investigated were given the power of censorship over a report on their own performance. Naturally, they chose to suppress the report.

NEA has kept its membership informed in every possible way about the progress of this legislation. Through weekly and monthly newsletters to our members, through the pages of NEA's fortnightly newspaper, Publishers' Auxiliary, and the NEA monthly magazine, National Publisher, the hometown press has been constantly informed about the progress of this pending legislation. NEA regards the Long and Moss bills as perhaps the most important legislation affecting the press now pending before Congress.

In 1964, NEA instituted an award of merit. The first recipient was Representative John E. Moss, who was singled out for his long fight for freedom of information. Last week this award was made for the second time and the recipient was Senator Edward V. Long, also for his right-to-know efforts. These awards should signify how important NEA regards leadership roles in the struggle to achieve freedom of information at all levels.

NEA believes that there is a crying need for legislation to force the Federal Government to cease suppression of information which the public has a right to know. This bill is a step in that direction. We of the press wish it were stronger and did not contain so many exceptions, some couched in broad language which we feel would allow bureaucrats to withhold what they should reveal. We realize, however, that any change at all is difficult to achieve and if it is the judgment of this subcommittee and the Congress that this is the strongest freedom of information bill that can become law, we will support that decision and back the pending bill without strengthening amendments.

NEA was distressed by the testimony presented to your subcommittee by a Justice Department spokesman on March 30. An Assistant Attorney General presented 10 pages of testimony to this body, the first 3½ pages devoted to honeyed words about "a steady flow of information" being "truly the lifeblood of our democratic system." These were fine assertions and we heartily concur.

However, the Department of Justice official after completing his remarks in tribute to the cause of freedom of information negated his position by devoting the final six and one-half pages of his presentation to telling you the bill might be unconstitutional, that its whole approach is "impossible" and would "adversely affect the public interest." In short, the Assistant Attorney General argued against any law that would substitute for "executive judgment and discretion."

Of all the untenable positions for a Federal official to take. Of all the affronts to sincere men like Congressman Moss who have been turning up instance after instance of suppression of information, for the convenience of the bureaucrats, and contrary to the public interest. The Justice Department concedes the public has the right to know, but only what the departmental executive chooses to reveal. What an insult to Congress. What an invitation to you gentlemen to pass a strong bill and put a powerful, headstrong bureaucracy in its place.

Apparently the administration does not take this legislation seri-

ously despite its three dozen sponsors in Congress, and despite unanimous Senate passage last year of an almost identical bill. Apparently the strategy of delay will be utilized, the Assistant Attorney General having told you it would take a long time to prepare some of the answers that ought to have been available last Tuesday.

Your record of this hearing on H.R. 5012 already contains a statement made by our President, Lyndon B. Johnson, when he was vice-president-elect at a meeting in Williamsburg, Va., of the Associated Press managing editors. We refer to his clear enunciation of his views at that meeting 5 years ago:

> In the years ahead, those of us in the executive branch must see that there is no smokescreen of secrecy. The people of a free country have a right to know about the conduct of their public affairs.

Only last Thursday, April 1, the President at a swearing-in ceremony for Henry H. Fowler, Secretary of the Treasury, in the White House, reiterated his feelings in this regard by saying in part:

> I want the press to have all the truth, the whole truth, and nothing but the truth.

We are proud to read this statement into your record.

This subcommittee has been preparing to pass such a bill as H.R. 5012 for a decade. The departments and agencies have been given ample opportunity to work with you to improve the bill. Your questionnaire has gone unanswered by such a key agency as the Budget Bureau, along with numerous others. The attorney from Justice even suggested that there were economy reasons for no greater outcry against this bill from Government agencies and departments.

So far, my comments have been confined to the testimony of the Department of Justice representative. As inconsistant as that statement was, it was topped by that of the Treasury Department spokesman. He told you that the bill would be seriously prejudicial to the effective conduct of the Government and damaging to many private individuals. He even ironically charged that passage of the bill would mean the Government will be unable to prevent invasions of the privacy of individuals. A bill designed to assert the public's right to know has now been characterized as harmful to the public's right to privacy. A country boy like myself has difficulty understanding this reasoning.

As I am sure all members of this subcommittee know, the eight exemptions contained in the bill have been worked out over a period of years in a sincere effort to strike a proper balance between information legitimately withheld for good reason that few would question, and on the other hand nonsecurity information suppressed simply for the convenience of appointed officials. Nobody wants defense secrets revealed. Nobody wants business trade secrets unveiled. Nobody wants an unwarranted invasion of personal privacy. Nobody wants law enforcement hampered by undue disclosure of investigatory information. All of these matters are safeguarded by the bill.

It is obvious that even if the list of exceptions were stretched from 8 to 80, opponents could still find reasons for complaining the list was neither long enough or broad enough. This suggests a future course for this subcommittee which the National Editorial Association recommends for your consideration, as follows:

1. Listen, but for a reasonable time only, to demands for expanding the exemption list or changing the wording.

2. After weighing the evidence and making whatever changes seem necessary, report and pass the bill, and pass it this year.

3. Let those agencies which contend hardship under a Federal public records law then come to Congress and ask for legislation in specific instances where disclosure can be proved to be contrary to the public interest.

This subject has had a full airing. The laws of this country are made by Congress and it is high time that secrecy-minded Federal officials are given a reminder of that fact. You have been challenged with the claim that the department and agency officials can best decide what the country should know and what it should not be told. Now is the time for Congress to refute that claim by rebuffing pressures from selfish interests and making a law for the public good.

If you will meet this challenge, you will have the support and the gratitude of the grassroots press of America.

Thank you very much for hearing this plea.

Mr. Moss. Thank you very much.

Mr. Griffin?

Mr. GRIFFIN. I have no questions, Mr. Chairman.

Mr. Moss. Mr. Macdonald.

Mr. MACDONALD. I have no questions, Mr. Chairman.

Mr. Moss. Mr. Rumsfeld.

Mr. RUMSFELD. I have no questions, Mr. Chairman.

Mr. Moss. We seem to be plagued by rollcalls.

I want to assure you that we are going to listen very carefully and we are going to weigh the evidence, and I hope that we pass the bill, and I hope we pass it this year. I again thank you for your appearance here and your association for its support of the legislation.

Thank you.

Mr. POTTER. Thank you very much, Mr. Chairman.

Mr. Moss. We will recess until 3 p.m.

(There was a short recess.)

STATEMENT OF JOHN A. McCART, OPERATIONS DIRECTOR, GOVERNMENT EMPLOYEES' COUNCIL, AFL–CIO

Mr. MCCART. Mr. Chairman and members of the subcommittee, I am John A. McCart, Operations Director of the Government Employees' Council, an organization comprised of 30 AFL–CIO unions representing employees in the wage board, classified, and postal services of the Federal Government.

We subscribe to the basic purpose of the bill under consideration today—providing the public with the maximum information possible about the operations of their National Government. Attainment of this objective is essential if citizens are to make intelligent decisions about the degree of efficiency of Government activities.

The first section of the bill enunciates this principle, outlines the steps to be taken by Federal agencies in disclosing such information, and the means available to the public to insure access to the information prescribed by the bill.

Following this general statement, H.R. 5012 then lists eight exceptions to the general disclosure principle. As the representative of unions and individuals employed by the Federal Government, the

council is concerned about two of these classes of records not subject to the full disclosure requirement.

Exception (2) deals with matters "related solely to the internal personnel rules and practices of any agency."

We find difficulty in understanding the justification for authorizing Federal installations to refuse disclosure of their basic personnel policies upon request. We believe policies governing promotions, training, discipline, processing grievances, appeals, labor-management cooperation, job classification, wage rates, and similar personnel matters should be supplied when requested. The only possible exception would occur when national security is involved.

The current situation evidences a lack of consistency. For example, the Federal Personnel Manual, containing the personnel laws, policies, rules, and regulations governing Federal civil service, may be purchased through the Government Printing Office through subscription. Similarly, the Postal Manual, which includes that Department's personnel program can be obtained at the Government Printing Office. Standards developed by the Civil Service Commission for classifying Federal white-collar positions can be secured in the bookstore at GPO when they are in print.

But the situation in other Federal agencies differs markedly. A request for one or more copies of a department's personnel manual or even chapters of it may elicit several types of responses. When the entire manual is asked for, the answer is usually that the agency does not maintain extra copies for general distribution. When asked why this is so, the most frequent reply is that there are insufficient funds for printing such material.

Copies of particular sections of personnel volumes can be obtained without as much difficulty. But when the request exceeds one or two copies, the "supply is exhausted" and "no funds for printing" responses are common. If the indvidual seeking the information offers to purchase the document involved, he is advised that the agency is not authorized to sell the material.

For these reasons, the council believes that official personnel policies should not be excluded from the disclosure requirement applicable under the general provisions of the bill.

There is one other comment pertinent to the language in exception (2). The term "personnel practices" seems somewhat indefinite. Our view is that a practice can represent an application of policy to particular individuals or situations, or a custom which has evolved independently of agency policy. Assuming this interpretation accurate, the exception described in H.R. 5012 lacks the specificity usually found in such measures.

Exception (6) presents a somewhat different problem. We feel strongly that an individual employee's personal files should not be open to public scrutiny. To do otherwise would represent a serious invasion of privacy.

But a question arises about the right of the employee to review his own personnel record. Agencies generally follow a policy of permitting employees to examine that portion of their personnel folders not containing investigatory material pertaining to loyalty, security, and qualifications. To our knowledge, however, the individual does not have access to this nonsecurity material as a matter of right.

Moreover, he has no means of insuring that the papers appearing in the official folder constitute the complete personnel file.

The same safeguard against public examination should be afforded an employee with respect to his medical records. The ability of the individual to review medical records affecting him is another matter.

In general, the council believes there must be some way for an employee to become aware of his medical file, particularly where his physical or emotional status may result in adverse personnel action.

True, there are instances where competent medical judgment dictates that an individual not learn all the details of his medical folder because it would be detrimental to the employee's health. In such cases, a qualified representative, including the person's physician or attorney, should have access to the information to protect the interests of his patient or client.

In summary, the public should have full access to the personnel policies of Federal activities, subject only to limitations of national security. Personnel and medical files should not be available to the public. But employees should be able to review their own personnel and medical folders consistent with security and the individual's well-being. Where medical information is withheld because of its detrimental effect on the employee, his representative should be permitted to examine the information.

Mr. Chairman, we appreciate the subcommittee's review of this important phase of the Government-citizen relationship and the opportunity to emphasize the legitimate interest of Federal employees in the pending bill.

Mr. Moss. I am going to ask the remaining witnesses to submit their statements for the record. The record at this point will receive several additional statements which have been filed with the subcommittee and they will be included as part of the record. The subcommittee will now adjourn. We will hold the record open the balance of this week.

(Whereupon, the hearing in the above-entitled matter was adjourned at 3:20 p.m.)

Letters and Statements in Support of Federal Public Records Law Legislation Submitted for the Record

MEMBERS OF CONGRESS

STATEMENT OF HON. EDWARD V. LONG, A U.S. SENATOR FROM THE STATE OF MISSOURI

Mr. Chairman, your bill, H.R. 5012, is to be commended as is your entire undertaking. I have long been interested in this subject, and during the last session of Congress, as chairman of the Senate Subcommittee on Administrative Practice and Procedure, I was fortunate in having an opportunity to try and do something about undue secrecy in Government.

Since the original introduction of the freedom of information bill in the Senate, instances of spurious withholding of information by Government agencies have reemphasized this important problem. Free institutions are in danger of collapse without the informed criticism of an electorate. The people only control their Government so long as they have a voice in its decisions; and if this voice is to be meaningful and constructive, the people must have a way of informing themselves of governmental activity. The two go hand in hand.

It was gratifying that S. 1666 of the 88th Congress successfully passed the Senate. It was an important first step; but only a first step. Because of this fact, it is imperative that the similar objectives and mutual cooperation continue between our respective subcommittees. The support and assistance of the Senate subcommittee shall continue until the idea of the free flow of information is made part of the law of the land.

Action of these measures may not be too far off. There is growing public indignation and frustration over the wrongful withholding of Government records. One proof that this situation exists, is the large number of Senators and Congressmen that have already pledged their support for this legislation. Fully 21 Senators cosponsored S. 1160, the current Senate freedom of information bill. They include the Honorable Senators Anderson, Bartlett, Bayh, Boggs, Burdick, Case, Dirksen, Ervin, Fong, Hart, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, Symington, Tydings, and Yarborough. In addition, I understand that 15 of your colleagues, Mr. Chairman, have introduced legislation touching on this same subject.

A few words should be said about our program in the Senate. S. 1160, of course, amends section 3 of the Administrative Procedure Act. A separate bill, S. 1336, has been introduced by Senator Dirksen and me. This bill is a complete revision of the entire act. The provisions of section 3 of S. 1336 are identical with those of S. 1160. Additionally, section 3 is controlled by other sections of the act in that it is the only section which applies to the whole Federal Government rather than to administrative agencies exclusively; and section 3 also borrows its definitions from the more complete text. We have announced hearings in the Senate on the entire revision on May 12, 13, and 14. This session, it will be fortunate, Mr. Chairman, to have the benefit of your studies, and we are optimistic that through our combined efforts this legislation will be passed in the very near future.

The records of the House of Representatives are replete with instances of your fine work in the freedom of information field, Mr. Chairman, and there is little that I can add that will embellish the record of those years of important public service. It is known that the work which you have done and are now doing will add immeasurably to the fund of knowledge which exists on access by the public to Government information. It was never the intention to thrust upon any Government agency a poorly drawn public information policy. The Senate has exhaustively studied every comment and criticism which came to its attention. However, your informed judgments are most welcome and will surely aid in ferreting out any deficiencies which may still exist in the texts of the various proposals.

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, the Federal Government can no longer afford to operate without the guideline of an effective Federal public records law such as this subcommittee is considering. And in the face of an increasingly more complex and enlarging Federal Government, the American people can no longer afford to be without the healthy countervailing force which is set in motion by a policy of free-flowing of Government information.

Yet, despite the fact that the sponsorship for these measures represents all sections of the country, the proposals introduced in the last several Congresses to achieve this end have met considerable opposition. The sponsors have, in my opinion, made every effort to accommodate the agencies and departments. It appears to me that every legitimate need for protection of any records or information in the custody of departments or agencies has been considered in the House and Senate measures. The eight exceptions to disclosure allow ample authority for the executive branch to limit availability of materials relating to (1) national defense or foreign policy; (2) internal rules and practices; (3) matters exempted from disclosure by statute; (4) confidential trade secrets and commercial or financial information; (5) memorandums and letters dealing with law or policy; (6) personnel and medical files; (7) investigatory files for law enforcement, and (8) reports regarding regulation or supervision of financial institutions.

There is no validity therefore to the frequently heard argument that these proposals impinge on executive privilege for they would not affect the proper exercise of authority of the President and department heads.

I have cosponsored similar legislation in the Senate for several years, and have found solid and widespread support for it, especially in my State. Hundreds of letters have come in from newspaper editors and publishers, owners of radio and television stations, businessmen and lawyers, and many other citizens with no special interest beyond their determination that Government officials shall not deny, distort or delay Government information. In view of the human element in public administration, there will always be some instances of this type of withholding information, and no open-records law, however carefully tailored, is going to cure every problem of this sort. Under a government by law, however, what we can prevent is withholding which is based on any loose statutory authority or which is done at an administrator's discretion in the absence of specific guidelines defining his duties in this area.

Officials can find no refuge in the arguments that such a proposal would overburden them with paperwork, and would violate the privacy of those with whom Government has dealings. A number of States have adopted the model Sigma Delta Chi freedom of information law, which defines the public's right to know, and others have some form of inspection of records statutes. We are fortunate that we have the benefit of State experience with such laws for I think all reports of this experience have shown that the public's right to full information about government is consistent with our democratic traditions. If, indeed, this proposal might entail a bit more paperwork, require a little more time on the part of our civil servants, I think the principle involved here far outweighs these considerations. Certainly, throughout the Federal bureaucracy which has enveloped our daily activities, time and money is expended every day to much less advantage than implementing the citizen's right to know.

Much is being said these days about the press and its invasion of the privacy of the individual. There are many knowledgeable people who believe that the scales are weighted in favor of the press, and that an effective public records law will but further the imbalance. But I do not agree with their premise. This legislation should indeed help the newspaperman who is charged with ferreting out the news and conveying it to the public through whatever media he works for.

More important, though, is the leverage it will give the private litigant whose case depends upon information in the hands of the Government, or the attorney whose duty it is to be informed on certain matters, or the businessman, who must rely on agency decisions, or all the other millions of Americans who have dealings with the Federal Government.

The value of the individual's privacy in our society can have meaning only as long as we have a free society, and we shall enjoy such a society only as long as the Congress, the press, and the public have complete access to informa-

tion about the activities of the executive branch of our Federal Government. Everything in our common law heritage and the history of our Constitution demands that this be recognized as a "right to know," endorsed by Congress, that it not be a privilege granted at the passing whim of Government officials. For this reason, I support the purpose of H.R. 5012 and similar measures pending before this subcommittee.

STATEMENT OF HON. FRANK E. MOSS, A U.S. SENATOR FROM THE STATE OF UTAH

Mr. Chairman, please accept my sincere appreciation for allowing this statement to be placed in the record. I firmly support H.R. 5012, the Federal public records law sponsored by Representative Moss, of California, and others.

As you may know, I am cosponsoring similar legislation in the Senate.

Secrecy in Government can be a major tool of incompetence, corruption, and tyranny. We are told that eternal vigilance is the price of liberty. This vigilance is to no avail if Government bureaucrats are able to hide their operations and activities behind a wall of secrecy.

When the bureaucrat is allowed to interpret congressional action and twist the meaning of past legislation to serve his own purpose in hiding facts which deserve the light of day, then the people of this great land are thwarted in exercising properly corrective action at the polls.

Secrecy in Government operations at all levels of our society is not a new problem, nor is it one which we will be able to eliminate through passage of more clarifying legislation. But, I feel we must be continually vigilant in our efforts to give the people all information which they have a right to possess.

Secrecy protects the relatively few in Government who betray a trust, or fail to measure up to the responsibilities given them.

The tendency to cover up for a slight error in judgment only makes it easier to continue covering up for later and greater errors.

The vast expansion of the activities of the Federal Government in the last half century has given a new urgency to the efforts to protect the peoples' right to know.

In 1946, Congress amended the Administrative Procedures Act to make more information available to the public, only to have the exceptions included in the act perverted into an excuse by some bureaucrats and agencies to withhold everything not chosen to be disclosed.

A few years ago, Congress tried again, by making it more clear that records should be made more available to the public. This effort, too, proved futile. We know from our own experience and the continuing complaints from constituents that the amendments have had virtually no effect in increasing the availability of information to newsmen and the public.

Departments and agencies have simply resorted to other equally indefensible excuses for withholding their records.

The bill now before your subcommittee makes the best possible delineation of the different classifications of exempt information which an agency may withhold. Naturally, I will not support an individual or agency desiring information on personnel records for other than investigations conducted by official sources, nor will I support prying into records for political purposes. By the same tokens, our national security cannot be jeopardized by forced release of information which will compromise this country's position militarily or internationally.

Determined resistance to the clearly expressed will of Congress has forced us to bring more pressure to make a reality the right of the people to know what their Government is doing.

This bill now before the subcommittee, and the bill which I am cosponsoring, will remove the umbrella under which bureaucrats may hide.

The bill enforces the right of access to Government information by providing action through the courts, to force production of agency records requested by a citizen. This provision gives an opportunity to correct erroneous interpretations and applications of the statute which may be applied by the individual in Government service.

It will also provide a forum in which the validity of the claim of "executive privilege" can be challenged and its limits defined.

We must stimulate compliance with congressional directives by passage of this bill, so the people may know what their Government is doing and will then be able to judge and police its performance far more effectively.

Thank you, again, for allowing my remarks to be submitted for the record being made by the subcommittee.

LETTER FROM HON. E. L. BARTLETT, A U.S. SENATOR FROM THE STATE OF ALASKA

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
April 1, 1965.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Government Information and Foreign Operations, House of Representatives, Washington, D.C.

DEAR MR. MOSS: Let me congratulate you and your subcommittee for carrying on the struggle for an adequate Federal statute to insure freedom of information for all citizens in their dealings with the Government. This is a struggle which has gone on for long and in recent years leadership has been given by you, Senators Tom Hennings and John Carroll and for this we are in your debt.

You are now holding hearings on H.R. 5012, a bill whose companion measure is S. 1666 in the Senate. It is similar to S. 1160 of the last session of the Congress. I was a cosponsor of this bill in the 88th Congress and I am again a cosponsor in the 89th Congress. I should like to give the subcommittee some comments on the proposal which is now before it.

The Government is a servant of the people. It was designed as such by our Founding Fathers and every generation of Americans has treasured this principle. We do not serve the Government, the Government serves us. It is important that the people know what their Government is doing and in a free country such as ours the people should have this information available to them as a matter of right, not as a matter of privilege.

The struggle of the Congress to see that the public and its elected representatives have free and full access to the actions of their Government is as old as the republic itself. All too often this intent has been evaded by bureaucracy anxious to hide its errors or to avoid awkward inquiries. Whatever laws the Congress has passed to insure free access have been given such limited interpretation by Government agencies so as to often render these laws almost useless.

It is this history which emphasizes the importance of seeing to it that whatever law you recommend to insure freedom of information, it should be as clear, as direct, as forceful, as simple and as understandable as possible. It is, of course, easy to say this and difficult to write such a law. I commend your subcommittee, however, for making the effort.

Let the subcommittee make it clear that access to information is the ordinary; that denial is the extraordinary.

Let the subcommittee make clear that it is not for the citizens to explain his interest in having the information; it is instead for the Federal agency to explain its denial of the citizen's request.

Let us put the onus of proof on the agency, not on the citizen.

My best wishes to the subcommittee and its important work.

Sincerely yours,

E. L. BARTLETT.

STATEMENT OF HON. LEE METCALF, A U.S. SENATOR FROM THE STATE OF MONTANA

It is a pleasure to support H.R. 5012 and related bills which are similar to a bill which I sponsored to establish a Federal public records law.

The Federal Government has much to learn from the State governments about access to public information. Let me illustrate with some of the access-to-information statutes in the State of Montana, where the entire spectrum of public decisionmaking—from agency files to legislative proceedings—is as open as Montana's wide-open spaces.

One of our statutes (sec. 93–1001–4), Revised Codes of Montana, 1947, Annotated) states that "every citizen has a right to inspect and take a copy of any public writing of this State except as otherwise expressly provided by statute." This is not an empty statute, for the next paragraph (93–1001–4) spells out how the public official must produce certified copies of public records demanded by any citizen.

Another section (59–512) states that "public records and other matters in the office of any officer are at all times during office hours, open to the inspection of any person." Only two exceptions to this statute are given—cases of attachment in possession of the clerk of court before filing of a return of service, and child adoption files. In each of these exceptions, access to the records still is possible under certain conditions.

Montana leads most States in the types of proceedings which are declared open to newspaper reporters. While some States limit reporting of meetings, Montana permits fair and true reporting of legislative judicial and "other public official proceedings" (Rev. Codes of Mont., Ann., 1947, sec. 94–2807).

We can learn some lessons from the experience of a State with open access laws.

The first lesson is that these and other liberal access statutes, do not hinder the efficient operation of government. As a former Montana Supreme Court justice, I can say that rarely has the administration of justice been hampered by these access statutes. In fact, Montanans are well informed about their State government. Through the efforts of the wire services, newspapers, and radio and television, all of our citizens—living in the largest inland State in the Union—can be immediately informed about the workings of their legislature, courts, numerous State boards, public meetings, hearings, and other State and local matters.

The second lesson we can learn from Montana is that democracy is helped, not hindered, by open access laws. I can declare without reservation that Montana is one of the most politically viable States in the Union. There are no "safe" districts in Montana. There are no party machines in Montana. This is due, largely I believe, to Montana's relatively well-informed citizens who cannot be fooled by backstage political string pulling. Surely, there are abuses of the public trust; certainly, I do not always agree with the actions taken and decisions made by some State officials. But I am always comforted by the fact that these abuses, actions, and decisions—and facts surrounding them—are generally known to the majority of Montana's electorate who may then act to correct the mistakes.

I only wish that Montanans had the same access to records of their Federal Government as they do of their State government. This leads me to the third lesson that we can learn from Montana's experience. In my State there is little distrusts of the State government. There is always criticism—most of it intelligent and knowledgeable—but there is little, if any, cynicism. When the citizen becomes separated from his government and its activities, a sense of distrust develops. I am convinced that much of the anti-Federal reaction in the West comes partly from some citizens of good will who have experienced arbitrary and unexplained actions by Federal officials in the State—actions from which the citizens felt they have had no recourse. For the good of our Republic and to rekindle a sense of participation in our Federal Government, I believe an important step would be the passage of a Federal public records law. With this legislation, it would be possible for the citizen to take recourse against arbitrary administrative decisions. He could demand and receive information on decisions made at the Federal level. With this information he could more adequately challenge arbitrary bureaucratic acts. If he is denied information, he can seek a judicial judgment with the Federal agency carrying the burden of proof. In this process, the privacy of the individual records in the Government can be protected while the information concerning bureaucratic mistakes will be opened. The result, I believe, will be a healthier confidence in the Federal Government. The result, then, is a more efficient Federal Government.

H.R. 5012, and my companion bill which I cosponsored in the Senate, would make information in Federal Government agencies more readily available and would sharply define the purposes for which information may be legitimately withheld.

Let me illustrate this with one example. It took the House Government Information Subcommittee 4 years to force the Bureau of Land Management to make public the reports by BLM engineers on the value of public lands for which applications had been filed. At first glance this may seem to be a small matter, but those of us from the fast-growing West recognize the importance of the public lands held in stewardship by the Federal Government. In Montana, 30 percent of the State's land is federally controlled. In other Western States the percentage is also high. As the pressure for settling these public lands has increased in recent years, there have been complaints about Bureau of Land Management decisions on applications for private use of the land. Only by making available the records of the Bureau's actions could the complaints be silenced. But for a number of years the basic documents showing land examiner's valuations of parcels of public lands were withheld from the public. Today, those reports are public records, and there is more public confidence in the Bureau of Land Management decisions on these applications.

But this subcommittee cannot alone break the curtain of secrecy and withholding. It can only handle specific cases over a long period of time. A Federal public records law is necessary to counteract the massive, agency-by-agency withholding. Such a law will make it unprofitable for agencies to withhold when in doubt. With the threat of a judicial judgment, many routine records will be available, and many others will be open with far less effort than it takes today.

The great strength of democracy in Montana is that it does not operate behind closed doors. Access to State records is not enough. We have delegated to Federal agencies authority to spend billions of dollars each year. The work of Federal regulatory agencies affects consumers' expenditures of billions more for light, heat, transportation, communications, securities, and in trade. To assure prudent expenditure of Federal funds and to guarantee fair rates for consumers, we must supervise the work of our public servants on the Federal level. Supervision must be based on knowledge. A press release is not enough. The records kept by our public agencies must be public records. The orders and rules, opinions, and decisions of our regulatory agencies are public business. And public records they should be.

I urge quick passage of H.R. 5012 so that the Senate may consider its companion bill promptly.

STATEMENT OF HON. THOMAS L. ASHLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

For the record, Mr. Chairman, I would like to say that I originally had intended to appear before the Subcommittee on Government Information and Foreign Operations to testify in favor of the so-called freedom of information legislation. At the time I was scheduled to make my presentation, however, I was attending an International Maritime Conference in London at the request of the State Department.

Nevertheless, I wish to briefly state my support for this legislation to clarify and protect the right of the public to Government information. The issue which H.R. 5012, which I have cosponsored, seeks to resolve is where Government secrecy ends and public accountability begins, of finding the right combination of freedom and security.

Many States have a public records statute which gives the citizen a right to inspect public records, and specifies the only information which officials can withhold. The Federal Government, unfortunately, has no such public records statute, and in recent years officials in the executive departments and agencies have appeared confused as to what authority they have either to give or withhold information. Contrary to the intent of Congress, they frequently rely on a section of the Administrative Procedure Act to withhold information from the Congress, the press, and the public.

The qualifications of section 3 of the Administrative Procedure Act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose. Investigations by this subcommittee show that that section of the law, meant to be a disclosure statute, has been repeatedly used as a shield of secrecy.

The legislation now being considered is in essence nothing more than a housekeeping measure to clarify existing law and to put a brake to a growing penchant for secrecy among Government officials. It would eliminate many of the vague phrases in the present statute, set up workable standards for making records open to public inspection, eliminate the test of who has the right to different information and give a remedy in court to any aggrieved person, with the burden of proving the legitimacy of withholding on the agency. To protect information which should be kept secret, the measure makes exceptions for matter exempted from disclosure by statute, state and military secrets and matter relating to national defense, and matters relating solely to internal personnel rules and practices. Material specifically covered by executive privilege would not be affected by the bill.

STATEMENT OF HON. ED EDMONDSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

I want to commend Mr. Moss for his long and fruitful record of interest in the principle of freedom of information, and in this bill to establish a meaningful

Federal public records law, which it is my privilege to join him in sponsoring in the House of Representatives.

Of all the constitutional guarantees which protect the American people, perhaps the most fundamental is the guarantee of a free press—and with it the guarantee of full reporting of the Government and its function.

There has been a problem in protecting the public's right to know what the Federal departments and agencies are doing, and it is my strong feeling that Mr. Moss' bill provides an effective solution to the problem by placing the burden of proof in the courts that information should be withheld upon the agency which wants to withhold it. This bill takes away the agency's right to decide what is and what is not the public's business, a right which has sometimes been abused.

This bill reinforces the American people's guarantee to a free press and a free flow of information from the Government, and it is my sincere hope that it wins early congressional approval.

LETTER FROM HON. WRIGHT PATMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Hon. JOHN E. MOSS,
Chairman, Government Information Subcommittee,
Rayburn House Office Building.

DEAR JOHN: All of us owe you a debt of gratitude for your 10-year effort to remove the barriers to a free flow of Government information. In particular, I recall, with the greatest admiration, the successful fight you waged in 1958 to make available to the public applications for tax exemption.

As you well know, the area of tax-exempt foundations is one of the areas that truly needs full disclosure. This is supported not only by your work but also by investigations conducted by the House Small Business Committee, which has, since 1962, been engaged in a factfinding study of the impact of privately controlled, tax-exempt foundations on the Nation's economy—dealing, in part, with foundation-controlled enterprises in competition with taxpaying businessmen. During the course of our study, I have urged the Treasury Department to make available to the public all information on tax-exempt foundations. We have been able to get some reforms in this area, and certain information that was formerly classified as confidential is now available to the public.

For example, foundations owning 10 percent or more stock in a corporation are required to attach a list to tax return form 990–A showing (1) the name of the corporation, (2) the number of shares of each type of stock owned (including information indicating whether the stock is voting or nonvoting), and (3) the value of the stock as recorded in the foundation's books. Until 1962, the Treasury Department followed a policy of nondisclosure of such information. Since then, such ownership of corporate stock by tax-exempt foundations has been made available to the public. In addition, the Treasury has amended its regulations to permit the public to obtain photocopies of portions of foundation tax returns which were not previously available to the public.

However, there is still one area of information which certain Treasury bureaucrats want to hide from public view. That area deals with the names and addresses of donors and the amounts they contribute to foundations. Yet, those officials well know that any number of foundations voluntarily place such information in the portions of their tax returns that are open to public inspection.

Under present Treasury regulations, a foundation's tax return is divided into two parts. One part is known as the "public portion" and the other section is termed the "private portion." The public portion is open to inspection at the district offices of the Internal Revenue Service and Washington, D.C. The names and addresses of the donors and the amounts contributed by them is the only information that does not appear in the public portion. Except for this, the public and private portions of a foundation's tax returns are identical.

The names and addreses of donors and their contributions are omitted from the public portion because the Internal Revenue Service maintains that such disclosure is prohibited by law. There is considerable inconsistency in the Internal Revenue Service reasoning. On the one hand, the Internal Revenue Service says that, based on its interpretation of the law, names and addresses of donors and the amounts they contribute cannot be made available to the public. But, on the other hand, the same Internal Revenue Service officials testified at our hearings last year that such information is definitely open to public inspection if a foundation records it in the public portion of its tax return. Yet, the present

law does not say that such information is public if it is recorded in the public portion of a tax return.

There is no earthly reason why there should not be full disclosure to the public—that is, the names and addresses of donors and the amounts of their contributions should be open to public inspection. The public is entitled to know who is supporting the foundations. If there is any hanky-panky going on, the public would thus be informed as to who is carrying it on. If, for example, "hot" money is finding its way into tax-exempt foundations, certainly the public should know about it. By making it mandatory that the public be informed, potential hanky-panky may be avoided.

Public disclosure of donor-information can serve as a restraint upon unfair, self-dealing practices. Douglas Dillon, former Secretary of the Treasury, admitted before our subcommittee last July that a foundation can be a source of unfair competition arising from active use of foundation assets by donors or trustees for private business ends. The Secretary agreed that a foundation could be used as a device for engaging in various trade practices which might be in violation of certain statutes administered by the Federal Trade Commission or the Antitrust Division. Contributions received from persons or organizations that supply goods or services to a company interlocked with a foundation, or contributions received from persons or organizations that buy goods or services from a company interlocked with the foundation constitute one of the areas of possible violation of such statutes. The Secretary agreed that this is one of the problem areas that should be considered in drafting legislation which would prohibit self-dealing.

Mortimer M. Caplin, former Commissioner of the Internal Revenue Service, is well aware of the problems involved in barring the public from donor information. Mr. Caplin testified that "there should be the greatest of disclosure by foundations to the public. Exemption is an extremely preferred status under our tax system." He also suggested that there should be a careful examination of that portion of the law which permits contributions from one foundation to another, and from that foundation to another foundation.

The late President Kennedy had assured me that he favored public inspection of all information contained in foundation tax returns. But, unfortunately, certain Treasury officials now consider that the public, which pays their salaries and subsidizes foundations, is not worthy of learning the names and addresses of donors and the amounts they contribute to foundations.

Those officials have apparently even managed to sell Secretary Dillon on the desirability of concealing these vital facts from the public. During the course of our hearings of last July, Secretary Dillon agreed that the names and addresses of donors to a foundation should be open to public inspection. However, at a later date, when the Secretary reviewed the transcript, he completely changed his earlier answer by stating: "I think it quite proper that the names and addresses of the original creators of a foundation should be made public at the time the foundation receives its tax exemption." At the same hearing, Secretary Dillon agreed that all matters relating to the granting or denial of tax exemption as well as revocations and penalties should be made public. However, subsequently when the Secretary reviewed the transcript, he qualified his earlier answer by saying: "I would not object to public disclosure with respect to a foundation's application for exempt status or the statutory grounds upon which a foundation's exemption was revoked. Of course, I do not think that it would be wise, from an overall viewpoint, to open internal memorandums and reports to public inspection."

The position of those officials is somewhat ridiculous when you consider that anyone can pick up a newspaper any day of the week and find a story stating that Mr. Donald Dill Pickle III has proudly contributed $100,000 to the Foundation for the Preservation of Dill Pickles. Hence, the name of the donor and the recipient of the gift are proudly displayed for all to see.

And, let us suppose that the Foundation for the Preservation of Dill Pickles contributed to the Foundation for the Preservation of Sweet Pickles. Under the law, the Foundation for the Preservation of Dill Pickles is required to list on its tax return the amount contributed and the name and address of the recipient, which, in this case, would be the Foundation for the Preservation of Sweet Pickles. Since such information is open to public inspection at the Internal Revenue Service offices, there is no secret about the fact that the Foundation for the Preservation of Sweet Pickles received a gift from the Foundation for the Preservation of Dill Pickles.

In addition, the trade publication of the tax-exempt foundations, Foundation News, which is published bimonthly by the Foundation Library Center of New York City, records in each issue the names of numerous donors making gifts of $10,000 or more, as well as the names of the recipients and the amounts received. Thus, there is nothing secret about the donors listed in Foundation News.

As a matter of fact, only 1 foundation—out of almost 600 under study—has complained to us about the fact that names of its donors and the amounts they contributed were made public. That foundation is the American Enterprise Institute for Public Policy Research, Washington, D.C., which asked us to withhold such information from the press. My answer was "No." This foundation seems to be particularly concerned about our making public its donors for fiscal year ending June 30, 1964, and has thus far failed to furnish us a copy of its form 990–A tax return for that year.

There is no doubt but that, in a democratic society, secrecy can be destructive to the whole body politic. Secrecy in tax-exempt foundations—which are given their special privilege by the representatives of the American people in the Congress of the United States—is altogether out of tune. It is the public that pays for foundation tax exemption. Every single tax exemption creates an additional burden for those who do have to pay taxes. Therefore, in my view, the American people are entitled to complete—I wish to emphasize that word "complete"—information regarding the operations of tax-exempt foundations.

I believe in freedom of information. But I believe that public information extends not only to the government in power and to all branches of it, but to those instrumentalities such as tax-exempt foundations which are given extraordinary privileges in our society. The privilege of exemption from taxation bears with it a great responsibility. It is the responsibility to let the people know who gives what for what. Hence, I think that I am not asking too much for freedom of information regarding tax-exempt foundations. The source of their funds is of great interest to the press and public. I believe the American people ought to know, because they are paying the burden out of their pocketbooks.

The public interest will be well served if the House Government Information Subcommittee will give consideration and approve the need for making such donor information available to the public.

Sincerely yours,

WRIGHT PATMAN.

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

I appreciate the opportunity to present my views to the subcommittee, not only because one of the bills you are considering was introduced by me but also because I have a deep, personal interest in the people's right to know. That interest is based on nearly 10 years of service with John Moss as a member of this subcommittee and as a member of its predecessor which initiated the study of information problems—the study which resulted in the bills now before this subcommittee.

I address you as a partisan—not in the political sense but in the moral sense. Access to Government information is not an issue based on political parties; it is based on a concept of government. By conviction, and by virtue of many years experience fighting for the people's right to know, I am strongly partisan in favor of the Federal public records law which would be established by the bills before this subcommittee.

I am surprised—and a little saddened—at the opposition which has developed to a Federal public records law. I note that a number of the Nation's major civic and professional organizations support the proposal, but I also note that nearly all of the departments and agencies of the Federal Government take the opposite side. They are strongly opposed to a Federal public records law as set forth in the bills before this subcommittee. These bills are not an offhand development; they are the result of many years work by this subcommittee, by its counterpart in the Senate, by dedicated newsmen and by many Federal Government officials. I had thought that, over the years, there might be a change of heart by those secrecy-minded bureaucrats who contended that they—and they alone—knew what information is good for the American people. I am afraid that is not the case. When legislation similar to the bills before you was considered by the Senate, that body took into account complaints by Federal

officials that certain categories of Government information must not be released. Each valid complaint was answered, I believe, by the legislation passed by the Senate and introduced in the House by myself and a number of my colleagues. But still the proposed Federal Public Records Law is not weak enough for most Federal departments and agencies. Yesterday you heard witnesses seriously urge that the proposed Federal public records law be weakened further; today I would like to discuss some of those suggestions for a weaker law.

This Subcommittee was urged to disapprove legislation which would make the records of the Federal Government "promptly available to any person." Instead, witnesses said, the present law should be left as it is—information need be made available only to "persons properly and directly concerned." What a misused provision of law this has been over the years. A Government employee decides whether a citizen, petitioning the Government, has a proper right to information. We heard just such an argument in the very first hearings held by this subcommittee in 1955. We heard the Civil Service Commission Chairman argue that he would disclose the names and salaries of Government employees only to a "legitimate" reported who wanted the information for a "reasonable" purpose. And why did he arrogate unto himself the power to determine the legitimacy of a request for Government information? He testified, in explanation, that "we do not want to wash our dirty linen in public."

Government information should be available to "any person" for a very good reason—it is the character of the information that determines its availability, not the character of the person requesting it. The Government—and its employees—have no right to discriminate between citizens who seek the facts of Government. If the particular item of information is of the type which must be kept within the official Government family—and that includes the Congress—it should be withheld from all the public. It should not be made available to the favored few as the present law permits.

One witness before this subcommittee used, as an example of the type of information which would be disclosed under the proposed Federal public records law, the studies being prepared for Congress in connection with the coin shortage. The General Counsel of the Treasury Department said that misuse of the study—which, he contended, they would be forced to disclose—would lead to hoarding of coins and profit by speculators.

The Treasury Department could not be further from the fact. I speak not only as an author of the bills which the Department criticized but also as chairman of another subcommittee of the House Government Operations Committee which has just issued a report on the coin shortage problems. Certainly a communication between the Treasury Department and the Congress on the policy problems of the coin shortage should be protected from premature disclosure. And it would be protected by a provision of the legislation which protects interagency messages on matters of policy. Just as certainly, the Treasury Department would have the necessary power under the proposed law to protect other information which has, in the past, permitted coin speculators to gain an unfair advantage. The report by my subcommittee urged, for instance, that the Treasury Department halt the publication of monthly reports on coin production in the Nation's two mints. These reports have been used by speculators to gain knowledge of when to hoard coins produced in small amounts during any 1 month. Following my subcommittee's suggestion, the monthly coin production reports were abolished and the Treasury Department could take exactly the same action under the proposed Federal public records law. One provision of the proposed legislation exempts from disclosure "conditions reports prepared by * * * any agency responsible for the * * * supervision of financial institutions." Certainly, the reports to which my subcommittee objected fall in this category. Thus, I do not believe the Treasury Department can use this example as valid grounds for opposing a Federal public records law.

It has been my experience that the Federal agencies can always come up with an excuse for secrecy. If the laws passed by Congress and signed by the President do not give them the power they seek, they fall back on their interpretation of the Constitution. And the opponents of the proposed Federal public records law are doing just that. They are arguing that such a law would be unconstitutional—that the Congress does not have the power to tell the executive branch of Government to open its files to the citizens of our Nation. This argument has all the aspects of a ghost I thought we had laid to rest while I served on this subcommittee. It is the dead issue of "executive privilege" wrapped in a new winding sheet.

Time after time Federal officials far down the administrative line from the President raised the cry of "executive privilege" when faced with a demand to disclose the facts of Government. Time after time they held up their interpretation of the Constitution as a shield against public knowledge of their activities. They relied on their interpretation—not the Court's interpretation, nor the laws spelling out the Constitution. They said that article II of the Constitution, granting the "executive power" to the President and charging him to "take care that the laws be faithfully executed" gave the whole range of bureaucracy the power to ignore the laws of the land. This claim of "executive privilege" was cut back to size in 1962 when the President said he, and he alone, would decide in each and every case whether such a privilege would be claimed against the Congress.

Now the issue is raised again by representatives of Federal Departments who claim that Congress does not have the power, under the Constitution, to enact the proposed Federal public records law. What they are claiming, of course, is that Congress does not have the authority to enact a public records law which is not acceptable to them. Certainly a public records law can be enacted, and it has been—it is the weak provision under which the Federal agencies now determine how much the public shall know about their operations. But just as certainly the Congress has the authority to enact a strong Federal public records law. In fact, Congress has the duty to enact such a law.

The proposal before you is just such a measure. I urge upon you its approval.

STATEMENT OF HON. SAM M. GIBBONS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, and members of the Subcommittee on Foreign Operations and Government Information, I am pleased to have this opportunity to present my views on the right of all Americans to know what their Government is doing and legislation which has been introduced to safeguard this cherished right.

The "right to know" is one of the very basic of all American rights under the Constitution of the United States. It is the cornerstone of our great democracy. It must be preserved at all costs.

With the great growth of our Federal Government, and government at all levels, for that matter, it is increasingly important that the right of all of our citizens to have free access to certain information be not diminished, but enhanced. Not weakened, but improved.

I, along with several other of my colleagues, have introduced bills to require every Federal agency to make all its records, with certain exceptions, readily available to any interested citizen of this country. If such an individual felt he were being denied access to Government information to which he felt justly entitled under this legislation, he could go into a Federal district court and force the appropriate Federal officials to produce the data or show sufficient cause why they were deemed "privileged."

Under the Administrative Procedure Act of 1947, Federal agencies were required to make official information available to the Congress and the American people under certain conditions.

Unhappily, the plain truth of the matter is that the act has aided the various Federal departments and agencies to maintain a tight lid of secrecy over records which clearly should not be so labeled. The problem, I believe, arises from wording in the 1947 act too vague for effective public access to exist.

I submit that the language in the present law which allows each agency to withhold certain information and records at its own discretion, under the guise of "secrecy in the public interest" must be changed. And changed during this session of the Congress, if we are to preserve our precious heritage of the right of the individual to be as well informed as he wishes to be on certain matters.

Presently, every last one of our various agencies and departments on the Federal level are allowed to set their own guidelines as far as determining just what "secrecy in the public interest" means. In fact, what one agency determines as fitting in that category may not be so judged by another agency.

What we need is uniformity established by the Congress, which would tighten up this clause in the Administrative Procedure Act to establish two objectives: (1) clearly define where the security of the United States stops and the right of every American to know what his Government is doing, and (2) provide an effective judicial remedy in a Federal district court for every U.S. citizen who

feels that he has a legitimate right to certain Federal records and information and has been denied it.

Now, no one wants to unduly hamper or restrict any Federal agency or any Federal official in the proper performance of their official responsibilities, but on the other hand, let us all remember that what we are talking about is part and parcel of the great American Revolution of 1776.

This country did not fight the tyranny of a George III to have its citizens, nearly 200 years later, be at the mercy of a huge bureaucracy with no adequate means with which to defend themselves. It has often been said that "knowledge is power" and particularly is this true with respect to the individual versus the power of the state.

This right to know is one of the most fundamental of all those guaranteed us by the Constitution and the Bill of Rights. What my bill, H.R. 5237, and the others introduced at this session of the Congress by interested colleagues, would do is place the burden of proof on the Federal agency or department concerned in cases of alleged denial of information.

Accordingly, any Federal agency would have to prove its right to deny specific information and records in a Federal court. This would be a great improvement, in my judgment, over the existing system whereby all an agency has to do is to say, "Why, we cannot divulge this information, because it falls in the 'secrecy in the public interest,' or 'confidential for good cause found' categories."

While I am strongly in favor of this legislation and the principle which it represents, at the same time, I do not want to do anything which will jeopardize the security or well-being of the United States. Clearly, we must draw a line somewhere, and I would be the first to admit that unlimited access to each and every governmental secret or piece of information would be both foolishly unrealistic and anarchical. No, we do not want that.

To safeguard this area of national security, my bill would exempt from the disclosure requirement the following obviously sensitive areas: National defense and foreign policy secrets specifically protected by Executive order; documents relating to internal personnel rules and practices of an agency; information specifically protected by other laws; privileged private commercial information obtained from the public such as trade secrets; agency memorandums dealing solely with matters of law or policy; personnel and medical files; files of law enforcement agencies dealing with investigations, and reports of financial institutions submitted to regulatory agencies.

The measures we are discussing today have been labeled "freedom of information" legislation. What more appropriate designation could be found? A democracy will survive only as long as her people are free to determine for themselves her future course.

In the darkness of secrecy can only be found the seeds of tyranny and ultimate disaster. The right to know, one of our most cherished possessions and one of our most cherished inheritances from the Founding Fathers, can be further safeguarded by enactment of this legislation. I strongly urge such action by this subcommittee and the full House Government Operations Committee.

STATEMENT OF HON. RICHARD D. MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I am pleased to have this opportunity to comment in behalf of the proposed Federal public records law.

I think that my background—I once was a reporter for a daily newspaper—gives me a basis for understanding the necessity for this legislation.

Because of the statutory void in this area, I feel strongly that a Federal records law is vitally needed—and I have introduced a bill (H.R. 5020) similar to the one sponsored by my distinguished colleague, Congressman Moss.

It is a truism that a democratic society cannot function without an informed citizenry. And an informed citizenry must rely on the Federal Government for much of the information it needs.

It also is obvious that disclosure of some kinds of information by the Federal Government would be harmful to our society.

It seems to me that the Congress should attempt to strike a reasonable balance between the public's need to know what its Government is doing and the equally important need to maintain secrecy in some areas.

In my opinion, the proposed legislation—by establishing procedures for court enforcement of the right to know, and by specifying categories of information that would be exempt from disclosure requirements—would meet this objective.

LETTER FROM HON. JACK EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., April 5, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives.

DEAR COLLEAGUE: Thank you very much for your letter of April 1, inviting me to appear before your subcommittee in support of my bill, H.R. 6739, having to do with making available Federal public records.

My bill is very similar to other bills introduced on this same subject, the primary difference being that the other bills provide that any "person" may have access to certain records. My bill provides that any "citizen" may have access to certain records.

I urge the subcommittee to favorably report this bill using the word "citizen" rather than the word "person" for obvious reasons. I am taking the liberty of writing you since I will be out of town on April 5. Please make this letter a part of the record.

Sincerely,

JACK EDWARDS.

LETTER FROM HON. ROBERT E. JONES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 31, 1965.

Congressman JOHN E. MOSS,
Chairman, Foreign Operation and Government Information Subcommittee, House of Representatives.

DEAR MR. CHAIRMAN: As you know, Congressman Jones is recovering from major surgery at the Bethesda Naval Hospital. Although he is making the normal anticipated recovery following such an operation, it is expected that he will have a prolonged convalescence and, therefore, will not return to his official duties for several weeks. We are pleased with the manner in which he has responded and are hopeful that he will be released from the hospital within the next 2 or 3 weeks.

In Congressman Jones' absence, I am taking the liberty of writing to you regarding certain portions of H.R. 5012, now under consideration by your subcommittee. I believe, and I am certain that Congressman Jones would be in complete agreement, that the following provisions do not strike a proper balance between the interest of the public in obtaining information and the interest of the Federal Government in the efficient operation of its various agencies. Obviously, these suggested changes would not materially alter the purpose of the bill to which I subscribe.

1. Exemption No. (5) on page 3 exempts intra-agency or interagency memoranda or letters dealing solely with matters of law or policy. Most legal or policy memoranda must of necessity deal to some extent with facts. Thus, inclusion of "solely" largely nullifies any practical effect of the exemption. I believe "solely", as it appears in line 9, should be deleted.

2. None of the present exemptions cover reports or investigations of accidents or other materials pertinent to litigation which, if disclosed, could adversely and unfairly affect the government's position in lawsuits. Where litigation is concerned, there appears to be no reason for treating a Government agency differently from a private party in making pertinent information available. The availability of such materials is already covered and should continue to be covered by the rules of discovery. It is suggested, therefore, that number "(8)" in line 14 on page 3 be changed to "(9)" and a new exception be inserted which shall read as follows: "* * * materials pertinent to litigation except to the extent they would be available under established rules of discovery in the Federal courts."

3. The remedy provided in subsection (b) on page 2 for persons to whom disclosures have not been made refers in line 10 to "* * * records or information

improperly withheld." Inclusion of the words "or information" appears to to be inconsistent with the rest of the subsection and creates ambiguity. It is suggested that these words be deleted in the interest of clarity.

Any consideration that you may give to any one or all of these suggested changes in H.R. 5012 will be greatly appreciated.

With every good wish, I am

Sincerely,

GEORGE MILSTEAD.

STATEMENT OF HON. CHARLOTTE T. REID, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I am indeed delighted that your subcommittee is giving consideration to legislation dealing with the orderly disclosure of public information by Government agencies, and it is a pleasure to have an opportunity to present this brief statement concerning H.R. 5021, a bill which I introduced in the House of Representatives on February 17, 1965, to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

Let me say at the outset that my purpose in sponsoring this legislation is not to unduly shackle any Government agency, improperly restrict its administrative authority, or invade the constitutional privacy of any individual. On the contrary, my bill would designate eight specific categories of information which should be protected from indiscriminate disclosure. Considered in this light, it is my belief that H.R. 5021 would facilitate rather than hinder any agency in determining the proper policy for the release of public data. Although this bill may not be the perfect panacea, I do believe it will go a long way toward alleviating a rather perplexing problem.

The public records debate is by no means a new one, but it seems to me that the continuing growth of the Federal executive establishment gives the question a new perspective. The trend toward bigger government multiplies rather than diminishes the need for disclosure and the necessity for supplying information to the people. Certainly no one can dispute the fact that access to public records is vital to the basic workings of the democratic process, for it is only when the public business is conducted openly, with certain exceptions, that there can be freedom of expression and discussion of policy so vital to an honest national consensus on the issues of the day. It is essential that free people be well informed, and we need only to look at some of our international neighbors to see the unhappy consequences of the other alternative.

The need for a more definitive public records law has been apparent for a long time. The Federal Register and Code of Federal Regulations created by the Congress in 1935, although most helpful, did not provide for detailed rules for the issuance of other forms of information or for regulations to assist agencies in formulating such procedures. Recognizing this, the Congress provided section 3 of the Administrative Procedure Act of 1946, relating specifically to public information. But now we can see that the language of this section was much too broad; and the intent of Congress, which I believe was then as it is now that Federal agencies take the initiative in informing the public, can be misconstrued and misinterpreted so as to render the provision virtually ineffective. Since the question here involves the intent of Congress, and if perchance the intent of Congress as stated in section 3 is ambiguous and, therefore, subject to misinterpretation, then it is our duty to spell out this intent in more direct terms. In my judgment, the ultimate responsibility lies with the Congress, and this is one of the considerations which prompted me to introduce H.R. 5021.

In looking at the existing law, it is not difficult to see how the intent of Congress could easily be circumvented by any agency desiring to do so. Section 3 of the Administrative Procedures Act includes withholding information in the public interest, yet executive agencies have wide discretion in interpreting this term "public interest." Matters relating to the internal management of an agency are also exempt under section 3, but certainly taxpayers have a right to be concerned as to how their tax money is being spent by agency managers. Section 3 also provides that official records must be made available in accordance with published rules of the agency, but does not direct that such rules actually be published. Section 3 also refers to "matters of official record," but the Congress did not define what is meant by "official record." Section 3 also directs that public records be made available to "persons properly and directly concerned," but here again an agency has wide discretion in interpretation. Further, information may be held confidential for good cause, but this, too, is a wide discretionary area.

It is not illogical to assume that many in the Government having the duty to release public information might naturally be inclined to be more guarded in these releases rather than perhaps running the risk of being charged by superiors with releasing too much, and I think a more explicit law would remedy this situation. H.R. 5021 would direct hands of departments to prescribe regulations for the conduct of their departments and make all records available to any person in accordance with published rules. Persons denied access to authorized records could file suit in a U.S. district court which would have the authority to order that such records be produced. The eight specific categories of sensitive Government information which would be protected from disclosure under H.R. 5021 are as follows:

(1) National defense and foreign policy secrets specifically protected by Executive order;

(2) Documents related solely to internal personnel rules and practices of an agency;

(3) Information specifically protected by other laws;

(4) Privileged trade secrets, commercial or financial information obtained from the public;

(5) Agency memorandums dealing solely with matters of law or policy;

(6) Personnel and medical files;

(7) Investigatory files compiled for law enforcement; and

(8) Examination, operating, or condition reports used by agencies responsible for the regulation of financial institutions.

Since coming to Congress, I have become increasingly aware of the lack of information disseminated to the American people on many phases of Government operations. I think the people have a definite right to know what their Government is doing in nonsensitive areas and that the news media should likewise have full access to such records. I do not believe that any agency of Government would argue in good faith against the intent of this proposed revision, for the bill contains sufficient safeguards for protecting vital defense information and other sensitive data. It would make it possible for all agencies to follow a uniform system to insure adequate dissemination of authorized information, thereby removing some of the confusion resulting from differing policies. Government by secrecy, whether intentional or accidental, benefits no one and, in fact, injures the people it is designed to serve. This legislation under consideration today will establish a much needed uniform policy of disclosure without impinging upon the rights of any citizens.

Thomas Jefferson once said, "A popular government without popular information or the means of acquiring it, is but a prolog to a farce or a tragedy, or perhaps both." The responsibility belongs to the Congress, and I therefore hope that your committee will give favorable consideration to this legislation. Thank you again for inviting me to present my views here today.

ORGANIZATIONS AND INDIVIDUALS

STATEMENT OF JOHN F. GRINER, PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

The primary objectives of H.R. 5012, the bill under consideration by this committee, is desirable. However, the American Federation of Government Employees is concerned with several exceptions to the application of the proposed enactment which should be modified in the interest of many Federal employees who may be affected by its provisions.

Maximum information about the operations of the Federal Government is a worthwhile objective. We believe that information which is legitimately sought and which does not involve national security should be made available. To that extent, we believe H.R. 5012 should receive our indorsement.

However, we are in disagreement with two of the eight exceptions to the general principle of disclosure as enunciated in this measure. First there is exception (2) which concerns matters "related solely to the internal personnel rules and practices of any agency."

It is certainly not defensible for Federal agencies or installations to refuse to disclose their basic personnel policies and yet that has happened altogether too often in years past, as evidenced by comments we have received from time to time from our members. It is, therefore, wrong in our opinion to write into law justification for such a practice.

Publications containing such statements of overall Federal personnel policy as the Federal Personnel Manual, Civil Service Commission Position Classification Standards, and the Handbook X–118, stating qualification standards for Classification Act positions are available upon subscription from the Government Printing Office. The same is true of the Postal Manual which contains the personnel policy and regulations of the Post Office Department. Personnel manuals of other individual agencies are not so easily obtainable. Requests for copies of small sections of manuals are frequently complied with, but not for copies of an entire manual other than a single copy intended for a union's national office. The response usually will be that the limited supply does not permit distribution to that extent.

It is also our belief that the personal file of a Federal employee should not be made available for public inspection. This situation relates to exception (6) which is included in this bill.

Maintaining limited availability of an employee's personal file suggests two related aspects of the problem of obviating the invasion of individual privacy. First, to what extent should inspection of such a file be permitted? It is our view that such inspection should be permitted only to authorized representatives of the employing agency management. Inspection beyond that limit should be predicated only on considerations of national security.

Unless withholding of information in an employee's own personal file would be detrimental to his physical or mental health, we believe the employee has an unquestioned right to know its contents. Agencies usually withhold that portion of the file having to do with qualifications or material relating to investigation of loyalty or security matters. The employee should have the right to inspect the nonsecurity contents of his file.

Inspection of a personal medical file is a more complex problem. The ability of the individual employee to examine his medical file meaningfully may be open to question as would be the desirability of the employee perusing medical findings which could be emotionally disturbing or physically harmful. In such instances, the employee's physician or attorney should be permitted to examine the file and advise the employee of the contents to an extent which will assure the protection of his interests and yet not adversely affect his health.

Thank you, Mr. Chairman, for the opportunity to comment on H.R. 5012.

LETTER FROM RALPH F. FUCHS, INDIANA UNIVERSITY, SCHOOL OF LAW

BLOOMINGTON, IND., *March 30, 1965.*

Hon. JOHN E. MOSS,
House of Representatives,
Washington, D.C.

MY DEAR CONGRESSMAN MOSS: I have read with interest your letter of March 15 and the memorandum of the staff of the Foreign Operations and Government Information Subcommittee, dated February 1, 1965, which accompanied it. It is good to know of the present status of the measure which is now H.R. 5012. Bills to the same general effect have been quite thoroughly explored previously, of course, and I doubt whether I can add significantly to what has been said.

There is no doubt, I think, that additional legislation is needed to procure adequate access to information from Federal agencies. The prevailing deficiencies in this regard relate both to adequacy of access by news media and to opportunity for persons involved in administrative proceedings to ascertain policies which are likely to determine agency decisions in these proceedings. H.R. 5012 makes commendable progress in defining the proper scope of the obligation to disclose. I note that it is substantially identical to paragraphs 3(c) and 3(e) of the latest draft by the staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary of a proposed revision of the Administrative Procedure Act.

One major question presented by H.R. 5012 is whether a judicial remedy against nondisclosure should be provided. I think that clearly it would be better to provide other means of achieving compliance, if it could be done effectively, both to prevent unnecessary burdens on the courts and to avoid the risk of undue interference with agency operations by unjustified demands. With the establishment of an administrative conference, suitably staffed, through which inquiries into inadequate agency functioning can be carried on, it seems to me that it would be better to refrain at this time from creating a new ground of litigation directed against the agencies. If additional legislation should define agency obligations as clearly as this bill, I believe there is reason to have confidence that genuine improvement would take place without direct judicial intervention. The Administrative Conference Act, however, confers authority only in relation to compliance with the Administrative Procedure Act. Therefore, new legislation providing for disclosure should perhaps be attached to the Administrative Procedure Act.

The principal question that remains with respect to the desirable scope of agency obligations to disclose information involves internal documents that arise when an agency is developing a policy or compiling evidence in an investigation. Item 7 in lines 12–14 on page 3 of the bill seems unduly narrow in this regard, since it refers only to investigatory files compiled for "law enforceemnt purposes." Many proceedings hardly fall in this category; yet the accumulation of evidence, only some of which will be used, is necessary in connection with these as well. I therefore suggest that after the word "purposes" in line 13 there be added, followed by a comma, the words, "or for use in agency proceedings." I recognize that there should be an agency duty to disclose evidence which is intended for use in later agency proceedings under many circumstances; but this duty should, it seems to me, be imposed by provision for discovery at the instance of private parties to proceedings, and not in the present bill.

The wording in line 3 on page 2 in paragraph 161(b) of H.R. 5012, which requires each agency to make "all" its records promptly available to any person, seems somewhat inconsistent with the exceptions recognized in paragraph 161(c). Especially if judicial enforcement of the obligation to disclose is provided, I think the bill should be quite explicit in this regard. Therefore I suggest that, instead of the wording in line 3 on page 2, preceding the period, the following be substituted: "provide for its records to be made promptly available to any person to the extent required by this act."

The language in lines 8–12 which follow would then lend specifically to the duty imposed.

Minor differences of wording between H.R. 5012 and the corresponding paragraphs of the Senate Judiciary Committee staff draft need hardly receive attention here. I am sure the staff of your subcommittee will choose among these alternatives according to which are preferable. They all seem to involve expression, not substance.

If any additional comments from me might be helpful, please let me know.

Sincerely yours,

RALPH F. FUCHS.

LETTER FROM CARL L. SHIPLEY, ATTORNEY, SHIPLEY, AKERMAN & PICKETT, WASHINGTON, D.C.

Re statement on H.R. 5012.

APRIL 2, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, House Government Operations Committee, House of Representatives, Washington, D.C.

DEAR CHAIRMAN MOSS: Our law office represents many persons and companies in administrative or judicial proceedings involving the Federal Government.

The ends of justice are frequently thwarted by the refusal of agencies of the Federal Government to make records promptly available, even though such records are public information and should be treated as such. Very often employees of the Federal Government are able to misuse their authority and thwart the legitimate claims of citizens against the Government by refusing to make available records which should be available.

At the moment, there is no recourse for the aggrieved citizen whose rights have been denied by the arbitrary action of some Federal agency. The enactment of H.R. 5012 will be a long step toward correcting this inequitable situation, and will strengthen our form of government.

However, H.R. 5012 can be strengthened by including a provision to protect individuals and businesses from the abuse of nonpublic information. Some Federal agencies, like the SEC, have been authorized by Congress to regulate highly sensitive segments of the national economy. The SEC deals with that extremely fragile state of mind known as investor confidence, which is the very lifeblood of the securities industry.

Through such devices as news "leaks," public statements of its staff, articles in trade journals, speeches to trade associations, publicized correspondence, and unofficial disclosure of proposed investigations, the SEC sometimes indirectly seeks to extend its regulatory authority into areas or over subject matter which Congress has not authorized by an abusive disclosure of nonpublic information. This, in turn, gives rise to adverse comment in trade journals, financial columns, and other news media, and undermines investor confidence in a segment of the industry or a particular business entity in the securities industry.

Under the Federal Constitution, Congress is the policymaking branch of the Government, and no matter with what good faith Federal agencies may seek to extend their authority, the prejudicial use of nonpublic information to coerce compliance with either policies or regulations which Congress has not authorized, is contrary to the national interest and should be brought to a halt through appropriate provisions in H.R. 5012.

Very truly yours,

CARL L. SHIPLEY.

STATEMENT OF G. B. BURNHAM, PRESIDENT, BURNHAM CHEMICAL CO.

My name is George B. Burnham and I'm president of the Burnham Chemical Co. The experience of the Burnham Chemical Co. at the hands of Government officials who withheld information from the public is a good example of why the freedom of information bill should become law. To illustrate the point, only one example is given.

In 1927 the sodium leasing laws of the United States provided that a patent (transfer of land title) could not be issued on lands which contained salines such as borax. On January 7, 1927, a Government mine inspector, Leroy A. Palmer, sent a report to the Commissioner of the General Land Office concerning the discovery of enormous borax deposits in the Kramer District of California. In spite of Palmer's report, the Department of the Interior granted patents (title) to these deposits to competitors of the Burnham Chemical Co. The commissioner of the Court of Claims reported: "This substituted statement [by prospectors] was a falsification of which the General Land Office had notice but which it ignored." [1]

Issuance of the patents by the Department of the Interior prevented the Burnham Chemical Co. from obtaining leases on part of the Kramer District land.

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[1] Report of commissioner, U.S. Court of Claims, Case No. 66–55, Finding No. 19. Copy in committee files.

Moreover, the borax combine obtained a monopoly on the deposit and forced competitors out of business. As a result of this granting of patents by the Department of the Interior both the Federal Government and the State of California were cheated out of royalties on the borax production as provided by the leasing law.

How did the Government get away with this costly "mistake"? On each of the 10 pages in the Palmer report there is stamped the following (photocopied from the original):

CONFIDENTIAL

NOT FOR PUBLIC INSPECTION

In 1950, 23 years later, the Department of the Interior put that confidential document in the National Archives. In late 1953 I found the Palmer report. Attorneys for the Burnham Chemical Co. then filed a suit in the Court of Claims early in 1955. After the trial, the court dismissed the case because of the statute of limitations. If the Palmer report had not been suppressed, the Burnham Chemical Co. would not now be trying to secure legislation to have the statute of limitations waived and the case adjudicated on its merits.

SUPPLEMENTARY STATEMENT

On May 6, 1957, the Interior Department gave my attorney a certified photostat copy of a report Leroy A. Palmer, a Government mine inspector, had made on January 7, 1927, to the Commissioner of the General Land Office concerning the discovery of borax deposits in the Kramer District of California. This certified copy shows that each of the 10 pages of the report bore a stamped notation "Confidential. Not for Public Inspection."

On March 29, 1965, I went to the National Archives to get more certified photostat copies of the Palmer report. I applied to Mr. Frank E. Bridgers for a card of admission to the search rooms. Mr. Bridgers asked me for what purpose I wished the admission card and I informed him I wanted to get copies of certain documents to submit to a congressional committee that was about to hold hearings. I saw the report again on that day and on each of the 10 pages was the stamped notation "Confidential. Not for Public Inspection." I ordered from Mr. Foster, four copies of the report. I told him I wanted the copies as soon as possible for congressional hearings which were being held soon.

I received these certified photostat copies of the report on April 7, 1965, from the National Archives. The words "Confidential. Not for Public Inspection" had been covered up when the photostat pictures of the Palmer report were taken. This was true of each of the 10 pages of the report.

STATEMENT OF ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Mr. Chairman, I apreciate this opportunity to present to your subcommittee these remarks on H.R. 5012 and related legislative measures.

In general, we support the principles and purposes of legislation to open up the processes of government to public view. In a democracy such as ours, the people must be fully informed if they are to make intelligent, rational decisions, if they are to govern themselves well and wisely. At the same time we recognize that certain kinds of information obtained by Government agencies must be kept in confidence to avoid defeating the reason for existence of such agencies. In our comments on H.R. 5012 we have tried to keep these two basic principles in mind.

H.R. 5012 would affect the operation of virtually every Federal administrative agency and the administrative procedure of many executive departments, including such agencies as the National Labor Relations Board, the Federal Media-

tion and Conciliation Service, and the Department of Labor. These agencies engage in operations and proceedings that vitally affect labor unions and their members. Therefore, we have a strong and vital interest in the efficient, effective operation of these agencies.

H.R. 5012 would require every agency to make all of its records promptly available to any person, with certain enumerated exceptions. These exceptions include: "(4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intraagency memorandums or letters dealing solely with matters of law or policy; and (7) investigatory files compiled for law enforcement purpose except to the extent available by law to a private party."

Each of these exceptions contains broad loopholes through which information could be extracted from Government agencies or departments which could be used to delay or interfere with the expeditious disposition of agency actions or procedures. Furthermore, this legislation would require years of litigation before the scope and effects of the bill's imprceise language become clear and definite.

For example, clause (4), which purports to exempt from disclosure information obtained from the public which is "privileged or confidential," would not appear to exempt wage data submitted to the Bureau of Labor Statistics, and the Wage and Hour Division of the U.S. Department of Labor in confidence and used by them in preparing and publishing wage studies and surveys. This loophole is serious because these wage studies and surveys are used by the Department as a basis for the prevailing wage determination which the Department is required to make under the Walsh-Healey and Davis-Bacon Acts.

Unless the Bureau of Labor Statistics can continue to assure those from whom wage data are obtained that these data will be kept confidential, the Bureau's sources of information in these vital fields could be seriously jeopardized. As presently drafted, clause (4) would also seriously interfere with the effective enforcement of the Fair Labor Standards Act, the Labor-Management Reporting and Disclosure Act, and the Welfare and Pension Plans Disclosure Act.

Clause (5) contains another broad loophole. It fails to exempt interagency or intraagency memorandums or letters dealing with matters of fact. Indeed, the Senate Judiciary Committee, reporting on the similar bill which was before the Senate last year (S. Rept. 1219, 88th Cong., 2d sess.), stated specifically that while "the Government cannot operate effectively or honestly" if "opinions of the moment" of Government officials had to be spread on the public record, "there is no exemption for matters of a factual nature." Clause (5) is drawn in such a way, for example, that it would appear that memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources would not be exempt from disclosure, even though the knowledge that their views may be made matters of public knowledge would inevitably interfere with their freedom of judgment and color their views. In addition, memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

Clause (7) would open up investigatory files to an extent that goes far beyond anything required by the courts, including the decision of the Supreme Court in the *Jencks* case. This clause, for example which provides for disclosure of investigatory files as soon as they "affect an action or proceeding or a private party's effective participation therein" is susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the National Labor Relations Board, access could be had to the statements of all witnesses, whether or not these statements are relied upon to support the complaint.

Furthermore, witnesses would be unwilling to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. Obviously, the Board's procedures could be substantially interfered with, and further delays to clog the Board's already overloaded docket would be encouraged. Substantial litigation would be required before the full scope and effects of clause (7) would be made clear.

The foregoing points make it clear that H.R. 5012 may have serious, adverse effects on the activities of administrative agencies and particularly those Federal agencies engaged in operations and proceedings affecting labor unions and their members and working people generally.

H.R. 5012 is, in form, an amendment of section 22, title V, United States Code. The bill does not in terms amend section 3 of the Administrative Procedure Act. Section 2, however, provides that "all laws or parts of laws" inconsistent with the bill "are hereby repealed." While the term "all laws or parts of laws" is presumably designed to include section 3 of the Administrative Procedure Act, it is far from clear how much of that section would in fact be repealed and how much of it would be left intact. If section 3 of the Administrative Procedure Act is to be amended or repealed, which would appear to be necessary if the bill is to have any significance, this should be done specifically, rather than inferentially or indirectly, as provided in H.R. 5012. If this is not done, the bill can only result in even greater confusion and uncertainty than already exists.

While, the beneficial purposes of the bill should certainly be kept firmly in mind, the foregoing serious deficiencies should be corrected before the bill is forwarded to the House of Representatives. It is suggested that the following amendments would take care of the more egregious deficiencies in H.R. 5012.

1. Amend clause (4) to read as follows:

"(4) Trade secrets and information obtained from the public in confidence or customarily privileged or confidential or information acquired during mediation or conciliation of labor disputes."

2. Amend clause (5) to read as follows:

"(5) Interagency or intraagency memorandums or letters."

Alternatively, this clause might be amended to read as follows:

"(5) Interagency or intraagency memorandums or letters dealing with matters of fact, law, or policy".

3. Amend clause (7) to read as follows:

"(7) investigatory files."

Alternatively, it is suggested that the rule enunciated in the *Jencks* case might well be written into the bill. This could be done by amending clause (7) to read as above, by inserting a new clause (8), and by renumbering the present clause (8) as clause (9). The new clause (8) would read as follows:

"(8) Statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross examination."

Enactment of legislation along the lines of H.R. 5012 is sought principally by the American Bar Association and the American Newspaper Publishers Association, which claim that it is necessary to correct certain interpretations of section 22, title V, United States Code, and section 3 of the Administrative Procedure Act. They claim that these provisions have been relied upon by executive departments and agencies to withhold information to which parties to actions or proceedings before such departments or agencies or the public are entitled. They claim, the provisions in question, and particularly section 3 of the Administrative Procedure Act, which were designed as disclosure statutes, have in fact become principal bulwarks of nondisclosure.

As I said at the beginning of this statement, we support the principle underlying this H.R. 5012, the principle that the full disclosure of the operations of the agencies of Government is in the public interest, but we also insist that another important principle be maintained, the principle of maintaining the integrity of purpose of Government agencies and avoiding adverse effects resulting from disclosure of confidential information.

We believe disclosure of information that jeopardize the purpose of a Government agency, and particularly the purposes of those Government agencies with which we are most familiar, is wrong and contrary to the intent of the Congress in setting up those agencies.

Therefore, we urge this subcommittee to give very serious attention to the points we have made in this statement and to the changes we have recommended.

STATEMENT OF KERMIT OVERBY, DIRECTOR, LEGISLATION AND RESEARCH DEPARTMENT, RURAL ELECTRIC COOPERATIVE ASSOCIATION, WASHINGTON, D.C.

Hon. JOHN E. MOSS,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MOSS: As the national trade and service organization of nearly 1,000 rural electric cooperatives which depend for their financial well-

being upon the operation and policies of the Rural Electrification Administration, NRECA is very much interested in H.R. 5012, which would amend title 5, section 22, of the United States Code to increase availability of information.

The Rural Electrification Administration is continuously engaged in obtaining many types of data from all of its borrowers, including the most intimate details of the borrower's financial position and wholesale power costs. We are very hopeful, therefore, that the current legislation will not confer a legally enforcible right on the general public to require disclosure by REA of data which would enable rival power companies the means with which to destroy our program.

H.R. 5012 would require every agency to "make all its records promptly available to any person" subject to eight enumerated exceptions. It appears that the language, if not carefully circumscribed and interpreted, would endanger the security of our member systems.

The critical language of H.R. 5012 appears in section 1(C)(4) which exempts from the disclosure mandate "trade secrets and commercial or financial information obtained from the public and privileged or confidential." This exemption, if adequately interpreted by committee report language, would achieve the objective which we seek. We, therefore, respectfully urge the inclusion in the committee report of the following language to protect REA borrowers:

Exemption No. (4) of subsection (c) is intended to apply, among other situations, to financial and commercial records of REA borrowers, including the system audits and loan surveys, of such borrowers, and all information disclosed to REA by borrowers for the purpose of obtaining REA loans.

If your committee desires to protect REA borrowers through the language of the bill itself, we suggest that section 1(C)(4) be amended to read as follows:

"Trade secrets and commercial, and technical, and financial information submitted and received as privileged or confidential."

We would welcome any opportunity to confer with you personally on any facet of this problem which affects our membership.

Very sincerely yours,

KERMIT OVERBY,
Director, Legislation and Research Department.

LETTER FROM AMERICAN TRIAL LAWYERS ASSOCIATION, AVIATION LAW SECTION, NEW YORK, N.Y., TO SENATOR EDWARD V. LONG AND CONGRESSMEN JOHN E. MOSS AND OGDEN R. REID, APRIL 5, 1965

Re Federal public records law bill, S. 1160, H.R. 5012. APRIL 5, 1965.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

Hon. JOHN MOSS,
House of Representatives, Washington, D.C.

Hon. OGDEN R. REID,
House of Representatives, Washington, D.C.

DEAR SENATOR LONG AND CONGRESSMEN MOSS AND REID: In behalf of the American Trial Lawyers Association, I certainly appreciate your cooperation in forwarding copies of the bills, a press release, and the hearings conducted last year.

I understand that hearings will be conducted next week with regard to this legislation, but trial commitments preclude my personal attendance despite an earnest desire to express the views of the association.

Perhaps you are aware that our association represents approximately 18,000 trial lawyers who specialize in civil tort litigation. Our publication, Trial, has a circulation of 50,000 trial lawyers.

We strongly support passage of this legislation, with two reservations. The principle of full disclosure by governmental agencies cannot be seriously disputed.

A problem, however, arises in formulating and articulating the exceptions to the general principle.

The proposed legislation would establish a general rule requiring every agency to disclose "all its records." Eight exceptions to the general rule are specified. Our association favors and strongly supports exceptions (1), (3), (4), and (6) through (8).

We have, however, serious reservations concerning the scope of two exceptions, (2) and (5). Exception (2) would preclude the disclosure of matters "related solely to the internal personnel rules and practices of any agency." Exception (5)

would preclude the disclosure of matter relating to "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy."

The United States of America has frequently been involved in civil tort litigation wherein it is claimed that Government personnel carelessly performed their duties in such a way as to cause damage to others. The Federal courts are vested with exclusive jurisdiction in such suits against the United States. The Federal Rules of Civil Procedure are, therefore, applicable and they adopt the principle of broad disclosure. Rules 34 and 26(b) provide the district court in which an action is pending with the discretion to direct any party to the litigation to produce documents which are relevant to the issues. Such documentation is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence, even though the documents sought are not in and of themselves admissible.

In the past, the Federal district courts have required the United States to produce for discovery in such litigation material related to the operational practices of the governmental agency involved, interagency and intra-agency memorandums and letters dealing with the policy affecting such operational practices. For example, the United States of America has been a party to litigation based upon the carelessness of Federal Aviation Agency employees in the manner in which they provided air traffic control over aircraft. In such litigation the Government has been required to produce personnel memorandums, and directives, manuals, and related matter which established the standards of operation governing the manner in which FAA personnel were obligated to perform their duties in controlling aircraft.

The language of exceptions (2) and (5) is such that, if broadly construed, a district court might be required to prevent disclosure of documents obtained in the past pursuant to the Federal Rules of Civil Procedure.

Exception (2) excludes from disclosure matters related to internal personnel rules and practices. In view of the general principle adopted by the bill, we are confident that it is not intended to embrace FAA manuals, and all personnel memorandums which set the standards pursuant to which Government personnel perform their duties in relation to the public. Exception (5) suffers from the same criticism because letters which establish policy to guide operational personnel may thereby be excluded from discovery.

We are frank to admit that we are unable to formulate a change in the language of exceptions (2) and (5) which would enable the discovery of material previously available, but at the same time prevent disclosure of purely internal matter not related to operational activities affecting the public.

We do, however, suggest that an attempt be made to modify exceptions (2) and (5) with the above-mentioned comments in mind. One solution might be to amend the bill to include a statement of principle which would make clear that the exceptions are to be construed narrowly and that matter previously discoverable should continue to be discoverable. Another suggestion is that exception (2) be confined to "internal personnel rules related to hiring, firing, disciplinary action, promotion and demotion" thereby deleting "and practices of any agency." The "practices" portion of exception (2) might be construed to relate to practices or operation affecting the public. Exception (5) might, perhaps, be amended to add a clause so that it reads: "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy, but not of operational practices affecting members of the public."

We truly appreciate the opportunity to express these views. We are confident they will receive your prudent consideration.

Respectfully yours,

LEE S. KREINDLER,
Chairman, Aviation Law Section.

LETTER FROM MAGAZINE PUBLISHERS ASSOCIATION, INC., NEW YORK, N.Y., TO HON. JOHN E. MOSS

APRIL 12, 1965.

HON. JOHN E. MOSS,
Chairman, Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives.

DEAR MR. MOSS: On behalf of the Magazine Publishers Association and the American Society of Magazine Editors which represent 113 companies publishing

over 300 magazines in the United States, I would like to add our voice in support of H.R. 5012, pending before your subcommittee.

Magazine publishers and editors believe that there should be the maximum interchange of information between the Government and the people and that the magazines of our Nation are effective disseminators of information to the people. The purpose of H.R. 5012 is to require Government agencies to make "records promptly available to any person" unless that information falls within certain specified exempted categories. For too long, too many Government agencies have unduly restricted the availability of information. Much of this has been to protect officials from criticism in the press without any substantial security reason for withholding the information.

When the Administrative Procedure Act (5 U.S.C. 1001 et seq.) was enacted in 1946, the Senate Judiciary Committee described the basic intent of the public information section of that act as follows:

> * * * that administrative operations and procedures are public property which the general public * * * is entitled to know or have the ready means of knowing with definiteness and assurance. (S. Doc. 248, 79th Cong., 2d sess., p. 198, 1946.)

The House Judiciary Committee explained that,

> * * * all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required. (Id., pp. 251–252.)

The work of your committee in the past has resulted in disclosure of many misinterpretations by Government agencies of this section of the APA and of title 5 United States Code, section 22, the general housekeeping statute, which have resulted in a withholding rather than a disclosure as intended by Congress. The latter was amended through the efforts of this committee to preclude reliance on that section when information was withheld. H.R. 5012 would further amend that act to affirmatively require disclosure except for certain exceptions and provide judicial relief where there was an unlawful withholding.

Magazine publishers and editors seek no special privileges on access to Government information. We recognize the need for restriction of certain information for security purposes. However, we believe that all categories of information which are not specifically exempted under the Constitution or the provisions of H.R. 5012 should be available to the public and the press.

The enactment of H.R. 5012 would recognize the right of the public to information relating to the operation of its Government. We support its enactment.

Sincerely,

CHARLES D. ABLARD.

STATEMENT OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, the American Civil Liberties Union supports the general aim and purpose of H.R. 5012 which would establish a Federal Public Records Law, by amending section 3 of the Administrative Procedure Act of 1946. The aim of this legislation is to protect the right of the public to information and is designed to regulate the policies of the various administrative agencies, departments, and bureaus of the Federal Government. Our organization believes that access to the records of Government agencies by public and press is vital to the continued functioning of the democratic process.

During the 88th Congress we testified in hearings before the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary of the U.S. Senate on S. 1666, a similar bill. During our testimony we pointed out some of the inadequacies of the present law which had come to our attention and expressed concern about various provisions of S. 1666 as introduced. A number of changes were made in S. 1666 which are reflected in the present bill, H.R. 5012. Nevertheless, we are still concerned about some of the exemptions set forth in subsection (e).

In our oral testimony before this committee last week we referred to the excellent memorandum by Deputy Assistant Secretary of Defense, Security Policy, Walter T. Skallerup, Jr., which was sent to each of the Under Secretaries of the services on November 26, 1962. This memorandum covers the subject of civil and private rights during security investigations and hearings and sets forth guidelines to bar improper questions. A copy of the memorandum is attached to this statement.

The memorandum recommends that each of the three military services adopt regulations to implement the policy set forth in the memorandum. Up until now we have been unsuccessful in obtaining copies of their regulations. Each of the three services, in response to our inquiries, has stated that it would not supply them to us because they were "internal management guides."

Our interest was prompted, not by reason of idle curiosity (which should not make the slightest difference) but because we have had a number of cases involving individuals interviewed by investigators reported to us in which the strictures of the Skallerup memorandum have been most flagrantly violated.

The Subcommittee on Constitutional Rights of the Senate Judiciary Committee has recently conducted extensive correspondence with all agencies concerning their practices in permitting individuals being interviewed to have with them counsel or friends or relatives. Practices very tremendously according to a monthly report of the subcommittee. Nevertheless, the few attempts we have made to obtain the specific regulations from each of the agencies governing this extremely important constitutional right have been fruitless.

Whether exemption (e)(2) which exempts matters "related solely to the internal personnel rules and practices of any agency" would give the power to the three services to withhold the regulations under which their investigators are now operating is unclear. Likewise, it is unclear whether exemption (e)(5) "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy" would have this effect. We would like to see a clear expression of legislative intent that would insure that all regulations and instructions to investigators covering their practices and procedures during interviews would be available as public record.

The revocation of a security clearance to a Government employee or military personnel is an extremely serious matter. Nevertheless, present practices and procedures leave much to be desired. Individuals who have their security clearance revoked are not entitled to know the basis for the revocation. To give one illustration: An Army private, after undergoing extensive training for over 6 months with the U.S. Army Security Agency, was unaccountably removed from the training in January 1964. Since then he has persistently attempted to find out the reason for his removal from training. The Chief of the Personnel Clearance Division of G–2 not only refused to give him any information but also stated that regulations forbade him from doing so. Efforts by a Congressman for further information were equally unsuccessful. We were finally able to obtain some more information concerning the reason for the revocation but this was almost on a "favor" basis.

In addition, we wrote for a copy of the Army regulations which allegedly prohibit disclosure of the basis for denial or withdrawal of security clearance. We have not been able to obtain them. We have been informed that "current Army regulations on this point have been given differing interpretations. The regulations are being amended to provide in all cases for disclosure to the subject and an opportunity for rebuttal, except when to do so would jeopardize national security." Of course, the adoption of these regulations would be a major improvement over present procedures; nevertheless, we still cannot see any basis for withholding copies of the current Army regulations.

Exemption (e)(6) of the bill providing "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" would seem to be a desirable exception. It should mean, as in this case, that the individual directly involved would be able to obtain information concerning his case but other individuals could not. It would seem that this is a necessary distinction that must be drawn in any freedom-of-information bill. Although the distinctions between the right of an individual to obtain particular records involving himself and that of the general public and the press should be kept at a minimum, there are, it seems clear, situations in which the individual distinction should be made.

We are particularly pleased to see that this bill eliminates a provision in prior bills permitting "secrecy in the public interest." This has been changed to exemption (e)(1) covering matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." This may be too broad. Although there is a surface appearance that particular information could only be kept secret by Executive order, as a practical matter it would appear that the determination would be made by lower echelon administrators. This could become a potential loophole to enable officials to foreclose vital sources of information by claiming that the requested information pertains to "national defense or foreign policy." For example, several years ago the polls conducted

by the U.S. Information Agency overseas were kept secret on the grounds that to publicize them would affect our foreign policy. The ACLU at that time failed to see any justification for this position. This particular section might afford a carte blanche for Executive decisions of that kind.

Although some of the exemptions set forth in subsection (e) are capable of abuse, nevertheless it is apparent that H.R. 5012 would be a major step forward. Accordingly, we give it our support.

NOVEMBER 26, 1962.

Memorandum for—

The Under Secretary of the Army.
The Under Secretary of the Navy.
The Under Secretary of the Air Force.

Subject: Civil and private rights.

In order to insure that inquiries and interrogations conducted in the course of security investigations and adjudicative proceedings do not violate lawful civil and private rights, or discourage lawful political activity in any of its forms, or intimidate free expression or thought, it is necessary that investigators and members of security review boards have a keen and well-developed awareness of and respect for the rights of the subjects of inquiries and of other persons from whom information is sought. Initially, this is a matter of proper indoctrination and training, and subsequently a matter of careful guidance and supervision. The civil and private rights of both the subjects of inquiries as well as of others to whom inquiries are addressed deserve equal concern and consideration on the part of Department of Defense personnel.

It is recognized that the military departments of necessity should learn a great deal about a person before a proper determination can be made with respect to entrusting him with classified defense information or placing him in an otherwise sensitive position. This applies to civilian employees of the Department, members of the Armed Forces, and employees of defense contractors. In making inquiries upon which security decisions are based, the Department of Defense usually enjoys the cooperation of all persons who reasonably may be expected to possess information bearing upon the reliability and trustworthiness of the subjects of such inquiries. This cooperation is based, we believe, in a large part upon the American public's understanding of the Government's purpose and interest in making the inquiries. Questions which are irrelevant or inconsistent with established testimonial privileges or constitutional considerations serve only to detract from the effectiveness of the security program of the Department of Defense.

Persons conducting security investigations and inquiries normally have broad latitude in performing these essential and vital functions. This places a high premium upon the exercise of good judgment and commonsense. While it is virtually impossible to establish elaborate rules which will provide satisfactory guidance in all circumstances, there are certain basic principles which have general application.

Care must be taken not to inject improper matters into security inquiries whether in the course of security investigations or other phases of security proceedings. For example, religious beliefs and affiliations or beliefs and opinions regarding racial matters, political beliefs and affiliations of a nonsubversive nature, opinions regarding the constitutionality of legislative policies, and affiliation with labor unions are not proper subjects for such inquiries.

Inquiries which have no relevance to a security determination should not be made. Questions regarding personal and domestic affairs, financial matters, and the status of physical health, fall in this cateogry unless evidence clearly indicates a reasonable basis for believing there may be illegal or subversive activities, personal or moral irresponsibility, or mental or emotional instability involved. The probing of a person's thoughts or beliefs and questions about his conduct, which have no security implications, are unwarranted. Department of Defense representatives always should be prepared to explain the relevance of their inquiries upon request. Adverse inferences cannot properly be drawn from the refusal of a person to answer questions the relevance of which has not been established.

It is requested that your Department review its applicable regulations and instructions, and those portions of its training and refresher courses for investigators and adjudicators, which deal with civil rights and individual private rights, to determine the propriety of their content. We would appreciate receiving within 30 days a description of the steps your Department may have taken

in this area. Inasmuch as it is contemplated that the attached list of prohibited questions may be incorporated in a DOD directive, your comments with respect to them would be appreciated. Any suggestions you may wish to offer along these general lines would be welcome.

WALTER T. SKALLERUP, Jr.,
Deputy Assistant Secretary of Defense, Security Policy.

TYPES OF QUESTIONS REGARDED AS IMPROPER OR IRRELEVANT IN SECURITY INVESTIGATIONS AND ADJUDICATIONS WHETHER DIRECTED TO THE SUBJECT OR ANOTHER INDIVIDUAL

A. Religious matters

1. Do you believe in God?
2. What is your religious preference or affiliation?
3. Are you anti-Semitic, anti-Catholic or anti-Protestant?
4. Are you an atheist or an agnostic?
5. Do you believe in the doctrine of separation of church and state?

B. Racial matters

1. What are your views on racial matters such as desegregation of public schools, hotels, eating places, etc.?
2. Are you a member of NAACP or CORE?
3. Do you entertain members of other races in your home?
4. What are your views on racial intermarriage?
5. Do you believe one race is superior to another?

C. Personal and domestic matters

1. How much income tax do you pay?
2. What is the source and size of your income?
3. What is your net worth?
4. What contributions do you make to political, charitable, religious or civic organizations?
5. Describe any physical ailments or diseases you may have.
6. Do you have any serious marital or domestic problems?
7. Are you or have you been a member of a trade union?
8. Is there anything in your past life that you would not want your wife to know?

D. Political matters

1. In political matters do you consider yourself to be a liberal or conservative?
2. Are you registered to vote in primary elections?
3. Did you vote in the last National, State, or municipal election?
4. Are you a member of a political club or party?
5. Have you ever signed a political petition? Explain.
6. Do you write your Congressman or Senator about issues in which you are interested or to obtain assistance?
7. What are your views regarding the decisions of the U.S. Supreme Court? (i.e., the prayer in public schools, desegregation, and Communist party cases).
8. What are your views on the constitutionality of proposed or existing legislation?

STATEMENT OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

This statement is presented by Vincent T. Wasilewski as president of the National Association of Broadcasters. The National Association of Broadcasters, or NAB, is a nonprofit corporation whose members include 2,140 AM, 837 FM, and 461 television stations, and all the national radio and television networks in the United States.

The NAB suports H.R. 5012, introduced by Chairman Moss of this subcommittee, and identical bills introduced by other members of the House of Representatives. This proposed legislation would define clearly the authority of Federal officers and agencies to withhold information from the public, and it would provide a procedure to compel the production of information improperly withheld.

The National Association of Broadcasters and its Freedom of Information Committee have long been opposed to all barriers to a free flow of information