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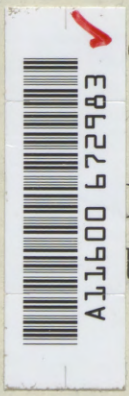

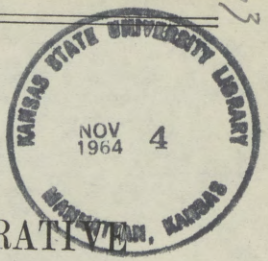

HEARINGS

BEFORE THE

COMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1666

TO AMEND SEC. 3 OF THE ADMINISTRATIVE PROCEDURE ACT, CH. 324, OF THE ACT OF JUNE 11, 1946 (60 STAT. 238), TO CLARIFY AND PROTECT THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES

AND

S. 1663 (in part)

TO AMEND THE ADMINISTRATIVE PROCEDURE ACT, AND FOR OTHER PURPOSES

OCTOBER 28, 29, 30, AND 31, 1963

Printed for the use of the Committee on the Judiciary

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[1] Senator Burdick was assigned to the subcommittee on Sept. 30, 1963; Senator Kennedy was a member of the subcommittee from Mar. 26, 1963, until Sept. 30, 1963.

CONTENTS

STATEMENTS OF WITNESSES

	Page
Hon. E. L. Bartlett, U.S. Senator of Alaska	123
Hon. Birch Bayh, U.S. Senator of Indiana	49
G. d'Andelot Belin, General Counsel, Department of Treasury; accompanied by Bertrand M. Harding, Deputy Commissioner, Internal Revenue Service	172
Howard H. Bell, vice president for planning and development, National Association of Broadcasters	88
Robert M. Benjamin, chairman, American Bar Association Special Committee on Code of Administrative Procedure; accompanied by Frank M. Schultz, American Bar Association, and John W. Cragan, American Bar Association	150
Creed C. Black, vice president and executive editor, Wilmington Morning News and Evening Journal, on behalf of American Society of Newspaper Editors	60
Hon. J. Caleb Boggs, U.S. Senator of Delaware	31
Hon. Everett McKinley Dirksen, U.S. Senator of Illinois	72
Paul Rand Dixon, Chairman, Federal Trade Commission; accompanied by John Victor Buffington, administrative assistant to the Chairman; Frank C. Hale, Acting Executive Director; and Fletcher G. Cohn, Assistant General Counsel for Legislation	161
Earl F. English, dean, University of Missouri School of Journalism	7
Edward Enos, Washington, D.C.	206
Hon. Sam J. Ervin, U.S. Senator of North Carolina	35
Hon. Kenneth B. Keating, U.S. Senator of New York	137
Hon. Edward V. Long, U.S. Senator of Missouri	2
James V. Mathis, Advance News Service	16
Hon. Lee Metcalf, U.S. Senator of Montana	48
Clark R. Mollenhoff, Cowles Publications, on behalf of Sigma Delta Chi	82
Hon. Gaylord Nelson, U.S. Senator of Wisconsin	50
John C. Pigg, Shattuc, Ill.	27
Walter B. Potter and Theodore A. Serrill on behalf of National Editorial Association	95
Eugene S. Pulliam, assistant publisher, Indianapolis Star and News, on behalf of American Newspaper Publishers Association	55
Norbert A. Scheli, Assistant Attorney General, Office of Legal Counsel, Department of Justice; accompanied by Webster P. Maxson, Director, Office of Administrative Procedure, Department of Justice	193
Mark P. Schlefer, Maritime Administrative Bar Association	124
Henry T. Simmons, Newsweek magazine	75
Lawrence Speiser, American Civil Liberties Union	109
Leslie H. Whitten, Hearst papers	140

APPENDIX

Text of S. 1666	1
Exchange of letters between Vermont Royster, editor, Wall Street Journal, and U.S. Senators Edward V. Long and Birch Bayh	216
1963 Report of Sigma Delta Chi Advancement of Freedom of Information Committee	218
Letter from General Counsel of Treasury Department to Chairman Long regarding files kept by Department of Treasury and recommendatory provisions for S. 1666	224
Memorandum from General Counsel of Treasury Department regarding statutes prohibiting disclosure of information acquired by Treasury Department	227

Page

Letter from General Counsel of Treasury Department to Chairman Long on wiretapping 232
Letter and attachments from Eugene P. Foley, Administrator, Small Business Administration, to Chairman Long regarding SBA policy on "self-dealing" loans 233
Letter from Paul Conrad, secretary-manager, Allied Daily Newspapers of Washington, to U.S. Senator Warren G. Magnuson with cover letter of U.S. Senator James O. Eastland 237
Letter from Railway Labor Executives Association to Chairman Long 237
Letter with attachment from Jesse P. Wolcott, Director, Federal Deposit Insurance Corporation, to Chairman Long expressing personal views on S. 1666 and S. 1663 239
Letter from Paul Rand Dixon, Chairman, Federal Trade Commission, to Chairman Long regarding three proposed amendments to S. 1666 242

AGENCY COMMENTS

U.S. Atomic Energy Commission 244
Civil Aeronautics Board 245
U.S. Civil Service Commission 248
Department of Agriculture 250
Department of Commerce 252
Assistant Secretary for Administration 255
Business and Defense Services Administration 256
Bureau of International Commerce 256
Maritime Administration 258
Patent Office 258
Foreign Trade Zones Board 259
Department of Defense 261
Department of the Interior 264
Department of State 266
Department of Treasury 268
Federal Aviation Agency 286
Federal Coal Mine Safety Board of Review 287
Federal Communications Commission 288
Federal Home Loan Bank Board 292
Federal Reserve System 293
Federal Trade Commission 294
General Services Administration 296
Interstate Commerce Commission 299
National Aeronautics and Space Administration 303
National Mediation Board 305
Post Office Department 306
U.S. Railroad Retirement Board 307
Securities and Exchange Commission 308
Selective Service System 319
Tennessee Valley Authority 320
Veterans' Administration 320

BIOGRAPHICAL INFORMATION

G. d'Andelot Belin 172
Howard H. Bell 87
Robert M. Benjamin 149
Creed C. Black 55
Paul Randall Dixon 160
Earl F. English 7
James V. Mathis 16
Clark R. Mollenhoff 81
Walter B. Potter 94
Eugene S. Pulliam 55
Norbert A. Scheli 193
Mark P. Schlefer 124
Theodore A. Serrill 93
Henry T. Simmons 75
Lawrence Speiser 108
Leslie H. Whitten 140

HEARING DAYS

	Page
October 28	1
October 29	35
October 30	87
October 31	137

FREEDOM OF INFORMATION

MONDAY, OCTOBER 28, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long of Missouri presiding.

Present: Senator Long.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Kathryn Coulter, special assistant; Donald V. Nangle, assistant counsel; Charles H. Helein, assistant counsel; Carlos F. Lucero, staff assistant; Joan Miller, staff assistant, office of Senator Long.

Senator LONG. The committee will come to order.

Today the Senate Subcommittee on Administrative Practice and Procedure begins public hearings on S. 1666, a bill to amend section 3 of the Administrative Procedure Act of 1946. This is the popularly entitled "Freedom of Information" bill which governs the information policies of the agencies, departments, and bureaus of the Federal Government.

This hearing is also on section 3 of Senate bill 1663, a part of which is identical with the present bill.

(S. 1666 follows:)

88TH CONGRESS
1ST SESSION

S. 1666

IN THE SENATE OF THE UNITED STATES

JUNE 4, 1963

Mr. LONG of Missouri (for himself, Mr. BARTLETT, Mr. BAYH, Mr. BOGGS, Mr. CASE, Mr. DIRKSEN, Mr. ERVIN, Mr. FONG, Mr. GRUENING, Mr. HART, Mr. KEATING, Mr. KEFAUVER, Mr. METCALF, Mr. MORSE, Mr. MOSS, Mr. NELSON, Mrs. NEUBERGER, Mr. PROXMIRE, Mr. RIBICOFF, Mr. SMATHERS, Mr. SYMINGTON, and Mr. WALTERS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

"SEC. 3. (a) PUBLICATION IN THE FEDERAL REGISTER.—Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency, every agency shall separately state and currently publish in the Federal Register (A) descriptions of its central and field organization including delegations by the agency of authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available, rules of procedure, descriptions of forms available, and instructions as to the scope and contents of all papers, reports, or examinations; (C) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public and (D) every amendment, revision, or repeal of the foregoing. No person shall in any manner be required to resort to, or be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation thereof required to be published in the Federal Register and not so published.

"(b) AGENCY OPINIONS, ORDERS, AND RULES.—Except to the extent that matter (1) is specifically exempted from disclosure by statute, or (2) involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order or (3) relates solely to the internal employment rules and practices of any agency, every agency shall, in accordance with published rules, make available for public inspection and copying all final opinions (including concurring and dissenting opinions) and orders made in the adjudication of cases and all rules, statements of policy, and interpretations adopted by the agency and affecting the public, unless such opinions, orders, rules, statements, and interpretations are promptly published and copies offered for sale. To the extent required to protect the public interest an agency may delete identifying details when it makes available or publishes an opinion, order, rule, statement, or interpretation; however, in such cases the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation. No final order, opinion, rule, statement of policy, or interpretation may be relied upon, used, or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided in this subsection.

"(c) AGENCY RECORDS.—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make its records promptly available except those particular records or parts thereof which are (1) specifically exempt from disclosure by statute; (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters. 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 is situated shall have jurisdiction upon complaint to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of 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 by a preponderance of the evidence.

"(d) AGENCY PROCEEDINGS. Every agency having more than one member shall keep a record of the individual votes of each member in every agency proceeding and except to the extent required to protect the national defense such record shall be available for public inspection.

"(e) LIMITATION OF EXEMPTION.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress."

Senator LONG. The purpose of this bill is to grant both the public and press increased access to the records of Government agencies. Such access is vital to the functioning of the democratic process, for only when the public business is, so far as feasible, con-

ducted openly can there be the continuing debate and consideration of policy which is crucial to the resolution of national issues.

A screen of agency self-made rules has been constructed within the framework of the existing section 3. Very often only the filtered facts which officialdom parcels out are allowed to become part of the public record.

Free people are, of necessity, informed; uninformed people can never be free. It is commitment to this aphorism which motivates us today. Too much of the public's business is being conducted in virtual secrecy. Government agencies do not release a large percentage of legitimately public information. Newspapermen are denied access to it. The public has only the most superficial knowledge of what Government policy is on some vital issues, how policies are arrived at, who is responsible for them, and other matters of comparable importance.

The tendency toward secrecy must be checked now. While we do not conceive of S. 1666 as a panacea, automatically opening every agency record, deliberation, and memorandum to public scrutiny, it does, we think, go a long way toward alleviating an undesirable situation.

Perhaps at the outset the provisions of the bill which relate to this little understood topic should be explained. A cursory investigation of S. 1666's language and construction may lead persons who are in basic agreement with its objectives to a misunderstanding of some of its specific provisions.

This measure is, in reality, only a part of the proposed alterations of the Administrative Procedure Act presently under consideration by this subcommittee. S. 1666 is identical with section 3 of S. 1663, an omnibus bill which is designed to comprehensively revise the whole of the existent act. Consequently, S. 1663, as it does amend section 3, is meaningful only when placed in the context of the revisions proposed for the whole act. There are important changes contemplated throughout the definition section of S. 1663. Therefore, the meaning of the words in S. 1666 cannot be tied to the current definitions in the law, but must be read in context with the entire revision.

An excellent example of the misunderstanding which may arise from a failure to read this amended section 3 within the framework of the entire proposed revision can be seen by the deletion from the 1946 act of the phrase, " but not rules addressed to and served upon named persons in accordance with law." The two words, "or particular," in section 2(c) would be striken from the act by S. 1663. Nothing, in fact, has been changed by the omission of this phrase when read in this context. It might be added parenthetically that the term "rule" is used again in the last sentence of section 3(a) and as newly defined does not mean ratemaking and other similar matters of particular applicability.

In order to understand the far-reaching effect of this measure's enactment, it must be kept in mind that the public information provision of the Administrative Procedure Act is applicable to all the agencies. Even the section 2 exemptions from the act which apply to its other provisions do not apply to section 3. We are, therefore, addressing ourselves to the information policies of all agencies throughout the Federal system.

Some confusion has arisen from a structural change made by section 3 in the bill. Unlike the present act, the exceptions in the measure apply only to the subsections which contain them. This is important because the three subsections consider fundamentally different information problems. These are publication in the Federal Register; agency opinions, orders, and rules; and, finally, agency records. These have been inserted into and dealt with in the various subsections.

A history of the language of subsection 3(a) of the present Administrative Procedure Act indicates that it was the intent of its drafters to direct the bureaus, departments, and agencies to describe their central and field organizations in the Federal Register. In an excess of caution, the phrase "including delegations by the agency of final authority" was added. What accrued was not an increase of understanding and meaning, but misinterpretation and confusion. In S. 1666, we have deleted the word "final," which qualified authority. The purpose of this deletion was to reaffirm the drafters' original intent, to provide, in one publication, a comprehensive compilation of delegations of devisional authority. Actually, the whole phrase in the act is probably redundant, and because it tends to confuse, might well be stricken.

Added to section 3(a) is the requirement that rules of procedure and descriptions of available forms be published in the Federal Register. These changes are in compliance with present agency practice. Rules of procedure are currently published by most agencies; any requirement that all available forms be published in toto is impractical and has never been literally followed by the agencies. Needless cluttering would result from the inclusion of forms of several hundred pages in length, and it is not felt by the publishers of the Federal Register to be warranted under the direction of the existing Administrative Procedure Act.

The final part of section 3(a) under the present act states that no person shall be required to resort to organization or procedure which is not published in the Federal Register. S. 1666 goes further, adding that persons may not be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation required to be in the Federal Register and not currently published there. This is a matter of fairness. In short, a citizen should not be affected by matters about which he has no knowledge even after he has made a search for the ground rules under which he must operate in dealings with his Government.

Section 3(b) has been extensively revised.

Three classes of material are exempt from the publication provisions of this subsection. Matters (1) specifically exempt from disclosure by statute, (2) involving any function of the United States requiring secrecy to protect the national defense and exempt from disclosure by Executive order, and (3) relating solely to the internal employment rules and practices of an agency, are not required to be made public.

Under the provisions of this measure, all final opinions, including concurring and dissenting ones, and orders made in the adjudication of cases must be made available for public inspection and copying. The same treatment must be given to all rules, statements of policy, and interpretations, but only if these are (1) adopted by the agency, and (2) affect the public.

It should immediately be apparent from this language that only certain classes of rules, statements of policy, interpretations are intended to be covered. And, the final sentence of subsection 3(b) puts teeth in the recourse against the failure to make available an order, opinion, rule, statement of policy, or interpretation. It states that these matters may not be relied upon, used, or cited as precedent by an agency against anyone unless there has been compliance with this subsection. This is also fundamentally a matter of fairness.

Four other matters must be mentioned before leaving any discussion of this subsection.

First, the subsection provides for any suitable method of alternate publication. The responsibility for making these materials available to the public rests, of course, with the agency. But, there would be no useful purpose served if it were to require the agency to duplicate sufficient and suitable efforts of a private concern.

Second, a great deal of discussion has centered around what constitutes an index. While we are open to suggestions for better drafting language, the term, index, appears to be the best alternative in this context. It would be of little value to have these materials available for inspection, and not have available a method that any interested person could use in finding them. The agencies already maintain some type of index to expedite their own work, and, generally, they are made available to the public. The inability of agencies to rely on things not indexed shall, very properly, entail some greater attention by the agencies in being fair to parties with matters before them. The justice of the procedure requires that this small additional effort be made.

Third, authority is granted to agencies to delete identifying details in its publication of orders, opinions, rules, statements of policy, and interpretations, if such action is deemed to serve the public interest. However, if information which would identify specific individuals, projects, or the like is deleted, a justifying statement must accompany the material. Obviously, it is necessary that personal facts embarrassing to members of the public be kept from prying eyes while the agencies' business should be kept in the public view.

And, fourthly, all that is expected of an agency to comply with this subsection is that it determine that its present portfolio of available materials is complete. If anything is missing which it will rely on, use, or cite as precedent, this must be inserted. The materials should be kept up to date.

Section 3(c) contains the portion of the bill which has been most extensively revised. It requires that all agencies' records be made promptly available except in cases where such records are: (1) specifically covered by a statutory exemption, as in the case of individual income tax returns; (2) covered by an Executive order forbidding disclosure for protection of the national defense; or (3) internal memorandums of agency members or employees related to the disposition of adjudicatory or rulemaking matters.

With these three exceptions, the areas in which secrecy is permissible are much more circumscribed and clearly delineated than under the present Administrative Procedure Act.

Furthermore, provision is made for court proceedings under S. 1666. Federal district courts may order the production of improperly

withheld records. The courts are advised to determine the matters de novo, the burden of proof resting on the agency.

It is not likely that there will be a great flurry of litigation instituted under this subsection. Only persons believing themselves to have substantial and meritorious interest in the withheld records will make the necessary effort to begin legal proceedings. However, any agency will undoubtedly be less prone to use "for official use only," "confidential," or similar classifications on public documents, if it realizes that such actions are subject to judicial scrutiny and must be justified.

The subsection dealing with agency proceedings requires members to record their votes in agency proceedings. It was added in the belief that the people are entitled to be informed as to how these highly placed persons discharge their obligations to the public. Votes, under this provision, refer only to votes within the rulemaking and adjudicatory functions contained in S. 1663. Public access to agency votes is especially important on close issues. An agency speaking in one voice does not demonstrate the autonomous nature of its membership nor does it present for airing what the members believe to be both sides of the issue.

Section 3(e) of S. 1666 states that nothing in this section authorizes the withholding of information nor the limiting of public access to records except as specifically described in the measure. This is substantially the present 5 U.S.C. 22, but is written within the context of this more comprehensive bill. Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill. They provide that specified records shall not be released unless authorized by law. Subsection 3(e) is not such an authorization to disclosure. It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies.

Many helpful suggestions have been made since S. 1666's introduction as to its form and content. All of these will be carefully evaluated on their merits. Many comments have been made praising the bill's objective, to make more freely accessible to the public information about the Government's functioning. But any judgment on the merits of S. 1666 must also involve a thoughtful balancing between the bill's objective to make information more freely available on the one hand and the public's interest in efficient and effective management of Government's business on the other.

We recognize that a government of men can never be utopian. It is not our intention at this juncture to scale olympian heights. Rather, we are only men, dedicated to the proposition that the government which operates best, operates publicly.

Senator Dirksen, the distinguished minority leader and the coauthor of this bill, will have a statement which he will make presently.

In the meantime, I am going to call on Dr. Earl English, and then when Senator Dirksen does come in we will ask Dr. English to suspend for a few minutes while we hear his statement.

Dr. English is the dean of the University of Missouri School of Journalism, educated in Western Michigan University and the University of Iowa. He has had most extensive newspaper experience,

has received many distinguished awards, and is a member of many honorary journalistic societies.

I will ask that this biographical sketch of Dr. English be included in the record at this time.

(The biographical sketch referred to follows:)

EARL F. ENGLISH

Born: Lapeer, Michigan, 1905.

Education: A.B., Western Michigan College, 1928; B.S., 1932; A.M., Iowa University, 1937; Ph. D., Iowa University, 1944.

Experience: Newspaperman, Imlay City, Mich., 1920; reporter, Kalamazoo Gazette, 1926–28; public school teacher, 1928–36; instructor in journalism, Iowa University, 1937–44; professor, University of Missouri, 1945 to present, dean, 1951.

Awards: Pacemaker award, 1936; Sigma Delta Chi award for research in journalism, 1944; Award of Merit, National Editorial Association, 1958; Freedom Foundation Fourth Estate Award, 1960; Alpha Delta Sigma Golden Fifty Award, 1963.

Member: American Society for Advancement of Science, American Psychological Association, American Council of Educational Journalism, American Association Schools and Departments of Journalism, American Society Newspaper Editors, Association for Education in Journalism, Sigma Delta Chi, Kappa Tau Alpha, Sigma XI, Rotary.

Author: "Exercises in Journalism, Scholastic Journalism" with C. Hach; editor, Missouri Journalism Bulletin Series, 1945 to present.

Senator LONG. Dean English, will you come forward?

We are grateful to you for coming from the University of Missouri. Incidentally, we Missourians are very proud of our university, and particularly our school of journalism, which we think is the best in the world.

STATEMENT OF DR. EARL F. ENGLISH, DEAN, SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI

Mr. ENGLISH. I am Earl F. English, dean of the School of Journalism, University of Missouri, whose Freedom of Information Center has been in operation for more than 5 years.

The objectives of the center, in broadest terms, are to gather materials concerning actions by governments, societies, and the communications industries that affect the acquisition, presentation, and dissemination of information; to publish, as occasion allows, aspects of its findings; and, to make its file available on request.

Our campus is some distance from Washington, so we do not have firsthand information on the problem of the Federal Government agencies withholding of information from the people. Though we are not in a posiiton to gauge the depth of the problem, we suspect it is significant.

Such information as we do have comes largely from the daily press. We have gone back in our press clip files for the 1960–63 period and extracted at random instances of withholding by Federal agencies.

I have a list here. We believe it generally illustrates the nature of agencies' withholding. We feel it is not in the least complete. Would you like to have me cite some examples?

Senator LONG. Yes, Dean, we would like for you to cite some of them, and put the rest of them in the record.

Mr. ENGLISH. The Civil Aeronautics Board ordered secrecy for the remaining time of its 4-month-old public investigation into alleged

illegal fare cutting by North Atlantic airlines, (New York Times, Aug. 6, 1963).

The Military Air Transport Service (MATS) refused the St. Louis Glove-Democrat statistics to clarify a routine news release. Concerning MATS National Safety Council award for reduction of accidents, the release stated that MATS had 15 fewer deaths in 1962 than the average number during the previous 2 years. When a reporter asked what that average was, and how many lives had been lost last year, spokesmen told him that these statistics were "classified information." However, after the newspaper reported the withholding "tieup," MATS released the fatality figures (Globe-Democrat, July 23, 1963).

A space agency official stated that—

there have been failures in the Soviet Union's space program, but that the Pentagon has stamped secrecy labels on what the United States knows about them—

because of possible damage to the intelligence apparatus through which data are obtained (New York Times, May 24, 1963).

In March 1962, the Federal Power Commission authorized the Pacific Power & Light Co. to issue a huge amount of stocks and bonds, $54,900,000. Yet the dissent filed by FPC Commissioner Howard Morgan, April 3, 1962, was never allowed to be made public (Congressional Record, Apr. 11, 1963).

Three years after the 1960 USIA prestige polls controversy, the USIA agreed to make public its surveys, but only after they are at least 1 to 2 years old. Reason for delay: To avoid possible damage to U.S. foreign relations by publicizing current studies (Christian Science Monitor, Mar. 16, 1963).

Hearings of the subcommittee of the Committee on Government Operations, March 1963, revealed the following cases of withheld information: (1) The Department of Defense refused to release pictures of nuclear tests in the Pacific. Yet, ships of the Soviet Union were nearby and could take their own pictures. (2) The Pentagon withheld news concerning the October 1962 Cuban crisis, claiming that news flowing from actions taken by the Government is part of the weaponry. Other facts were withheld concerning the U–2 flight over Russia and the Bay of Pigs invasion.

How much the Central Intelligence Agency spends is kept secret from all American citizens, except about a dozen men in Washington. It is entirely deleted from the Federal budget listings (Columbia Missourian, Mar. 6, 1963).

Some of the things the Moss Committee on Government Operations has not been able to pry out from under the secrecy curtain are: Pentagon secrecy on the names of Army Reserve officers retained for active duty; and refusal by the Defense Department to approve pictures of Titan missiles and B–58 bombers (Christian Science Monitor, Jan. 23, 1963).

Senator LONG. I think it woud be well for you to go ahead and read these.

Mr. ENGLISH. An Army study on how to put men on the moon by 1965 has had 10 separate security reviews by 3 Goverment agencies and the original 4 volumes have been cut to 2 by censors. The document, completed in 1959, is still technically barred from public scrutiny by the State Department. (New York Times, Sept. 24, 1962.)

A military secrecy policy was formed in April 1962, to be watchdog over our space program. To aid the secrecy, it was even decreed that military satellites will no longer have special names. (Washington Post, June 27, 1962.)

The Coast Guard follows a policy of keeping violation charges secret until safety penalties have been assessed, thus resulting "in unnecessary exposure of the public to unsafe vessels and incompetent operators," according to Representative John E. Moss (Providence Journal, Apr. 30, 1962).

For 26 years after its establishment in 1936, the Rural Electrification Administration refused to make public its information about loan application. (Apr. 9, 1962, news release from the Special Subcommittee on Government Information.)

Athough the Federal Aviation Agency decided in June 1961, to release recorded transcripts of the last words between pilots and control towers in major air collisions for publication, they have refused to release tape recordings of the voices for broadcast. Also, any portion of these transcripts can be withheld by the FAA where there are "clear and compelling reasons to make an exception to the general rule." (St. Louis Post-Dispatch, June 23, 1961.)

A scientific report on deficiencies in the Nation's air raid warning system prepared under contract for the Army by Johns Hopkins University was kept secret. This was done to prevent "embarrassment to the Army, Department of Defense, and the Office of Civil and Defense Mobilization," said Representative John Moss. (UPI release, Nov. 23, 1960.)

Example of withholding information for publicity effects:

In August 1960, Army officials admittedly restricted dissemination of news about new helicopter records so that the results could be announced at a Washington banquet. (Report by the Committee on Government Operations, July–December 1960.)

Late in 1960 the Air Force refused to release the names of 800 high-ranking officers who have been "excused from flying" but continue to draw flight pay. The argument was used that it might be "embarrassing" to the officers involved. (Report by the Committee on Government Operations, July–December 1960.)

In the summer of 1960, a financial writer was informed by the Navy that the prices paid by the Government for certain jet aircraft engines could not be made public because the information was "proprietary." (Report by the Committee on Government Operations, July–December 1960.)

The Department of Labor maintained a firm policy in 1960 that it would not identify business firms caught cheating their workers in violation of the Federal Fair Labor Standards Act. (Report by the Committee on Government Operations, July–December 1960.

On August 23, 1960, the Department of State announced that it would no longer permit researchers to examine advance proofs of the Potsdam papers. Such access, the Department claimed, would delay publication of the papers. (Report by the Committee on Government Operations, July–December 1960.)

In the summer of 1960, the Atomic Energy Commission refused to release the 15-year-old photographs of the first two nuclear bombs for fear of "worldwide repercussions." (Report by the Committee on Government Operations, July–December 1960.)

The State Department, apparently reverting to managing the news, has ordered its desk officers dealing with Latin American affairs not to give any information to reporters when "ticklish" situations arise in the countries for which they are responsible.

Reporters are referred to area directors, who, State Department officials say, are "more qualified" to speak with the press. Desk officers for Haiti and British Guiana, for example, have been ordered not to see certain reporters.

This policy represents "coordination," not "management" of news, officials argued. However, they did not explain the difference. Nor could they say when a situation in a country was "ticklish" and when it was not.

That is the Washington Post, August 26, 1963.

I say this is just a sample of the instances in our files in the Freedom of Information Center at the University of Missouri.

Senator LONG. Does that complete your statement, Dean?

Mr. ENGLISH. That completes the citations.

I have observations to make about the bill.

Senator LONG. Will you proceed with your observations?

Mr. ENGLISH. If I get afield on this, I hope you will call me on it.

In 1945 Congress acted to increase the availability of information from the Federal administrative agencies by writing section 3(c) of the Administrative Procedure Act, 5 U.S.C. 1002. The pertinent portions of this section on information practices provide for publication and inspection of records:

* * * Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency * * *.

(c) Public Records.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

These parts are pertinent because they carry the language that has plagued Congress and litigants ever since the law passed, for the language, as will be explained in detail later, allows the bureaucrat to withhold information at his discretion. The law thus fails in its purposes. As the late Thomas C. Hennings told a reporter (St. Louis Post-Dispatch, Jan. 6, 1960):

The history of this section shows that some officials have taken advantage of the ambiguous language and misused it to conceal rather than divulge, information which the public has every right to know.

That Congress should have intended to write a law providing for publication and inspection of the records of the agencies is understandable, for their power over the national life is enormous. While the American has at least a passing acquaintance with the names of the executive departments, this is not so with the various commissions and boards ranging from the American Battle Monuments Commission to the Veterans' Education Appeals Board, sandwiched between which are, for example, the Federal Communications Commission, the Housing and Home Financial Agency, National Labor Relations Board, and many, many others whose rules and decisions on the basis of these rules vastly affect every American. The late Dr. Harold L. Cross, who early saw the need to amend the law underlined the strength of the agencies in testimony before the House Subcommittee on Government Information (Nov. 26, 1955):

Multiplication of Federal Administrative Agencies and expansion of the facts to include adjudications which have serious impact on private rights has been

one of the dramatic legal developments of the past half century. Nearly every phase of our lives and business is affected in some way directly or indirectly, visibly and invisibly to a greater or lesser degree by a maze of Federal administrative regulations.

Dr. Cross deplored that this information "bill of rights" for Americans "whose affairs are controlled or regulated one way or another by agencies of the Federal Government" should be cited again and again by the agencies as sanctioning denial of information. Since this testimony, antagonists starting with the Hoover Commission in 1955, have sustained a continuous effort to rewrite the law as the most needful of steps to improve governmental information policies. Bill after bill has died in committee as congressional sessions have come and gone. Notable advocates of change have died during this program, Senator Cross, Senator Hennings, chairman of the Senate Subcommittee on Constitutional Rights, and Jacob Scher, Northwestern University and chief counsel to the House Subcommittee on Government Information. Now, Senator Long and others continue the effort to amend the law.

An amending bill (S. 1666), based on many that have gone before it, has been introduced in Congress. The argument remains substantially as it has been. Detractors of the present law argue it is not the Federal public records law which it could be and should be, that it is an authority for the agencies to withhold information. Not as vocal but as adamant in their charges are those including the President, who feel change would affect the balance of power between the executive and legislative branches by reducing the power of the executive branch—to plead "executive privilege" to withhold information from the Congress and people. The amenders see no conflict with executive privilege, contending that the intention of the present bill is no more than to clarify the language to the extent that the original purpose of the act will be realized. President Kennedy doubts the change can be made. He wrote in part to Sigma Delta Chi Freedom of Information Chairman V. M. Newton, Jr., questioning him of his position on the matter:

> I know that you are familiar with Public Law 85–619[1] which was directed toward the same objectives as the proposed amendment to section 1002 of title 5 of the United States Code, presented in your letter. The record clearly indicates the important part, you, yourself, played in the enactment of this public law. Perhaps, however, neither Public Law 85–619 nor the proposed amendment to section 1002 of title 5 can deal with the fundamentals of the problem. The legislative history of Public Law 85–619 seems to center around "executive privilege" and the interpretation placed thereon by the Chief Executive. To the extent that this is the case, the problem probably is not susceptible of being dealt with in statute * * *.

To return to the law in question, specifically where does the language fail and how does the latest attempt to amend the law S. 1666 cope with these failures?

The language failures listed here have been variously singled out for criticism by Dr. Cross, Professor Scher, Senator Hennings, and Dr. Bernard Schwartz, law professor at the New York University and sometimes legislative committee counsel.

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[1] The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its offices and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. This section does not authorize nor prohibit withholding information or limiting the availability of records to the public.

1. "Any function of the United States requiring secrecy in the public interest."

Provisions of the law as to publication or inspection of agency records are inapplicable where there is involved "any function of the United States requiring secrecy in the public interest." The phrase reappears exactly in the Long bill. Cross, who argued that the phrase "public interest" be replaced with "national security" observed—

> "public interest" has always had a way of becoming identified with the interest of whomsoever is making the determination.[1]

Schwartz found the phrase so "broadly drawn" as to hand over to agencies so wishing the power—

> to immunize any function from public inspection simply by asserting that the public interest requires it.

Scher's 1959 study, based in part on discoveries of agency withholding policies by the House Subcommittee on Government Information, and quoting liberally from the Attorney General's manual on the law, held that the phrase gave "uncontrollable and unreviewable discretion," over releases of information by agencies. He doubted the very legality of this because the areas of confidential privilege are to be decided by the courts, not the agencies, according to court decisions Scher cited in support of his holding.

2. "Any matter relating solely to the internal management of an agency."

Cross could find—

> no good reason why in this Government of the people, by the people, and for the people, the management internal or otherwise, of the agency should not be any of their business except as grace is the decided emotion.

He quoted a case in point:

> Moreover, we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of executive departments of the Government as contrary to a sound public policy * * * it is but a small step to ascertain a privilege against any disclosure of records merely because they might prove embarrassing. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed, the privilege might gradually be enlarged by executive determinations until as is the case in some nations today, it embraced the whole range of governmental activities. *Reynolds* v. *U.S.*, 192 F. 2d 987, 995 (3d Cir. 1951).

It seemed to Schwartz that the final say in cases involving information connected with internal management—matters of personal and budget procedures, for example—

> should be vested in some impartial body such as the capital office of Legal Services and Procedures which has recently been proposed.[1]

Despite the fact that the Attorney General's manual specifies types of internal management that should be secured against disclosure, Scher found the "internal management" phrase—

> vague, indefinite [giving] further discrimination to the agency.

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[1] It is the phrase "public interest" that has had the broadcasters and the FCC at loggerheads for a generation, for the law states broadcasting is to be in "the public interest," on the definition of which there is no agreement between the FCC and the broadcast industry.

[1] In a limited search, the center found no reference to this proposed office. In 1959 Representative Dante Fascell introduced a bill to establish an Office of Federal Administrative Practices which would number among its duties "continuous studies of the adequacy of public information practices and procedures of the agencies * * *."

On this particular, the Long bill represents to critics of existing law no advance so far as the publication requirement is concerned since the phrase exempting "any matter relating solely to the internal management of an agency" is retained. However, as regards inspection of records where internal management is the plea for nondisclosure the proposed bill narrows its scope in one place to matters that—

> relate solely to the internal employment, rules, and practices of the agency and in another to the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule-making matters.

3. "In accordance with published rules."

Only Scher has taken exception to this phrase which he reads to mean, at least in extension, that where an agency comes on an area of information it wants to keep secret but where there is no authority for this, the agency needs at this point simply create a rule closing off the area of information in question. Score again, said Scher, for the discretionary powers of the agency. This latent control of the availability of information, as Scher read it, appears twice in S. 1666 in the same positions as in the original law, in one instance referring to inspection of agencies' opinions, orders, and rules, and in the other to agencies' records.

4. "Matters of official record."

The Attorney General's manual on the law, on which Scher depended for definition, defines the phrase largely by listing those records that are not official and so, of course, not open to inspection—"intra-agency memorandums and reports," "intra-agency reports of investigations," et critera. Or to touch all bases, the manual states that:

> The great mass of material relating to the internal operation of the agency is not a matter of official record.

The Long bill omits the "official records" phrase, generally describing the records—regularly referred to as "final" records—that are to be available for inspection and details procedure to enhance their availability. For example, the agencies must maintain for public inspection and copy current indexes of rules, orders, and opinions.

5. "Persons properly and directly concerned."

A serious limitation exists in the present provision in that agency records are to be made available "to persons properly and directly concerned." All critics have puzzled over the possible meaning of this phrase and all have agreed it constitutes another grant of power to the agencies on whose grace the seeker of information must depend, hoping the agency will see his concern is proper and direct. This is another of the loopholes which the Long bill closes.

6. "Confidential for good cause found."

7. "Required for good cause to be held confidential."

Had the information section of the Administrative Procedure Act been in all other details perfect, inclusion of these phrases alone would have been sufficient to render its purpose of increasing information from the agencies unlikely of achievement. The number of good causes that can be adduced to justify secrecy range from national security to agency efficiency to personal privacy. These phrases are omitted from the Long bill.

Exceptions:

No one has proposed an information bill without exceptions. The Long bill, in addition to the limiting language above, provides a very interesting and apparently brandnew, exception:

> In making available for inspection opinions, orders, and rules, the agencies "to protect the public interest * * * delete identifying details when it makes an opinion, order, rule, statement, or interpretation; * * *." Justification for the deletion must be explained in writing.

Senator LONG. Thank you, Dean, for an exceptionally fine statement.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. Dean English, you cited at some length—and I am very grateful to you for so doing—what might be described as sort of a "chamber of horrors of withholding." Some of your illustrations were of silly things that were withheld, some of them involved very serious things that were withheld, but I think the list is very good.

As you know, the present law, section 3 of the Administrative Procedure Act, provides no means for testing the withholding of information in the courts.

However, let us suppose that there were such a procedure today. Suppose that you could go into court. Out of your many illustrations, is there a single example that you cited that you believe would result in victory on the part of the press?

In other words, with the loopholes in the present law, is there any way in which you could win a case even if you could go into court?

Mr. ENGLISH. It is pretty doubtful that a case would go to court. It is pretty doubtful that it would be taken to court. There is so much of this withholding that you would be in court all the time.

Mr. FENSTERWALD. What I had in mind was that, even if you had the right to go to court, it would be very difficult to say to a court that withholding was not in the public interest, or that there had not been good cause found for withholding, or that a person was entitled to the information, et cetera, et cetera.

Mr. ENGLISH. That is right.

Mr. FENSTERWALD. So, even if you had a court procedure, which you do not, my question is, Do you think you could ever win a case in court today?

Mr. ENGLISH. I think it would be pretty doubtful that you could win. As one observer has pointed out, first you would have to educate the judges on all of what is involved. It would take some doing. I doubt if you could.

Mr. FENSTERWALD. Another question very much along the same line—maybe the same question stated another way—with all of the loopholes in the law as it now stands with respect to official records, do you think that the law encourages disclosure or encourages and authorizes withholding of information?

Mr. ENGLISH. It seems to have been used to encourage withholding, at least the citations that we have indicate that it is referred to by those who withhold information.

Certainly we know that was not the intention of those who formulated it, but it seems to have served to that end.

Mr. FENSTERWALD. Would it be your judgment that if we are unable to get sufficient support to adequately change the law, to tighten it up, that it would be better simply to repeal it, get rid of it?

Mr. ENGLISH. Certainly certain sections of it.

Mr. FENSTERWALD. I am thinking particularly of section 3(c) which deals with official records, which is really the nub of this problem. The other sections are not really a matter of great controversy.

Mr. ENGLISH. I would rather see it eliminated entirely.

Mr. FENSTERWALD. You at the Freedom of Information Center deal with this problem not only at the Federal level but at the State and local level. Have the States found any solution to this problem that the Federal Government seems incapable of solving?

Mr. ENGLISH. No solution. There will never be a solution to this kind of problem. We can certainly only work toward the end of better performance.

Mr. FENSTERWALD. Have the States passed legislation in this direction?

Mr. ENGLISH. Yes, we have. Many States have passed the Sigma Delta Chi open records law. I think it has helped.

Others say perhaps not as much as we had hoped, but I think it has helped.

Mr. FENSTERWALD. Have you at the Freedom of Information Center come up with legislative proposals other than reform of the Administrative Procedure Act which you think might be useful for us to study?

Mr. ENGLISH. No, I am not prepared to present anything. I think this proposal, this bill, does not go as far as I would like to have it in some respects, as I indicated in the report, but certainly I would rather have this than nothing.

Mr. FENSTERWALD. Am I correct, then, that it is your feeling that the present bill which we are considering, if anything is not too strong but, on the contrary, is too weak?

Mr. ENGLISH. It has some weak points in it, but I would not want anyone to think that we shouldn't pass it because it is weak. It would certainly be a great improvement over what we have.

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Cornelius Kennedy is the counsel for the minority.

Mr. Kennedy, do you have any questions?

Mr. KENNEDY. Mr. English, you were very helpful in bringing together the comments a number of people have made about S. 1666. I would like to ask you a question about one of them.

One of the men you quoted stated that the bill retained the language about "functions of the United States requiring secrecy in the public interest" and "matters relating solely to internal management" in connection with publication in the Federal Register, but did not retain it in connection with the inspection of agency records.

I wonder what your own feelings would be. Is it desirable that matters relating, say, solely to internal management of an agency be published in the Federal Register, or is it sufficient that it may be available for inspection? Is it of such a nationwide importance that it should be actually placed in the Federal Register?

Mr. ENGLISH. I don't think it is necessary to place it in the record if it is available.

Mr. KENNEDY. Thank you. That was my question.

Senator LONG. Thank you, Dean. We do appreciate your making a trip to Washington to testify. You have been very helpful to the committee, and we are grateful to you, sir.

Our next witness is Mr. James Mathis, who is a distinguished newsman and correspondent. He has represented a number of papers in the State of Texas and is presently a political writer in the Newhouse Advance News Service.

Mr. Mathis, we appreciate you coming here and testifying. We are happy to have your statement at this time.

I would like for this detailed biographical sketch of Mr. Mathis to be included in the record.

(The biographical sketch referred to follows:)

JAMES V. MATHIS

James V. Mathis, 39, born West Monroe, La. Student, Louisiana Polytechnic Institute, Northeast State College, and Louisiana State University. Reporter, news editor, Monroe (La.) News-Star World, 1947–50; reporter, Houston Post, Houston, Tex., 1950–62—assigned successively to police, criminal courts, city hall, State Capitol Bureau, Austin, Tex., 1950–57. Washington Bureau chief, 1957–61; associate editor, the Houston Post, 1962; Newhouse newspapers—Advance News Service, 1962 to date. Nieman fellow in journalism, Harvard University, 1961–62. U.S. Coast Guard Reserve, 1942–45. Recipient, Houston and Texas awards for investigative reporting. White House correspondent for Advance News Service; writes series on political and social issues, and does investigative assignments.

STATEMENT OF JAMES MATHIS OF THE ADVANCE NEWS SERVICE

Mr. MATHIS. I have been asked to tell of my experience of recent date in seeking information of an unclassified nature from the Department of Agriculture. Since the argument ran over 8 days, and required possibly 30 telephone calls, numerous letters, and the time equivalent of 2 days of work, I will only try to summarize here—that is long enough.

On October 7, a Monday, I requested of the Department of Agriculture the total fiscal 1963 payments made to Victory Carriers, Inc., a New York steamship company, for shipments under Public Law 480. While Victory Carriers is an American firm, I had established that Aristotle S. Onassis, the Greek shipowner, had a commanding position in its operation. I wished to tie the USDA information in with similar figures to be obtained from the Military Sea Transport Service and General Services Administration to illustrate Mr. Onassis' relationships of a financial nature with the Federal Government.

After transfer through three parties from the USDA press office, I reached a Mr. Healy of the Ocean Transportation Division. He insisted that he would require the names of all Victory Carrier ships in order to find the information. I obtained the ship names from the Maritime Administration and relayed them. Then Mr. Healy wanted the shipping agent.

On Tuesday morning I relayed the name of the shipping agent to Mr. Healy. I had ascertained that the agent had booked Public Law 480 shipments for Victory Carriers. Mr. Healy finally refused absolutely to collect the figures. He referred me to a Philip Dodson of the Accounting Division. Mr. Dodson declined to give the information, but agreed to check with superiors and call me back. He did not call back.

On Tuesday afternoon, I telephoned Harold Lewis, a career employee and assistant director of information for current news. Mr. Lewis, normally a helpful man, said he would try. Another day ended.

Let me say here that MSTS and GSA had in the meantime supplied similar information within 3 hours. I pointed this out to Mr. Lewis. Subsequently, the admiral in charge of MSTS was called by USDA, in turn called his information officer whom he told that he had erred in releasing the payments to three Victory Carrier tankers. The admiral, I was told, said the information was privileged, a statement open to challenge.

However, I already had the figures and there was nothing they could do about them.

All Wednesday I waited for the Agriculture Department to act on my request. At about 5 p.m., I wrote Secretary of Agriculture Orville Freeman making the request formal and protesting the delay as equivalent to suppressing unclassified information. I called Sam Archibald of the Moss subcommittee and asked his assistance. I telephoned and then followed with a letter to V. M. Newton, editor of the Tampa Tribune and for over a decade active in the SDX fight for information.

Mr. Archibald intervened, talking with Lewis, who told Archibald I would get the information, but after 5 days. I offered to search records myself if they were too busy to do it, but this offer was turned down.

On Thursday, October 10, Mr. Lewis called. He said it would take 5 days to put the figures together, but that they would be available on Monday. On this same day, Mr. Newton sent a strong letter to Secretary Freeman, protesting the delay.

Monday came, and I could not even get an answer to repeated telephone calls to Mr. Lewis' office. At 4:30 p.m., I sent a telegram to the Secretary renewing my protest and asking on what legal authority the Department withheld the figures. I called Mr. Creed Black of Wilmington, Del., chairman of the American Society of Newspaper Editors Freedom of Information Committee, and asked his assistance. I wrote him a letter, too. I called Mr. Fensterwald, and sent him copies of everything and wrote him a letter, also. Later Monday, Mr. Lewis called. He hoped to get the figures Tuesday, and agreed to telephone at noon Tuesday, regardless. He did.

At 1 p.m., Tuesday, October 15, I finally got the figures I had requested on Monday, October 7. They weren't exactly what I asked—they were based on the calendar year instead of the fiscal year. But at this point I would have taken anything, and they served to illustrate a new story.

But let me go back a moment. On Thursday, convinced that USDA was falling back on the all too familiar delaying tactics, I wrote and filed two articles.

The articles dealt with Victory Carriers' business relationships with the Federal Government, and the relationship of Onassis to the Federal Government. But the lack of USDA figures made the picture incomplete.

By the time the USDA provided the figures, the entire situation which gave the articles timeliness to the public had changed. Had not

a House Member picked up similar information and used it on the House floor on Monday, the article would have been relegated to the back pages, or not printed at all in some of our papers. This is what I mean when I say that delay is tantamount to suppression.

Normally, you simply do not have the time to pursue a request with the required diligence and determination. In this case, Mr. Archibald and Mr. Newton were of considerable help, and probably proved the difference.

Let me make these additional points:

1. Under any normal accounting procedure, payments made by a Government agency to a private firm should be available within minutes. I am sure, despite USDA protestations, that such was the case in this instance. If not, then someone should check their bookkeeping system.

2. Delay is an effective tactic employed by virtually every Federal agency. It gets around an outright refusal and its consequences, yet works almost as well as refusal.

3. If there were provisions for an immediate plea for relief to court such as provided in the bill here, then it would be unnecessary to build what amounts to a political case against the Department or administration to get legitimate information.

Senator LONG. Thank you, Mr. Mathis, for bringing us a personal and specific case of the possibility of withholding of information. You have been very helpful to the committee.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. Mr Mathis, I believe I am clear on this, but since the point has not been brought out in your statement could you tell us what your view is as to why the Department of Agriculture so doggedly resisted what would seem to be a matter of routine information made available?

Mr. MATHIS. I think so. I think some figures in the administration at that time were accepting hospitality from Mr. Onassis.

Mr. FENSTERWALD. Is it your opinion that orders were given to the Secretary of Agriculture and other department heads that they should withhold information?

Mr. MATHIS. I wouldn't venture that far. I think they sometimes act without orders.

Mr. FENSTERWALD. In other words, you think it was his own discretion, and with the state of the law as it now exists he withheld it?

Mr. MATHIS. I think that is true.

I think that people realized the meaning of the figures that I had asked for.

Mr. FENSTERWALD. Mr. Chairman, just so the record will be complete, I think it would be well at this point if I inserted some material that was supplied me by Mr. Mathis, which are copies of two telegrams to the Secretary of Agriculture dealing with this problem, and which do document the statement he made earlier.

Senator LONG. I think that it should be in the record.

Without objection, it will be included.

(The material referred to follows:)

OCTOBER 14, 1963.

Mr. FENSTERWALD: Enclosed is a letter and subsequent telegram sent to Secretary of Agriculture Orville Freeman. I think they are self-explanatory.

Sam Archibald tells me that you are having trouble finding specific complaints on news suppression. While USDA has not specifically denied this, the effect

has been to kill the timeliness of any article. I feel that the delay is deliberate and without justification, especially since the Military Sea Transport Service, Defense Department, and GSA complied with a request for similar figures within 3 hours.

I might point out that in sending along this request I hope for some assistance in getting the information as soon as possible. Unless various committees of Congress and professional freedom-of-information committees of Sigma Delta Chi and the American Society of Newspaper Editors show some results, what the hell good is it for reporters to waste their time complaining?

My regards,

JAMES V. MATHIS,
Advance News Service.

SECRETARY OF AGRICULTURE ORVILLE FREEMAN.

SIR: On Monday I requested of the Department of Agriculture the fiscal 1963 payments made to Victory Carriers, Inc., a New York steamship company, for Public Law 480 shipments.

The ships involved are the *Ames Victory, Coe Victory, Couer d'Alene Victory, Jefferson City Victory, Longview Victory, Mankato Victory,* and the *Northwestern Victory.* Universal Shipping Co. is the Washington agent.

Victory Carriers, Inc., is held 75 percent in trust by the Grace National Bank, New York City, for the children of Aristotle S. Onassis, and 25 percent by a Panamanian corporation owned by Mr. Onassis. The requested information has not been made available, nor have I received from the USDA a satisfactory reason for withholding it.

I wish to protest the delay. Other Federal agencies have made similar information available within 3 hours of the request. Under normal accounting procedures payments made from taxpayer's moneys would be available immediately. The delay by USDA is equal to suppression of unclassified facts.

Thank you for your consideration,

JAMES V. MATHIS,
Advance News Service.

OCTOBER 14, 1963.

SECRETARY OF AGRICULTURE ORVILLE FREEMAN.
Department of Agriculture,
Washington, D.C.:

Renew request for information made 7 days ago for payments made by USDA to seven ships operated by Victory Carriers, Inc., in shipment of grain under Public Law 480. Your public information assistants now refuse to answer telephone calls on status of request. Ask citation of Federal law giving authority for withholding information.

JAMES V. MATHIS,
Advance News Service.

Copies to Moss subcommittee; Creed Black, ASNE Freedom of Information Committee, Wilmington, Del.; V. M. Newton, Jr., SDX Committee, Tampa Tribune, Tampa, Fla.

Mr. FENSTERWALD. In addition, I would like to take three newspaper clippings on this story that Mr. Mathis wrote and put them in the record at the same time.

Senator LONG. Without objection, they will be included.

(The clippings referred to follow:)

[From the Sunday Oregonian, Oct. 13, 1963]

JACKIE'S YACHTING HOST SOMETIMES AT ODDS WITH U.S. JUSTICE DEPARTMENT

(By James V. Mathis, Advanced News Service)

WASHINGTON.—Aristotle Socrates Onassis, the Greek host for Jacqueline Kennedy and Under Secretary of Commerce and Mrs. Franklin D. Roosevelt, Jr., has not always had such good relations with the higher echelons of the U.S. Government.

Onassis, who built a shipping fortune of more than $300 million on waves of deflation, was indicted less than a decade ago for conspiring to defraud the U.S.

Government in the purchase of surplus ships. Some of his ships were seized in a civil action.

Onassis himself was tapped on the shoulder and arrested by a Federal marshal while eating at the Colony Restaurant in New York City.

The criminal indictment was subsequently dismissed and Onassis paid a $7 million civil settlement.

He later was subpenaed and appeared before a House Merchant Marine and Fisheries Subcommittee which was investigating reports that Onassis was reneging on part of the agreement which settled earlier differences with the Justice Department.

Onassis, who began in business in Buenos Aires, Argentina, as a telephone operator, must have pondered the differences in circumstances and status when the wife of the President of the United States and the son of a former President boarded the gleaming yacht *Christina* in Glyfada Bay near Athens on October 4.

In recent years, Onassis has made a practice of entertaining the great for luxury cruises. Among his guests have been ex-President Dwight D. Eisenhower and Sir Winston Churchill. Churchill was aboard when Onassis swept soprano Maria Callas away from her 64-year-old husband in 1959 in a romance that is still going up and down. But Onassis had never had such a flag-draped list aboard before. It was so stunning he didn't even sail along himself.

Roosevelt, who as Under Secretary of Commerce has full duties and authority over commerce divisions second to Secretary Luther Hodges, and Mrs. Roosevelt joined the Onassis yacht in Athens. They left the United States September 25 for a tour of France, the United Arab Republic, Somali, and Israel. He is due back in his office on Monday. His secretary says Roosevelt would be on annual leave while touring the Greek islands.

The ship Onassis uses as a yacht is a 332-foot converted Canadian frigate. She has steam-turbine engines capable of delivering a brisk 20 knots. Beneath the bridge is a spacious office equipped with telephones able to link up talkers for 5,000 miles. Each of the 12 cabins has a private bath. The book-lined smoking room has a wall of lapis lazuli.

The ship is fitting for a multimillionaire who still thinks of himself as a rough, tough, romantic sailor at 57.

When Onassis left Greece in 1923 at 16 to go to Argentina to recoup the family fortune, it took every cent the family could scrape together to pay his passage and give him $60 walking around money. Within 2 years, working days importing Turkish and Oriental tobaccos and nights as a telephone operator, Onassis had made $100,000 and was well on his way to his first million.

HOLDINGS NOT KNOWN

By 1931, while others were collapsing in the financial panic, Onassis was rich enough to buy up a fleet of cargo ships from a Canadian firm for $120,000 each—about 1 percent of their cost price. He was off and going and has never stopped.

No one knows, probably not even Onassis, the number of ships he operates now. He testified before the House committee in 1958 that he had 70 corporations under his control.

His activities in recent years have run from attempts to rehabilitate Monte Carlo—despite snubs from Princess Grace, of Monaco, who refused to go aboard his yacht—to giant deals with Saudi Arabia which guaranteed oil cargoes for his tanker fleet.

Onassis got into trouble in the United States soon after World War II when he set out again to take advantage of deflation. Wartime American vessels were being put on the block as surplus. But restrictions were written into the sales contracts specifying that the ships could only be bought by American citizens or by companies controlled by Americans.

The Justice Department, investigating years later, decided that corporations which bought vessels for Onassis were fake. The indictment grew out of this decision, as did the civil action.

One unusual aspect of the case was that a law firm in which Herbert Brownell was a partner gave Onassis initial legal advice in setting up the corporations. Brownell later was Attorney General when Onassis was indicted. He was called before the same House committee and explained that while the law opinions given by his firm had not changed, the facts of the Onassis operations had changed in intervening years.

Onassis was understandably bitter about the whole affair. He said in 1958 that he knew about the civil suits, and heard for months in Europe "nasty cracks that a group of Greek shipowners were indicted in a sealed envelope." That sealed envelope and the rumors were more than he could stand, he said. He flew to New York and fired off a telegram to Brownell making known his presence.

Two days later, still without word from Brownell, Onassis was arrested at lunch.

The settlement that grew out of that suit and indictment is still in force at the Federal Maritime Administration. The Maritime Administration is a part of the Commerce Department, for which Franklin Roosevelt, Jr., is No. 2 man.

A corporation set up in New York by Onassis as a result of the settlement now does extensive business with Federal agencies. The company is controlled 75 percent by a New York bank that acts for Onassis' two children and 25 percent by a corporation in Panama which is owned by Onassis.

Onassis sometimes chafes under the restraint and regulations and agreements and demands made upon him by the Federal Government. He made this abundantly clear in a colorful appearance before a House committee in 1958.

Those who know Onassis know that he is deeply concerned about the shape his reputation assumes in public print. He resents especially events that seem to reflect on his integrity and business image.

The cast-off husband of Maria Callas—who said he got seasick while sailing on the Onassis yacht while Onassis got stronger and stronger and thereby won soprano Maria—told reporters in 1959:

"Onassis has his billions and wants to polish up his tankers, using the name of a great star."

Onassis was modest before he flew off with Maria to his yacht. His rejoinder:

"Friends have described me as a sailor. Sailors do not usually go for sopranos. I would indeed be flattered to have a woman of her class (Maria's) fall for me."

[From the Newark Star-Ledger, Oct. 12, 1963]

ONASSIS HOST TO JACKIE AS HIS SHIPS HARVEST U.S. DOLLARS

(By James V. Mathis, Star-Ledger Washington Bureau)

WASHINGTON.—Decisions by U.S. Federal agencies have a far-reaching effect upon Aristotle Socrates Onassis, the Greek shipping magnate now furnishing a luxury yacht for Jacqueline Kennedy and her party.

Onassis controls or owns an interest in 70 corporations set up in many nations. The extent of his worldwide operations and contact with U.S. agencies is impossible to trace.

Yet at least one corporation in which Onassis has a key position—Victory Carriers, Inc., of New York City—is American based, and partial information on its relations with the Federal Government is available.

In fiscal year 1963, for instance, Victory Carriers was paid $858,596.58 by the Military Sea Transport Service of the Defense Department for shipments on general cargo vessels and three tankers. Another $198,000 was paid by the General Services Administration to Victory for hauling fertilizer from Tunis to Korea, under the foreign aid program.

BOOMING BUSINESS

The vessels did so much business with the Agriculture Department—hauling Public Law 480 giveaway grain—that Department officials said it would take 5 days to get a total.

All of these agencies hire foreign-flag ships, including those of Onassis, but information on payments in this manner is said to be unavailable without a list of the 70 corporations and all Onassis ships.

More important to Victory Carriers and to Onassis is the $48,342,000 guarantee put up by the Federal Government which allowed the firm to finance and build four new tankers.

BUILDS MORE SHIPS

That guarantee, which operates like a housing mortgage, is administered by the Federal Maritime Administration, a division of the Commerce Department.

(One of the guests on the Onassis yacht is Franklin D. Roosevelt, Jr., Under Secretary of Commerce.)

Three of the tankers have been commissioned since 1961 and haul oil for the military. They were paid $670,063.05, $222,235.41, and $763,298.12, respectively, in 1 year of operation. The fourth tanker will be in operation in about a month.

Victory Carriers is legally an American-controlled corporation. It grew out of a settlement reached between Onassis and the Justice Department after a criminal indictment and civil action.

Justice had said that Onassis had bought American surplus ships illegally through corporations acting as fronts.

HE'S IN THIS, TOO

Seventy-five percent of the stock and control of Victory Carriers was given to a New York bank which acts as trustees for Onassis' two children—a boy and girl now 14 and 13 years old—who were born in New York hospitals. Onassis kept the remaining 25 percent and a director's seat through a Panama corporation he owns fully. He is consulted before each major decision as a minority stockholder and parent of the children.

Onassis must go to the Federal Maritime Administration to revoke or change any part of the trust arrangement.

The Maritime Administration also exercises under signed agreement with Onassis considerable control over the 14 ships transferred from American flag to Liberian registry. Bonds totaling $3,300,000 have been posted with Administration to assure conformity to the agreement. The Administration may draft the vessels at any time, and the ships are not supposed to trade with Red China or Iron Curtain nations.

PROFITS ARE PROTECTED

Steamship officials here point out that Onassis enjoys a much higher income from the 14 ships under the Liberian flag than if he operated them under American maritime regulations and costs. At the same time, he gained the $48,342,000 financing guarantee for the four 46,000-ton tankers.

Until last July, Victory Carriers had outstanding notes on the seven ships it bought from the Government. On July 23, all the mortgages—totaling $719,238—had been paid.

Roosevelt, who as Under Secretary has full duties and authority over Commerce divisions second to Secretary Luther Hodges, and Mrs. Roosevelt, joined the Onassis yacht in Athens. They left the United States September 25 for a tour of France, the United Arab Republic, Somali, and Israel. He is due back in his office on Monday. His secretary says Roosevelt would be on annual leave while touring the Greek islands.

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[Oct. 16, 1963]

SENATOR RAPS F.D.R., JR.: ONASSIS SHIPPING FIRM PAID $4.7 MILLION, UNITED STATES REVEALS

(By James V. Mathis)

WASHINGTON.—The Department of Agriculture disclosed Tuesday that Victory Carriers, Inc., a shipping firm in which Aristotle Socrates Onassis has a commanding position, was paid $2,692,292 for services in the last 12 months.

Onassis has provided a 332-foot yacht for First Lady Jacqueline Kennedy and her party for a Mediterranean cruise. One of Mrs. Kennedy's guests was Under Secretary of Commerce Franklin D. Roosevelt.

Payments to Victory Carriers—a New York firm partially owned by Onassis and partially in trust for his children—from two other agencies totaled $2,077,096.

The total Federal Government payments to the firm in 1 year amounted to $4,769,389.

BACK AT DESK

Mr. Roosevelt was reported Tuesday to be back at his desk in the Commerce Department. He made no rebuttal to charges in Congress that his presence on the yacht was improper.

"He was on annual leave," a Commerce spokesman said. "He will get no per diem for the days on the ship. He is not planning any statement. He was a guest of Mrs. Kennedy."

Meanwhile, the Federal Maritime Administration, a part of the Commerce Department, clamped a strict no-talk rule on its employees as to relations with Onassis companies. Administrator Donald Alexander was the only one who would answer inquiries.

Mr. Alexander said the instructions had gone out because he was the only central source of information.

Representative Oliver P. Bolton, Republican, of Ohio, Monday had questioned the judgment of Mr. Roosevelt, whose Department has sole jurisdiction over the policies of the Maritime Administration, in placing himself in a position of obligation to Onassis.

NO COMMENT

Representative Bolton also questioned the propriety of Mrs. Kennedy's accepting hospitality from Onassis, whose shipping interests are under the directions of Federal agencies.

White House Press Secretary Pierre Salinger Tuesday refused to comment on Representative Bolton's questions.

Bolton was not deterred, however, by attempts to ignore his speech. He plans to place additional information on Onassis in the Congressional Record Wednesday or Thursday.

Mr. Alexander said that the $1,442,500 due to the Maritime Administration on October 15 on one Onassis ship is not an actual payment. The amount is a working capital requirement, and has nothing to do with terms or interest. It is a way of policing shipbuilders and operators.

Mr. Alexander said that Under Secretary Roosevelt had no relations with his agency. The Administration is under the direction of Clarence D. Martin, Under Secretary of Commerce for Transportation, Mr. Alexander said.

Mr. FENSTERWALD. Mr. Mathis, would you expect any retaliation from the Department of Agriculture because of your testimony here and, if so, in what form?

Mr. MATHIS. No, I wouldn't. I wouldn't see why they would retaliate. If the figures were embarrassing, they would withhold them, whether I was testifying or not.

Mr. FENSTERWALD. In other words, it is going to be extremely difficult for us in the long run unless this law is radically changed to fix it so you will get the information in time to do you some good?

Mr. MATHIS. I would think so. There is no procedure we can follow now except this very complicated procedure that I followed here in sending telegrams, writing letters, calling people. It costs, as I say, 2 or 3 days of good time to do something like this.

Mr. FENSTERWALD. I have heard of other newsmen who by pursuing your methods and frequently by the use of the House committee or this committee can in a particular case get enough pressure brought to bear on a particuar agency for a particular piece of information to shake it loose.

Do you think this is the way the system ought to work?

Mr. MATHIS. No, I don't. I don't see why we have to go through that procedure. I think that the information, if it is legitimate, is not classified, and if it doesn't affect the national security, should be available for us upon request.

Mr. FENSTERWALD. Is it your view that under the present act as it is now drafted that anything can be legally withheld?

Mr. MATHIS. Under the present?

Mr. FENSTERWALD. Under the present Administrative Procedure Act.

Mr. MATHIS. Well, they do withhold what they want to withhold.

Mr. FENSTERWALD. And they can merely say that they are holding it for good cause found and there is nothing you can do about it?

Mr. MATHIS. Sometimes you can appeal up the line, and in a case like this it would do no good to appeal to a higher authority or someone higher in the information setup.

Mr. FENSTERWALD. The only person higher than the Secretary of Agriculture would be the President. You don't think appealing to him in a case like this would do any good?

Mr. MATHIS. It is hard to see how I would get any help out of the White House on this.

Mr. FENSTERWALD. I gather from your testimony that you feel that delayed news is really tantamount to withholding, that if you can delay putting out news long enough that normally it is of no value and, therefore, eventually it will be given after its value is worn out.

Mr. MATHIS. Yes, if they can hold it up a week or two, the whole situation is changed.

In this instance, the parties were off the boat that was involved. One of them was back at his desk in Washington. It was no fault of their own that someone else picked up the story and ran with it about that time in the House.

Mr. FENSTERWALD. You have given us, I think, a very good current and specific example of wrongful withholding of news on the part of a Cabinet member. I wonder if in the past you have had any other serious cases which you think would highlight the problem of either delay or withholding.

Mr. MATHIS. Over the years, since 1957, there have been any number of them with respect to some of them, I don't remember the exact dates.

I had a protracted argument with the Defense Department, Army in particular, over a request for records of a court-martial which had been public at the time it was held, but were not available here in Washington. You had to get permission from the man who was tried or from the top man in the Army, I believe the Judge Advocate General. We never did win that. As I understand it, you still can't get the records, although you can get the records of any criminal trial in a civil court you can't get the same kind of record in the military. Then I have had differences with the Securities and Exchange Commission over records which they hold are privileged which have been turned down. They have a procedure in the act which sets out a method of applying, getting before the Commission to get information released. I was turned down without even the privilege of a Commission hearing on that.

I have requested of the Maritime Administration before they began releasing through the State Department the names of ships that were

hauling goods to Communist Cuba. They delayed that for something like 2 weeks until they could get them over to the State Department and get them released there at their own convenience.

In this particular case on the Onassis matter, the week, the Monday after these articles appeared on Friday the Maritime Administrator, Mr. Alexander, gave orders to every man in the agency that had connection with this not to speak to anyone, to refer all calls to him.

Mr. FENSTERWALD. On what authority did he do that?

Mr. MATHIS. I suppose on his own authority, although I think his resignation has been accepted since then. He told his information officer, refer all requests to him. He told a Mr. Ray Yowell in that department to refer all requests to him.

Both men had previously talked to me and had been of great help. Mr. Alexander said that this was a means of coordinating information and centralizing all the information that they had.

Mr. FENSTERWALD. Wouldn't you normally centralize it in the press officer and not in the head of the agency?

Mr. MATHIS. I would think so. It depends on how hot it is.

Mr. FENSTERWALD. Would you say this was the equivalent of the gag rule?

Mr. MATHIS. Well I will say this. Mr. Alexander did answer questions when I got to him, but it is holding the reins within his hands when he already has it set up to answer questions through the information agency. A week before these stories ran, I talked to lawyers and everybody connected with the case. They were free and open, under no rules.

Mr. FENSTERWALD. There was no reason that they shouldn't give you the information they were seeking?

Mr. MATHIS. None, none whatsoever.

Mr. FENSTERWALD. They had no statutory authority to withhold?

Mr. MATHIS. None. I looked at all of the records of Onassis' dealings.

Mr. FENSTERWALD. Could we get back just a minute to this case in Texas. I thought you said that the court-martial case in Texas was an open trial at which reporters were admitted, is that correct?

Mr. MATHIS. That is correct. I believe it was in Waco. It was covered at the time.

Mr. FENSTERWALD. And reported?

Mr. MATHIS. And reported.

Mr. FENSTERWALD. And at the same time or at a later date the Defense Department refused to allow you to look at the records of that trial?

Mr. MATHIS. That is correct. There were new developments and new information coming to Washington, coming to one of our Senators here, coming to reporters, which opened up a possible news story if we could go back and look at the testimony.

Mr. FENSTERWALD. And they wouldn't let you look at the testimony which you were privileged to listen to and take down had you been in the courtroom?

Mr. MATHIS. That is correct.

Mr. FENSTERWALD. Doesn't that sound sort of silly?

Mr. MATHIS. It did, but I understand, if I am not mistaken, Mr. Archibald went into this case and has a record on it. They cited laws to him. We never did win it. As far as I know, the court-martial records are still closed.

Mr. FENSTERWALD. The only way that you could win it would be through political pressure? You don't have any legal recourse, in any event?

Mr. MATHIAS. None that I know of.

Mr. FENSTERWALD. I would like to ask you the same question I asked Dean English, and that is in view of the way section 3 of the Administrative Procedure Act is now written—with its loopholes, with no recourse in courts—do you think it would be helpful or harmful to be just taken off the books?

Mr. MATHIAS. I am not too familiar with the law as it now stands, but it certainly is no help.

Mr. FENSTERWALD. Do you think that it encourages and authorizes withholding?

Mr. MATHIAS. I have never had occasion to come within the operation of that law. I have never worked with a story that went that way. I think Federal agencies are going to seek any way they can to withhold information that is embarrassing, that they want to release at a later date.

Mr. FENSTERWALD. I think it is rather significant that in all your trials and tribulations that you never had this law cited to you, because, in the case of most agencies, it is the only law on the books today which allows them to withhold information. If you press hard enough in many cases, you will find that the officials have to fall back on this, because, with the exception of the Internal Revenue Service and a few other agencies, there are no specific statutes for withholding information. So, most of the withholding is done under section 3(a) of the Administrative Procedure Act, which is that part of the act which applies to the whole Federal Government.

Mr. MATHIS. I am sure that in this case of the court-martial and some of the others that I have been involved with at different times and took to the House committee that they have cited this law. But there, again, you get into the question of delay. By the time you get these letters and get their answers back and write a new demand and go all the way around, you may be 3 months before you get the thing resolved.

Mr. FENSTERWALD. Again, we get back to your central point, that delay in most cases is the same as withholding.

Mr. MATHIS. It works the same. With the great flow of news that comes out of Washington you turn your attention to something else very rapidly.

Mr. FENSTERWALD. Mr. Chairman, I have no further questions, but I would like to thank Mr. Mathis for coming and telling us of his problems. I have heard from a lot of people on the same subject, but very few of them are very anxious to volunteer to testify. I would personally like to thank him for coming up this morning.

Senator LONG. Mr. Mathis, the committee certainly appreciates it, too. As Mr. Fensterwald said, there has been difficulty in getting people to put their feet to fire to come and give the committee information that is available in many cases.

Mr. Kennedy, do you have any questions?

Mr. KENNEDY. I do not, Mr. Chairman. Thank you.

Senator LONG. Thank you, Mr. Mathis, for coming.

We have a witness now that I am going to ask Mr. Kennedy to introduce in behalf of Senator Dirksen. Senator Dirksen has been delayed and has been unable to get here to participate.

Mr. KENNEDY. Thank you, Mr. Chairman.

Senator Dirksen was called to another meeting while he was on his way over here. In the Senator's absence, I will ask the question of Mr. Pigg that Senator Dirksen was going to ask.

Would you give your full name, please?

STATEMENT OF JOHN C. PIGG, SHATTUC, ILL.

Mr. PIGG. John C. Pigg.

Mr. KENNEDY. Speak just a little louder so we can hear you up here.

Where do you live?

Mr. PIGG. Shattuc, Ill.

Mr. KENNEDY. Is that on a farm?

Mr. PIGG. That is on a farm.

Mr. KENNEDY. And could you tell us whether you applied for acreage allotment in connection with the feed grain program in 1961?

Mr. PIGG. Yes.

Senator LONG. Mr. Kennedy, let me interrupt to tell Mr. Pigg that he should be perfectly at ease before this committee because I am a farmer from Missouri.

Mr. KENNEDY. As a matter of fact, almost everybody on this committee is from a farm State, Mr. Chairman.

Senator LONG. I not only come from a farm State, I live on a farm.

Mr. KENNEDY. Did you have any difficulties in connection with this application?

Mr. PIGG. Yes.

Mr. KENNEDY. Would you tell us briefly what they were?

Mr. PIGG. Well, when they sent me the allotment they had cut it way down, and I went and made the appeal.

Mr. KENNEDY. In applying for the allotment, what did you do?

Mr. PIGG. I turned my acreage in.

Mr. KENNEDY. Was that your acreage for the preceding years?

Mr. PIGG. 1959–60.

Mr. KENNEDY. And you turned that into the county committee; is that right?

Mr. PIGG. Yes.

Mr. KENNEDY. What county is that?

Mr. PIGG. Clinton County.

Mr. KENNEDY. And what happened after you turned in your figures for the 2 preceding years?

Mr. PIGG. Well, when they sent my acreage base back, why they had cut it way down.

Mr. KENNEDY. The first time they sent it back did they give you the full amount that you requested?

Mr. PIGG. No, sir.

Mr. KENNEDY. They just cut it right down?

Mr. PIGG. They cut it right down there.

Mr. KENNEDY. And then what did you do?

Mr. PIGG. Then I made an appeal.

Mr. KENNEDY. You made that appeal to what—the county committee?

Mr. PIGG. The county committee, and I met with them. Then they brought it partly back up.

Mr. KENNEDY. Did you give them any further information at the time you made the appeal?

Mr. PIGG. I explained everything to them and they decided; they said I was right then.

Mr. KENNEDY. And then they raised it back up to what you thought you should have had based upon your earlier years?

Mr. PIGG. Close enough to it.

Mr. KENNEDY. And then what happened after that?

Mr. PIGG. Then in the fall, in August, they cut it back down to where they had it the first time.

Mr. KENNEDY. And what did you do then?

Did you go in to see them?

Mr. PIGG. Then I made an appeal again and they said they had some complaints and I said on what and who, and they said they couldn't tell me because they told them they would keep it confidential and they wouldn't do nothing. Then I met with them again and I took Mr. Hazlet with me.

Mr. KENNEDY. Who is Mr. Hazlet?

Mr. PIGG. A lawyer.

Mr. KENNEDY. So you got a lawyer to go with you that time?

Mr. PIGG. And he tried to find out, and they said three guys had signed the complaint and they were keeping it confidential and they couldn't give their names out and they wouldn't give him no information, and told us that we never had no case.

Then Mr. Hazlet wrote to Mr. Dirksen.

Mr. KENNEDY. And that is when you brought the case to Senator Dirksen?

Mr. PIGG. To Senator Dirksen.

Mr. KENNEDY. I wonder if you could tell us just briefly how this acreage allotment system works. Each farmer submits this record of his previous year's plantings?

Mr. PIGG. Two previous years.

Mr. KENNEDY. And then?

Mr. PIGG. When they set up the allotment, they are going to cut it a certain percent all over, and each farmer turns in what he plants. Then they cut each acreage according to the percent they are supposed to cut down the corn.

Mr. KENNEDY. In other words, the smaller the allotment that you received, the more there would be left to allot to other farmers in the county?

Mr. PIGG. The county got so many acres allotment.

Mr. KENNEDY. Then you brought the matter to Senator Dirksen.

Mr. Chairman, according to our files, Senator Dirksen wrote the Department of Agriculture and on May 1, 1962, received from the office of the administrator of the bureau handling this particular crop acreage allotment program, a letter which said, among other things:

Included in the record of this case are statements from farmers having knowledge of the history acreage of this farm which were obtained by the county committee on a confidential basis. For county committees to divulge the source of information in confidence when by releasing the information would impair the legitimate interest of persons supplying the information would not in our opinion be proper and would result in less effective administration of the programs at the local level.

Senator Dirksen then wrote to the Secretary of Agriculture and asked this particular question:

I have not yet received an answer to my specific question whether a farmer whose acreage is reduced is entitled upon request to be furnished the names of persons submitting evidence against him and the evidence presented by them. I would appreciate your advising me of the specific authority relied upon by the Department in connection with its position in the matter.

In other words, Mr. Pigg, as I understand it, the issue was whether you would be able to see these complaints that you were told had been made against you in order that you could meet those complaints with your own information, is that correct?

Mr. PIGG. That is right.

Mr. KENNEDY. Mr. Chairman, the Secretary of Agriculture replied to Senator Dirksen on August 2, 1962, stating that:

This is in reply to your letter of July 17 requesting advice as to the specific authority relied upon by the Department of Agriculture in withholding from a producer the names of persons supplying information adverse to him in connection with this participation in the feed grain program. The Department regulations governing the availability of information records comply with requirements of section 3 of the Administrative Procedure Act, 5 United States Code 1002.

Mr. Chairman, I will parenthetically say that that is the section, of course, that we are considering here this morning. The Secretary of Agriculture then said:

Such section provides in part as follows: "Section 3. Except to the extent that there is involved, (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to internal management of an agency"—

and he skipped to section 3(c)—Public Records—

Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

The Secretary of Agriculture underlined the language—

except information held confidential for good cause found.

Then he concluded:

Paragraph 536(b) of the Department of Agriculture regulations constitutes a statement of those matters considered to be confidential.

In other words, Mr. Chairman, the Secretary of Agriculture based his refusal to furnish this information upon which the county committee made its decision to the man who asked for it, who would be hurt by the failure to furnish that information, upon the language of section 3 of the Administrative Procedure Act "except information held confidential for good cause found."

Senator LONG. What year did you have this difficulty?

Mr. PIGG. It started in 1961.

Senator LONG. It started in 1961?

Mr. PIGG. Yes.

Senator LONG. Mr. Kennedy, let me ask you this: I am concerned with a situation of that kind. This may not be a violation of a section of the Constitution, but there is a general principle of law in criminal matters, and I see no reason why it wouldn't apply to matters of this kind, that the accused would certainly have the right in a criminal case to be faced with his accusers. While this isn't of a criminal nature, that same principle should perhaps apply. Would you care to comment on that?

Mr. KENNEDY. I think, Mr. Chairman, it has always been traditional in our system of doing things that you are entitled to know the case that is against you. And even in criminal matters where informants play a large part in some types of criminal cases, they must be disclosed by the Government if the Government is going to accuse anyone and make a decision on the basis of the informant's information.

This is a far less serious type of matter. This is merely dividing up the county's acreage allotment amongst the farmers in the county. If one farmer gets less, other farmers in the same county get more, so that it might be said to be to the interest of some farmers to make complaints against others, and it certainly should be brought out in the open.

Senator LONG. I see no reason why the accused should not have the privilege of being faced by his accusers. Otherwise, he would have no way of knowing and the public would have no way of knowing what faith to give to their statements, who the men were and what their standings were or their reputations were for truth and veracity.

Mr. KENNEDY. That is completely correct, Mr. Chairman.

Senator LONG. Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. No; but I would like to make one observation.

It seems to me this illustrates very well that this problem of withholding information applies not just to White House correspondents but, I would guess, to all 190 million Americans. At some time or other, I would think, all of us would go to a Government agency somewhere and be refused information to which we thought we were entitled and we would be given no reason, which is exactly what happened to Mr. Pigg. He had to go all the way up to the minority leader of the Senate to even get some spurious justification for the withholding.

He had no remedy.

There was nothing he could do, except to bring what amounts to political pressure, and I take it, Mr. Pigg, that to this day you still haven't seen the information that you sought. They never showed you what you asked for?

Mr. PIGG. They never showed me a thing.

Mr. FENSTERWALD. Is it true that Senator Dirksen isn't capable of finding out even as a U.S. Senator?

Mr. KENNEDY. Even to a U.S. Senator, the Secretary of Agriculture refused to furnish the information, underlining that language from the Administrative Procedure Act, so that neither the man involved himself nor his representative in the Congress has been able to find out how the county committee made its decision or upon what information.

Mr. FENSTERWALD. I would say that we are deeply grateful to you, Mr. Pigg, for coming here to Washington to tell us this. You have come a long way and have told an interesting story, and I would like to thank you very much.

Senator LONG. I want to thank you, too, Mr. Pigg. We do appreciate your coming up. It is not very often that someone has the perseverence to carry his case all the way to Washington, and we are certainly glad that you would come before this committee and give us the information that you have this morning. Thank you, again, very much for coming.

My colleague, Senator Boggs, is in the audience, and I understand that he has a statement.

Senator, will you come around. We appreciate your coming down.

STATEMENT OF HON. J. CALEB BOGGS, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BOGGS. Thank you, Mr. Chairman.

Mr. Chairman, I certainly appreciate this opportunity to appear before you and the committee today in behalf of a bill which is as important as any before the Congress. I can think of no better way to begin my remarks than by repeating the paragraph written by Thomas Jefferson which you quoted when you introduced this proposal, S. 1666.

Senator LONG. Senator, we are happy that you are one of the cosponsors of this bill.

Senator BOGGS. I am very proud to be a cosponsor along with you and the other Members of the Senate, sir, who are cosponsors.

Jefferson said, and I quote:

> Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power knowledge gives. 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.

That sums up very well the argument, in my opinion, in favor of this proposal.

In order to form judgments about their Government, the people must be able to find out what is going on. This proposition is so obvious and so necessary to our form of government that I do not understand how it can be seriously questioned.

What S. 1666 provides is a sensible system for making sure that information from Government agencies is readily available. I am sure that many agencies will have no difficulty complying with the terms of this legislation. It would merely mean some revamping of present practice, not a drastic change of policy. Other agencies, however, may have to make considerable changes in the way they conduct the public's business.

Can any agency, or anyone else for that matter, argue in good faith against the intent of this proposed legislation?

What grounds can there be for denying to citizens their right to know what their Government is doing?

The bill contains adequate safeguards for keeping secret those matters vital to national defense. Internal workings of agencies would also be excepted and, as you know, so would any matter covered by statute.

With these exceptions in mind, I ask again what could be the valid grounds for opposition to the intent of this bill?

Because of the nature of the subject we are considering, it is difficult to give specific examples of Government secrecy operating to the detriment of the public's right to know. After all, the instances which could be cited would be only those which came to light in spite of the shades of secrecy being drawn. We have no way of knowing the full extent of this secrecy. Hopefully, it is very little.

The instances we have heard of, on the other hand, may well be the tip of the iceberg.

Consider the effect of this bill if it is enacted into law. All agencies will then follow a similar system for making sure their business is open to public view. Those agencies which have been doing well in this regard will have no problems becoming accustomed to a new procedure. Those agencies which have kept public business more private will have to operate more openly. If the assumption is incorrect that information of public value is now being kept hidden or at least difficult to find, then all agencies by complying with the bill's provisions can effectively put that assumption to rest.

Please understand, however, that I am not suggesting that this is entirely a one-way street. I am sure that even under present circumstances more diligent work on the part of reporters would uncover more information which the public should know. A reporter has a tremendous responsibility in this land of government by the governed. It is also true, of course, that the public has a responsibility to follow the workings of government closely at all levels and to demand that matters affecting them be explained. At this point I might mention that during the time it was my privilege to be Governor of my State, the State of Delaware, a statute was enacted providing that all meetings of public agencies be open to the public.

Allowance was made for executive or closed sessions, but these can only serve for background discussion of delicate matters. Any decision must be arrived at in open meeting.

I am proud to say that this legislation has worked well and the citizens of Delaware are consequently better informed about their government, local and State. Because of this law, reporters and broadcasters in my State are able to do a better job and do a fine job, I might add. The law itself is brief, and with your permission, Mr. Chairman, I would like to quote it at this point.

> The meetings of all boards and commissions of the State of Delaware and any political subdivision thereof at which any business is transacted shall be open to the public and to representatives of the press. Nothing contained in this section shall be construed to prohibit executive sessions or conferences of such boards and commissions at which no business shall be transacted.

It is a very simple but effective statute which provides the public policy for the official agencies in the State of Delaware, and it has been operating with success. Actually I have heard no criticism of it, although when it came to the Governor's office for signature there was great concern as to whether or not it was appropriate and would be effective. There were alarms about it.

Senator LONG. Was there alarm and concern from the agencies?

Senator BOGGS. In part, yes, from the agencies and other people who follow closely the business of the Government. I think they thought it was impracticable. The primary criticism was that it might be im-

practicable because you couldn't always get a full discussion of the facts surrounding a particular situation if it was always going to be open to the public; but I think the experience has shown very successfully that the public interest is more fully protected with open information at all times.

Mr. Chairman, I want to thank you again for this opportunity to be heard, and congratulate you personally on the interest and effort which you are taking in this important legislation, and assure you it is a privilege to be a cosponsor on this proposal.

Senator LONG. Senator, we appreciate your interest. We appreciate your cosponsoring the bill with us. We appreciate your interest in coming here this morning and giving us this very helpful statement, and especially the experiences which you have had as Governor of your State on this type of legislation.

Senator BOGGS. Thank you.

Senator LONG. The committee will stand in recess until 10 o'clock tomorrow morning, when we will meet again here in this room.

(Whereupon, at 11:30 a.m., the subcommittee recessed, to reconvene at 10 a.m., Tuesday, October 29, 1963.)

FREEDOM OF INFORMATION

TUESDAY, OCTOBER 29, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long of Missouri presiding.

Present: Senators Long, Hart, and Dirksen.

Also present: Senator Hartke.

Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Kathryn Coulter, special assistant; Donald V. Nangle, assistant counsel; Charles Helein, assistant counsel; Carlos F. Lucero, staff assistant; Joan Miller, staff assistant, office of Senator Long.

Senator LONG. The committee will come to order.

Our first witness this morning is our distinguished colleague from North Carolina, Senator Sam Ervin, who is one of the cosponsors of the bill.

Senator Ervin, we are very happy that you appear before us this morning; we appreciate your coming down here to testify. Will you proceed, Senator?

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator ERVIN. Thank you, Mr. Chairman.

It is a pleasure for me to appear before the subcommittee in support of S. 1666, which would remove some measure of secrecy from the operations of Government agencies. I have long been interested in this subject and as chairman of the Subcommittee on Constitutional Rights, I have been concerned with undue secrecy in Government as a possible deprivation of constitutional rights.

If America is to continue under a government of law and not of men, the opportunity of every citizen to inform himself about current issues is of supreme importance. Yet, as our Government becomes increasingly more complex and bureaucratic, we find it more and more difficult to know how the countless thousands of daily administrative decisions are being made, who is making them and, indeed, what is actually being said in them.

S. 1666 is an important step toward making the public's "right to know" a meaningful right. That the public has such a right cannot be disputed, for a democratic form of government presupposes such a

right. Without it, the electorate cannot, in any real sense, choose its representatives. For the right to make such a choice certainly includes the right to inform oneself concerning the alternatives. The people only control their government so long as they have a voice in its decisions; but this voice is a nullity if people have no way of informing themselves of governmental decisions.

As Hamilton declared of freedom of the press:

> It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author that in this our free and elective Government, he may be removed from the seat of power. If this not be done, then in vain will the voice of the people be raised against the inroads of tyranny.[1]

I believe that S. 1666 is an important measure in this area because it not only guarantees that rules and orders shall be made public, but also assures full disclosure of the method and channels by which such rules are made. Not only orders, but dissenting opinions, as well, must be made available for public inspection or published. The public, therefore, can be apprised of the decisionmaking process as well as the actual decisions made. People thus will know what officials are responsible for what decisions and can act on this information accordingly.

The Subcommittee on Constitutional Rights has long been interested in problems concerning secrecy in Government. Legislation similar to S. 1666 was introduced by the late Senator Hennings in the 85th Congress and the 86th Congress and was the subject of hearings and studies by the subcommittee.[2]

During the 85th Congress, 2d session, the subcommittee studied and the Congress passed, another measure, designed to prevent officials from relying on an innocuous "housekeeping statute" as authority to withhold information. Experience, however, has shown that administrative officials have many weapons in their arsenal, many of them in the form of statutory authority granted by Congress for specific purposes, but broadly interpreted in the executive branch.

S. 1666 establishes three exceptions to the requirement of open records and availability of information:

(1) Information specifically exempt from disclosure by statute;

(2) Information protected by Executive order in the interest of national defense; and

(3) Internal memorandums relating to adjudicatory and rulemaking matters.

However, to avoid confusion and misuse of the act, I would hope that the committee report on the bill would clarify the terms " public interest" (sec. 3 (a) and (b)) and "internal management" (sec. 3(a)) allowing exceptions to publication and availability of information.

It is clear from the legislative history of the Administrative Procedure Act of 1946, which S. 1666 would amend, that Congress never

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[1] Speech in *People* v. *Croswell* (1804).

[2] S. 2148, 85th Cong. Hearing, Apr. 16, 1958; and appendix material printed):
Committee print: "A bill to amend the public information section of the Administrative Procedure Act": reports of executive departments and agencies and views of National, State, and local press associations, on S. 2148;
S. 186, 86th Cong. Hearing, Apr. 17, 1959 (printed); reported from subcommittee as clean bill, S. 2780.
Committee print: Withholding of information from the public and press; a survey of Federal departments and agencies (1960);
Hearing on S. 921 and the powers of the President to withhold information from the Congress, Mar. 6, 1958 (printed).

intended the public information section of the act to be used as a device for withholding information from the public. Rather, it was drafted to insure that the public could obtain information about the operations and procedures of Government agencies. The Judiciary Committee report on the administrative procedure bill described these provisions as requiring agencies "to take the mystery out of administrative procedure by stating it."

According to the committee report, the section was—

> 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 to have the ready means of knowing with definiteness and assurance.[3]

Despite the stated intent of Congress, surveys have shown that this section has been cited again and again as authority for restricting availability of information. The results of three of these surveys made in 1957, 1958, and 1959, are contained in documents of the Constitutional Rights Subcommittee.[4] I refer this subcommittee to them because, although compiled several years ago, this material will, I believe, reveal that the problem caused by the ambiguity of this section of the act is a continuing one which has disturbed people for a number of years.

The war against secrecy, however, must proceed on every front. I have stated elsewhere—and I think it bears repeating—that the amendment of one statute will not remedy the more devious and more dangerous forms of denial of Government information which occur when executive branch officials withhold information from Congress, or yield it too slowly to be of value, or when they manage the release of news to the public, and control its dissemination through various channels. When all is said, only an alert citizenry and a vigilant Congress can guard against such threat to our democracy.

During my tenure as chairman, the Subcommittee on Constitutional Rights has continued its efforts to protect not only the right of the public and press to disclosure of information, but also the related right of Congress as the agent of the people to knowledge about the operations of the Federal Government. In furtherance of this interest, the subcommittee has conducted several surveys of Government agencies and departments regarding agency policies concerning the right of Federal employees to petition Congress and the right of Congress to acquire information from them.

The right to counsel which agencies accord to witnesses before them has also been studied by the subcommittee. This problem is relevant to the general one treated by S. 1666 in that the right to information can be nullified if persons trained to interpret the information in question are barred from proceedings. Since our investigation, at least one agency has changed its rules to provide more liberal access to counsel.

Another area which has concerned me is the extent to which rights of confrontation and cross-examination are available in proceedings of Government agencies. I am concerned that the Civil Rights Com-

[3] S. Rept. 752, 79th Cong., 1st sess., 1945.
[4] See footnote 2.

mission, for example, does not afford these rights to witnesses. These practices of the Commission were upheld by the U.S. Supreme Court in *Hannah* v. *Larche* (363 U.S. 420). However, Justices Douglas and Black dissented. There, Justice Douglas pointed out that—

> the right to know the claims asserted against one and to contest them—to be heard—to conduct a cross-examination—these are all implicit in our concept of "a full and fair hearing" before any administrative agency (p. 502).

This area is relevant to the subject matter of S. 1666, since it avails an individual little to know the rules and orders of an agency, if he is denied fair procedures in contesting those rules which are invalid or if the rules are insufficient in this regard initially.

These are all matters which we cannot afford to overlook, if we are to hold securely those fundamental rights guaranteed by the Constitution. S. 1666 is a further step in that direction.

The right to freedom of information about Government is an ancient right flowing from the common law, and reserved to the people under the Federal Constitution. Many of the States, by enacting meaningful public information laws, have already demonstrated an appropriate concern for the furtherance of this right. Congress cannot do less. It should do more.

I should like to offer for the record of these hearings the illuminating views of a number of North Carolina editors and publishers who in letters and editorials have commented on this legislation.

I hold, with James Madison that "a people who mean to be their own governors must arm themselves with the power which knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy, or, perhaps both."

Thank you, Mr. Chairman.

Senator LONG. Thank you, Senator Ervin.

Senator ERVIN. I would like to have inserted in the record editorials and letters from my State of North Carolina.

(The documents referred to follow:)

VIEWS OF NORTH CAROLINA EDITORS AND PUBLISHERS REGARDING S. 1666, SUBMITTED BY U.S. SENATOR SAM J. ERVIN, JR.

THE DAILY TIMES-NEWS,
Burlington, N.C., October 19, 1963.

Senator SAM J. ERVIN, Jr.
Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Let me say at the beginning that it is refreshing to see that there are those like yourself who join us in our profession in concern regarding the free flow of news to the public.

I remember well an experience I had back in my reporting days when a decision had been made by our county commissioners regarding a delicate matter which had drawn considerable debate over a period of time.

"Don't say anything about that in the paper, for the public won't understand," said one of the officers of the board to me after the meeting adjourned. Of course, I paid no attention to the request. The story was printed, and such stories always have been printed by our paper, regardless of the many requests we have had during the same period from those in authority.

"The public won't understand" seems to be a pet project in some areas of public authority and responsibility. Yet the public does understand most of the time, and the public reacts, too, when what is understood is interpreted as either right or wrong.

The main thing is that matters of public affairs draw many interpretations. We see, in seeking news as our professional food each day, those who are afraid to talk to us. They fear that they might lose some status with those in authority

over them. There are those who would encourage secret meetings of public bodies, for they feel that "the public won't understand" if a report were made on that meeting.

This Nation, however, has been built to its level today because the people have understood. They have had a free flow of news in most areas of their public environment, and they have reacted positively to challenge and to threat of defeat. All we need to ask ourselves is where would the Nation be today had they not been given a privilege to know—and to react to it in accordance with their own decision. I'm afraid we wouldn't have found our Nation as we have found it today.

Our national news releases often leave much to be desired. We don't want to be subjected to propaganda, but this can happen when handouts in news become so much a part of the news business. Reporters, too, must use some unusual tactics at times in getting at the bottom of a story considered worthy of doing all the digging necessary to get it. And when news is released—and it wasn't intended to be released—a lot of things can happen. This is what is called today news management, or a part of it is so included.

Any measure that can strengthen public information being available to the public is a new mark in keeping the people informed so that they can understand. If this be sidetracked as routine and not timely, then the stronger can come the hold on us all.

Move in this connection in your always wise way, and know in doing it that we are with you. Let me know in any way I might help you.

With all good wishes to you, I remain,

Sincerely yours,

A. HOWARD WHITE, *Editor.*

[From the Mebane Enterprise, Mebane, N.C., Oct. 24, 1963]

YOU AND S. 1666

Hearings will be held on October 28 through 31 before the Judiciary Subcommittee on Administrative Practice and Procedure on a subject which is of the utmost importance to every American citizen. It is vitally so to those of us in the South.

This bill, S. 1666, is being cosponsored in the U.S. Senate by North Carolina Senator Sam Ervin, Jr. It is in accord with Senator Ervin's constant vigil over the rights of the American citizens as he relates to the Federal Government. It has to do with the restricting departments and agencies of the Federal Government from withholding information from the public.

We, of this newspaper, feel deeply that the people in our area of the Nation have the ability and commonsense to make value judgments correctly on any subject if they are allowed to know all the facts of the issues involved. We deplore the idea of dictatorial department chiefs ruling by their own decree what we of the Nation are allowed to know.

The idea that some of these departments have grown so powerful and have developed an aura of omniscience about their operations which immunizes them from the scrutiny of the Congress frightens us. These men of the Congress, some of them, are people who have not sold their birthright of representing us in the Congress and we certainly refuse to approve any action or decree which restricts them from having full access to all the information in every department of our Government.

Yes, we think some of the men there are rooted and grounded in the convictions that some things are forever right and others forever wrong. We feel that these men will not compromise their convictions, and our expressed will, if they know the details of all the issues. They cannot know without access to all the information. With the information available to them, we, at home, have the assurance that the very gates of hell will not withstand the right decisions.

We abhor the principle of withholding information from our people. It is a fallacy to operate on the basis of keeping information from the American public is a safeguard from our enemies. With the many deals going on inside our present administration, soon we will have no enemies but the Republicans and they, like our once external enemies, have the information before our people and many in our Congress.

The "big stick" must be visible to be effective, if we do have any enemies remaining. We urge you to impress your desire upon the committee with letters, calls, and wires to keep public information public.

KINSTON DAILY FREE PRESS,
Kinston, N.C., October 21, 1963.

Re bill, S. 1666.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SAM: Your letter of October 17 and copy of bill, S. 1666, relating to freedom of information from governmental departments have been received.

I am very glad to note that the Senate is taking some definite action which will further protect the rights of the citizens of this country to know what's going on in the various departments of Government.

I agree heartily with the bill that only such information which may be properly classified as secret, as it refers to the safety of this country, should be withheld.

Heads of many of the executive departments in Washington in recent years have shown a decided tendency to abridge the freedom of information and the people's right to know.

I certainly hope the bill, S. 1666, will be enacted and the people's constitutional right to know what is being done in Washington will thus be further emphasized and protected.

With best wishes, I am,
Yours sincerely,

H. GALT BRAXTON, *Editor.*

P.S.—You may use my letter, of course, in any way that you feel is helpful to the cause of freedom of information.

H.G.B.

WILMINGTON, N.C., *October 25, 1963.*

Senator SAM J. ERVIN, Jr.,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: I wish to go on record as being wholeheartedly in favor of the principles and purposes contained in Senate bill 1666.

It is my feeling that this legislation, if enacted, will give the press, radio, and other news media greater opportunity to fulfill their responsibility in reporting to the public on the public's business.

I believe this bill has been exceptionally well prepared and the exceptions set out in it are most agreeable to me. I look forward to its enactment as a major contribution to the cause of freedom of information.

You have my permission to place these expressions in the record. I also want to thank you for your thoughtfulness in sending me a copy of the bill, along with your clear explanation. This is so typical of the great service you are giving your State and Nation.

Enclosed is a tearsheet of an article on the bill which was published on the editorial page of the Sunday Star-News on October 20, 1963.

With kind regards, I remain,
Sincerely yours,

AL. G. DICKSON, *Executive Editor.*

[From the Sunday Star-News, Wilmington, N.C., Oct. 20, 1963]

RECORDS MEASURE FAVORED

SENATOR ERVIN OFFERS VIEWS ON PROPOSAL IN BEHALF OF PRESS FREEDOM

(By Al G. Dickson)

Friday morning's mail brought a letter from Senator Sam J. Ervin, Jr., which serves well as a kind of climax to observance of National Newspaper Week.

Senator Ervin's comment dealt with a bill S. 1666, which he has cosponsored in the interest of freedom of information. This measure was introduced on June 4 and was referred to the Committee on the Judiciary, of which Senator Ervin is a member. Its purpose is to "amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1916 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes."

Here is Senator Ervin's explanation of this commendable legislation:

"Many of the States have a public records statute which gives the citizens a right to inspect public records, and specifies the only information which officials can withhhold. 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. S. 1666 not only would prevent their relying on that act to withhold information, but also from withholding at all unless they specify authority from Congress to do so. To protect information which should be kept secret, the measure makes exceptions for (1) matter exempted from disclosure by stature, (2) matter relating to national defense, and (3) internal agency memorandums relating to adjudicatory and rulemaking matters."

CAN GO TO COURT

Senator Ervin points out that the right of the citizen to Government information is enforced by a provision which allows him to ask a court to order the production of records and information, if they are improperly withheld by an agency.

"It has been truly observed that liberty is wedged in the interstices of procedure. Although S. 1666 does not alter the many other more subtle ways officials can withhold and manage information, this measure, if enacted, should provide some further protections for that ancient right springing from the common law and reserved to the people under the Constitution of the United States—the right to full information about the operations of our Government," Senator Ervin wrote.

He reported that hearings on S. 1666 will be held before the Judiciary Subcommittee on Administrative Practice and Procedure on October 28–31.

Because of his interest in this legislation, Senator Ervin would appreciate comments or suggestion on the bill, accompanied by permission to place those views in the record.

At first glance, this may appear to be a measure in which only the various news media are interested. But that certainly is not the case. This bill, if enacted, will give the public's representatives—the reporters—in Washington and elsewhere throughout the land greater opportunity in fulfilling their responsibility in giving the reading public the news it wants and deserves.

Freedom of information is everybody's business, not just particular interest of a newspaper, radio, or television station. The fact the people's right to know has suffered considerable mistreatment on the level of the Federal Government in recent years is one that should cause concern to every citizen for at least two important reasons.

One of those reasons is the greater freedom of the press is exercised, the better informed will be the citizenry for its responsibility of letting its elected representatives know its opinions and wishes. The other reason is that one of the best means to counter the growth of government, especially on the bureaucratic level, is to be kept informed as to what it is—or is not—doing.

The bill, S. 1666, introduced by Senator Long of Missouri, not only deserves unrestrained public support but proponents should make their views evident at the proper time—during the hearings in Washington on October 28–31.

PARKER BROS., INC.,
Ahoskie, N.C., October 22, 1963.

Hon. SAM J. ERVIN, Jr.,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: Many thanks for your kind letter outlining S. 1666 and your decision to cosponsor. Please mark me down and our entire organization as being 100 percent in agreement with you on this matter.

There is far too much secrecy in government today—from the courthouse to the White House as the stumping speaking phrase goes. And unfortunately the trend seems to grow from year to year all along the line.

This bill appears to be a very worthwhile attempt to help in reversing this unwholesome trend. You are to be commended for your effort in helping in the attempt to have it passed.

In case you have not seen it I am attaching an editorial on this subject from the last issue of Chapel Hill Weekly. To its sentiments we subscribe wholly—in fact wish we had written it first.

Sincerely,

JOE M. PARKER,
Editorial Director, Parker Bros. Newspapers.

[From the Chapel Hill Weekly, October 1963]

A WORTHY BLOW FOR UNMANAGED NEWS

It has been several months since bureaucratic curtain pulling has provoked editors to howl "news management" at the Federal Government, but the necessary irritant persists.

Such an indictment is not the exclusive property of any particular administration. It is the nature of bureaucracy to prefer to wrap its doings in secrecy. Thereby it avoids criticism and interference and justifies the manner in which it operates by claiming that the desired result of its actions demands obscurity.

While justification can be found for concealing the mechanics of fighting the cold war on its military and diplomatic fronts, we have too often seen the concept of guarded information extended into any number of areas in which the knowledge of details was not merely the right but the need of the public at large.

North Carolina's Senator Sam J. Ervin, chairman of the Senate Judiciary Subcommittee on Constitutional Rights, has observed the phenomenon and found it not to his taste at all. He is cosponsoring a bill which specifies what information Government officials may withhold, the authority by which they may conceal it, and what they shall make available to the public. In many ways the bill Senator Ervin advocates resembles public records statutes enacted by a number of States. The Federal Government has never had such a statute, and officials who did not want to publish information hid behind the Federal Administrative Procedure Act. Senator Ervin's bill would amend the act to prevent the practice. Officials would have no authority to withhold information from the public or from Congress, unless the information concerned the national security, unless the right to withhold information is granted by act of Congress, or unless the information is purely a matter of internal administrative procedure affecting no one except officials involved.

Senator Ervin has noted that officials can still make numberless end runs around his bill, if it is passed, but, he notes, "this measure, if enacted, should provide some further protections for that ancient right springing from the common law and reserved to the people under the Constitution—the right to full information about the operations of our Government."

We have had our quarrels with Senator Ervin on other aspects of the U.S. Constitution, but we, along with all the others who have ever sought to learn a needed fact from any agency of the U.S. Government and come away empty-handed in frustration, should pay him full gratitude.

THE HIGHLANDER NEWSPAPER,
Highlands, N.C., October 21, 1963.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter of October 17 in regard to the S. 1666 bill.

My personal feelings in regard to this bill are that our citizens should not only have the right to inspect public records, but should be encouraged to do so if they are interested. It seems to me that a lack of in interest is one of the big problems. A country whose citizens are not interested in what goes on in government, whether it be on the local, State, or National level, is heading for trouble. S. 1666 might be one way of helping to overcome this apathy.

I do feel, however, that information relating to our national defense, or matters exempted from disclosure by statute, and internal agency memorandums relating to adjudicatory and rulemaking matters should be protected.

With kindest regards, and compliments to you on the fine job that you are doing I remain,

Most sincerely,

MARTHA GOODE, *Publisher.*

RUTHERFORD COUNTY NEWS,
Rutherfordton, N.C., October 21, 1963.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: Thank you for your letter and the copy of the freedom of information bill.

Because it concerns the public's right to know as to what its government is doing, I hope that every citizen will be vitally interested in seeing the passage of this bill.

Sometimes this battle for freedom of information appears to be just between the press and the Government. Naturally newspapers feel it is their responsibility to carry on this fight—for the public. And what makes newspapers fight for freedom of information is a public raising questions continuously about their Government. I hope the day never comes when the public quits asking these questions.

Good government comes from an informed electorate. A well informed voter is a product of free education and a free press.

Without government growing larger and more complex, there is a greater need for freedom of information. Should the bureaus and agencies object to your bill, I, and surely others, would become suspicious enough to ask: "If you are carrying out your duties properly and above board, then what do you have to hide?"

I urge that Congress will pass this bill and urge the appeal to all citizens to do likewise in order to open the doors of information to the public as specified in the bill.

Sincerely yours,

T. PARKER MADDREY,
Editor and President.

NORTH STATE GAS SERVICE, INC.,
Forest City, N.C., October 23, 1963.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: Best wishes for the success of S. 1666 which you are cosponsoring.

It seems to me that withholding or controlling of information presents one of the greatest dangers to our form of government. I am glad to see a Senator of your stature taking the lead in a bill that should do much to clarify the situation.

Please do not bother to answer this letter.

Sincerely yours,

JAMES E. BYERS.

MOORE COUNTY NEWS,
Carthage, N.C., October 24, 1963.

SENATOR SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: You may place my views on record as favoring S. 1666.

I commend you and the other sponsors of this bill for your interest and zeal in protecting the average citizen of the United States from being taken over by a dictatorial Federal Government that seems to seek all for itself at the expense of those for whom it was created.

The right to know what any and every agency is doing and why must always remain the right of the people in a democracy. True, there are some things in the national interest which should not be divulged, but who is to determine this? A Democratic administration can call for secrecy "in the public interest," just as a Republican administration might also. Perhaps your clause requiring the justification for certain deletions that must be fully explained in writing, will take care of certain situations, but who in the final analysis will be the judge?

No one bill can cover every situation, but yours is certainly a start. An even better way would be to cut down on the too numerous agencies already in existence.

With kindest personal regards,

Sincerely,

ROBERT S. EWING.

THE MCDOWELL NEWS,
Marion, N.C., October 23, 1963.

Senator SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: As a citizen, I have always believed it to be my right and the right of all other Americans to have available to us full information about the operations of our Government.

As a newspaper editor and reporter, I have become very much aware that this right is often denied, or to say the least, there are frequent attempts by some public officials to deny it. I realize that there is some information which by its very nature must be held in secrecy, but I cannot go along with the withholding of any other information which indeed is public business and therefore should not be handled as private by governmental agencies and officials.

The Congress as representatives of the people, the press which reports to the citizenry, and any member of that citizenry should be protected from such withholding of information.

I believe Senate bill 1666 should help to remedy the situation. I commend you for cosponsoring the bill, which I believe is a very needed measure.

Will you please place my views and my endorsement of S. 1666 in the record at the hearings before the Judiciary Subcommittee on Administrative Practice and Procedure.

Sincerely,

MRS. ROSAMOND L. BRALY, *Editor.*

THE NEWS AND OBSERVER,
Raleigh, N.C., October 21, 1963.

DEAR SAM: Thank you very much for your letter and the enclosed copy of the bill designed to insure the access of the public and press to essential public records.

I agree with you that there has been too much holding of the facts that the people ought to know. I hope that this bill will improve the situation.

With best wishes.

Sincerely,

JONATHAN DANIELS, *Editor.*

GOLDSBORO NEWS-ARGUS,
Goldsboro, N.C., October 18, 1963.

Hon. SAM J. ERVIN, Jr.,
Senator from North Carolina,
Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: By all means I wish to be on the record as favoring S. 1666. I think that the measure would help in guarding the public's right to know and in halting the drift of some Government bureaus to regard themselves as the interpreters of what information should be freely accessible.

Sincerely,

HENRY BELK.

[From the Asheville Citizen, Oct. 23, 1963]

ERVIN JOINS ANTISECRECY FIGHT

As the size of the U.S. Government grows, there is an increasing tendency on the part of some officials to withhold, from the public and the press, information that might be detrimental to the party in power or to the special interests of certain bureaus and agencies. This keeping back of information that ought to be public is damaging to a democracy, which depends on the enlightened opinion of the people.

Therefore, Senate bill 1666, of which Senator Sam J. Ervin is a cosponsor, is a timely and necessary statement of the public's right to full information about the activities of the Federal Government.

This bill would make all governmental activities, records, decisions, orders, and procedures public and a part of the Federal Register. In order to protect material that should be kept secret it makes exceptions for matters specifically

exempted by statute, for information relating to the national defense, and for rulemaking memorandums, etc., within a given department or agency.

While there will still remain some devious methods by which bureaucrats can withhold information that ought to be public, this bill is a clear and necessary assertion of the citizen's constitutional right to have all the activities of his Government brought out into the open. It ought to be adopted.

[From the News-Herald, Morganton, N.C., Nov. 4, 1963]

CURBING GOVERNMENT SECRECY

A growing trend toward secrecy in Government would be rolled back under the terms of a bill being cosponsored in the U.S. Senate by North Carolina's Senator Sam J. Ervin, Jr.

Introduced by 18 Senators, the bill (S. 1666) sets forth in its title its purpose "to clarify and protect the right of the public to information" by means of amending the Administrative Procedure Act.

If enacted, as it should be, the measure would halt much of the needless secrecy which cloaks governmental operations which should be openly performed.

The bill does not attempt to force publication of information which should be protected. It makes exceptions, for example, for matter exempted from disclosure by statute, such as income tax payments; national defense matters, and internal agency memorandums, relating to adjudicatory and rulemaking matters.

Many States have a public records statute which give citizens a right to inspect public records and specifies the only information which officials can withhold. Unfortunately, the Federal Government has no such statute, and in recent years officials in executive departments and agencies have appeared confused as to what authority they have either to give or withhold information.

Senator Ervin explains that "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 pending bill would not only prevent their relying on that act to withhold information but also from withhold at all unless they have specific authority from Congress to do so. The right of a citizen to Government information would be enforced by a provision which allows him to ask a court to order the production of records and information if they are improperly withheld by an agency.

Senate bill 1666 does not alter the many other more subtle ways officials can resort to for withholding and managing information but it should provide some further protections, as Senator Ervin explains, for "that ancient right springing from the common law and reserved to the people under the Constitution of the United States—the right to full information about the operations of our Government."

The public's right to know frequently runs headon into a public-be-damned attitude on the part of a bureaucrat whose predisposition to secrecy has no ground beyond a personal whim. Only when such officials are brought to a realization that in a democracy the public is entitled to have an accounting by the free flow of information that holds no classified status will the galloping spread of secrecy be overcome.

It is too much to hope that the Senate bill can reshape the attitude of all officials. But it should and will set forth ground rules for the well-intentioned but confused agency leaders.

It has been observed that "Liberty is wedged in the interstices of procedure." This new bill will take care of the procedural bottleneck on Government information, and all citizens will be the beneficiaries.

We hope Senator Ervin and other sponsors obtain passage of the worthwhile measure.

[From the Asheville Citizen, Nov. 3, 1963]

PUBLIC IS ENTITLED TO FULL INFORMATION

Citizens of a democracy have a right to know what is going on in their government. In recent years, however, there has been an increasing tendency on

the part of some Federal departments and agencies to withhold much legitimate public information from the press and the people. At present the heads of agencies have almost complete discretion in this regard.

That is the reason why a "freedom of information" bill sponsored by Senator Long of Missouri, Senator Ervin, of North Carolina, and 17 other Senators is needed and should be passed by Congress.

This measure would require Government agencies to—

List in the Federal Register places where the public can obtain information about their activities.

Make available for inspection and copying all final agency opinions and statements of policy.

Keep an index of opinions, rules, and orders (which presumably would be available to the public).

Specify times, places, and procedures for the inspection of records.

Make public the individual votes of members of agencies on issues that come before them.

The measure makes exceptions for (1) records exempted by statute, such as income tax returns; (2) matters relating to the national defense; and (3) internal agency memorandums on rulemaking matters, etc.

The American Government belongs to the people. If democracy is to work, the public should know what policy is on vital issues, how it is decided, who is responsible for it, and other pertinent information. This bill provides the public with an additional guarantee against unnecessary secrecy, which could cover up inefficiency or even dishonesty on the part of Federal officials. Congress should approve it.

[From the Elizabeth City (N.C.) Daily Advance, Oct. 25, 1963]

FREEDOM OF INFORMATION

Sam J. Ervin, North Carolina's fine Senator, who has done a fine job in fighting for the rights of the individual in the civil rights bill before Congress, is also busy with another measure that is of importance to all interested in freedom of information. Senator Ervin has cosponsored a bill dealing with the Government withholding public information.

The right of the citizen to Government information is enforced by a provision which allows him to ask a court to order the production of records and information, if they are improperly withheld by an agency. The Daily Advance endorsed the Senator's effort.

Many of the 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 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 Congress, the press, and the public. The bill sponsored by Senator Ervin not only would prevent their relying on that act to withhold information, but also from withholding at all unless they specify authority from Congress to do so.

To protect information which should be kept secret, the measure makes exceptions for (1) matter exempted from disclosure by statute, (2) matter relating to national defense, and (3) internal agency information memorandums relating to adjudicatory and rulemaking matters.

It has been truly observed that "liberty has been wedged in the interstices of procedure." Although the Ervin bill does not alter the other more subtle ways officials can withhold and manage information, the measure, if enacted, would provide some further protections for that ancient right springing from the common law and reserved to the people under the Constitution of the United States—the right to full information about the operations of our Government.

The public does not expect the Government to reveal information that would be detrimental to the country's safety. But the public does want, and deserves, to be kept advised about what is being done. With that thought in mind we hope that Senator Ervin's bill will receive favorable action.

GREENSBORO DAILY NEWS,
Greensboro, N.C., October 29, 1963.

Hon. SAM J. ERVIN, Jr.,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ERVIN: This will acknowledge your letter of October 17 with enclosure of Senate bill 1666.

I am sure we have a mutual interest in the matter with which this bill deals. In fact, following your letter, we carried editorial comment on this measure.

Although it may be that you have already seen our editorial, I am enclosing a tearsheet in order that you may have it for your files or any other use to which you wish to put it.

With personal good wishes, I am,

Sincerely.

H. W. KENDALL, *Editor.*

NORTH CAROLINA PRESS ASSOCIATION,
Wilson, N.C., October 29, 1963.

Senator SAM J. ERVIN,
U.S. Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: The press of North Carolina is watching with interest the progress of bill S. 1666, which should be called an amendment to "protect the people's right to know."

In this day of a growing trend toward news management and concealment, this bill makes available to the public the information it should know about its Government, and protects information dealing with security and the other designated exceptions.

The people place their confidence in the Congress and rightly. As the present Administrative Procedure Act is written and interpreted, information is withheld from the Congress, the press, and the public, possibly because the Federal Government does not have the very amendment now being considered.

As president of the North Carolina Press Association, and as a firm believer in the light of publicity as a preserver of our liberties, please convey to the committee the gratitude of a people who believe in the democratic processes of government. And to you our eternal thanks, for your long record of public service.

Sincerely.

ELIZABETH G. SWINDELL, *President.*

[From the News of Orange County, N.C., Oct. 24, 1963]

WOULD AID "RIGHT TO KNOW"

By the very nature of its size the Federal Government is progressively becoming a creature farther apart from the people it is intended to serve.

The people's "right to know," as noted in the U.S. Constitution, is being thwarted daily by even well-meaning Federal officials who withhold public information and public records from the press and from interested citizens. Though many States have public records statutes that give citizens access to this information, there is no such law existing in the Federal Government, to implement the constitutional provision.

Now a bill has been introduced in the U.S. Senate to clarify and protect the right of the public to this information. It would end the confusion as to what authority Government officials have to give or withhold public records and information.

REQUIRE CONGRESS TO EXCEPT * * *

It would, with certain logical exceptions such as the interests of National Defense and specific purely internal agency memorandums, make such information accessible to the public unless Congress subsequently granted authority to withhold it. In addition a provision is included to permit a citizen to gain a court order for the production of records and information which may be improperly withheld.

The right to full information about the operations of the Federal Government has never been more important than today. Senate bill 1666, upon which hearings

will be conducted this coming week before a Senate Judiciary Subcommittee, will put this right into law.

In this Congress which has been so much concerned with equal rights for all citizens, the enactment of this proposed public information law takes on additional importance.

Senator ERVIN. I want to commend the chairman of this committee for the introduction of this bill and for the very fine fight that he has been making for the right of the people of America to know what their Government is doing.

Senator LONG. Thank you, Senator Ervin. I am certainly grateful to you for being here this morning with your fine statement, which will be presented to the full committee. I appreciate very much that you are one of the cosponsors of the bill.

Before we proceed with our next witness, I have here statements of Senator Lee Metcalf, Senator Birch Bayh, and Senator Gaylord Nelson, which I would like to place in the record at this point.

(The statements referred to follow:)

STATEMENT OF SENATOR LEE METCALF, U.S. SENATOR FROM THE STATE OF MONTANA

It is a pleasure to support, as I have cosponsored, this bill to further safeguard the right of our people to know about the public business.

S. 1666 would make information in Government agencies more readily available and would sharply define the areas in which and the purposes for which information may be withheld.

The bill would require each agency to publish in the Federal Register descriptions of its organization, general policy statements, and the text of its rules or statements on its operational procedures. With certan exceptions, agency opinions, orders, policy statements, and interpretations would be open to the public. So would the individual vote of each member in every agency proceeding.

Exceptions include statutory exemptions, such as trade secrets, or where the records involve national defense or when they are internal memorandums relating to the consideration and disposition of adjudicatory and rulemaking matters.

It is unfortunate that that law on the books which is closest to being a Federal public information statute has in the past been used to suppress information.

Section III of the Administrative Procedure Act of 1946 (5 U.S.C. 1002) is entitled "Publication of Information, Rules, Opinions, Orders, and Public Records." But it is shot through with exceptions, qualifications, and limitations. These have led to claims of authority for withholding public information. This section begins with broad exceptions, including: "to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to the internal management of an agency." The statute requires agencies to make available to the public all final opinions or orders in the adjudication of cases "except those required for good cause to be held confidential." It further requires that matters of official record be made available to persons "properly and directly concerned except information held confidential for good cause found."

Not only are these words and phrases ambiguous, but their definition varies from agency to agency because the existing "Manual on the Administrative Procedure Act," issued by the Attorney General, authorizes each agency to determine what functions require secrecy in the public interest.

The records of this subcommittee and of the Freedom of Information Subcommittee of the House Committee on Government Operations are full of allegations that withholding of a mass of records, documents, and other information has been justified by the words "requiring secrecy in the public interest."

Not long ago the White House ordered reversal of a decision by the National Science Foundation that it would not be "appropriate" to disclose cost estimates submitted by unsuccessful contractors in connection with the multibillion dollar Mohole project.

The manual suggests that the words "relating to the internal management of an agency" might include budget procedures and personnel and employement matters. It seems to me that plans for spending our tax dollars are certainly the concern of every citizen. And while I would oppose release of certain per-

sonal information about Government employees, I believe the public has a right to know who they are and how much they are being paid. Yet a few years ago the Civil Service Commission Chairman declared that names and salaries of Federal employees would be given only to those the Commission felt would use the facts for a "reasonable" purpose.

An example of an extreme interpretation of the phrase "relating to the internal management" was the refusal on these grounds by the Navy Department, since reversed, to provide a copy of a telephone directory published by the Navy Ordnance Laboratory to a trade publication.

Several years ago, the Comptroller of the Currency refused to allow a citizen to examine certain blank forms which must be filled out to apply for organization of a national bank. The reason given was that the citizen had not placed a "legitimate" request. This may have been a variation of the word "properly" in the present law. After several months of correspondence, the Comptroller of the Currency finally allowed this man to look at some blank forms used by his agency in the conduct of public business.

"Required for good cause to be held confidential" or "held confidential for good cause found" are other catchall phrases. As interpreted by the manual, "good cause" can be either an agency rule issued in advance, or it may be an ad hoc determination in a specific case. As they have been interpreted in some agencies, if none of the other broad exceptions and qualifications work, a Federal employee may decide that his own reason for withholding information from the public is a good one.

This bill would go a long way toward reestablishing section 3 of the Administrative Procedure Act as a definite public information statute. It would prohibit use of the law to restrict information. It provides that failure to publish or make available the required information will constitute a cause of action in a Federal district court, thereby creating a public right to information. And it reminds those we hire to transact our public business for us that they have an affirmative duty to provide information basic to democratic government.

The great strength of democracy is that it does not operate behind closed doors. We have delegated to Government agencies authority to spend billions of dollars for us each year. The work of Federal regulatory agencies involves the expenditure of billions more by consumers for light, heat, transportation, communications, securities, and in trade. To assure prudent expenditure of this money, we must supervise the work of our public servants. Supervision must be based on knowledge. A press release is not enough. The records kept by our public agencies are public records. The orders and rules, opinions, and decisions of our regulatory agencies are public business. And public records they should be.

STATEMENT OF SENATOR BIRCH BAYH, U.S. SENATOR FROM THE STATE OF INDIANA

Mr. Chairman, a free flow of information is our best guarantee for economy and fairness in Government.

This is true in every branch of Government as well as at every level. It is especially true in regard to the so-called independent regulatory and executive agencies that exert great influence in such vital areas as transportation, trade, fuel, power, communications, banking, small business, housing, commerce, and securities.

The operations of these agencies affect us all. Therefore, it is disappointing to learn of many examples in recent years where these agencies appear to have withheld news and information.

Since most of these agencies are arms of the Congress, created to fill in the details of Government, the responsibility for improving this situation lies with us. Article I, section 5, of the Constitution states that each House of the Congress shall keep a published record of its proceedings. I interpret this to include the agency "arms" of the Congress as well, especially since the representation of the American people in the agencies is far less direct than in the Congress.

In this context of less representation we can see the clear need for a free and independent press that can work unobstructed in relaying information to the people. This is why I would support S. 1666, the freedom of communication bill, even if there were no examples of the withholding of news.

I support this bill even though a recent survey of Washington correspondents by Newsweek magazine reported that the Kennedy administration gave reporters

more access to news than previous administrations. As a matter of fact, my staff asked Washington-based Indiana correspondents how they felt on this subject, and they agreed with the Newsweek survey.

We have two constitutional matters in this bill to which we must pay equal attention. The first, and most obvious, is the right of the American people, through the press, to freedom of information. The second is the right of each individual to privacy. We must not be so zealous in guaranteeing freedom of information that we tread on individual rights and call upon an agency to give out personal information that clearly is not in the public interest.

In addition to the broad scope of the problem of a free flow of information, we need to pay attention to making public the procedures of the agencies. The publication of records, organization, and processes would help those who need to appear before the independent agencies but do not know how to go about this.

Just last week, a constituent of mine wrote that he overpaid his income tax by $1,700 a few years back and that the deadline for recovering that money now had elapsed. I have introduced a private bill for his relief. But the point I want to bring out is that this man was dealing with the Internal Revenue Code, a fairly familiar but highly complicated code. If this happens in a code that is more familiar than most, then what can we expect in regulatory agencies whose complex procedures baffle even experts?

It is my strong hope that S. 1666 will take the opinions of experts, distill them, and place them at the disposal of private citizens and attorneys who have business to do with the regulatory agencies but who may be blocked by a lack of knowledge.

Statement of Senator Gaylord Nelson, U.S. Senator From the State of Wisconsin

Mr. Chairman, I am pleased to be a cosponsor of bill S. 1666 which I believe will strengthen one of our basic American rights—the people's right to know what is going on in their Government.

This is a right which is sometimes ignored by elected or appointed officials who become preoccupied with the challenges of their jobs and forget the fact that they must be at all times accountable to the people for everything they do.

It is a right which we have reemphasized in the State of Wisconsin, with the passage of one of the strongest antisecrecy statutes in the Nation. When I was Governor, the legislature enacted a simple but sweeping law which declares that every public body—every city council and county board of supervisors and school board, the legislature and all its committees—must meet and vote in public and must make all its records available for public inspection.

The strength of the Wisconsin law is that it opens the doors, by law, and then carefully defines those rare occasions when the doors can be closed. This is crucial. An antisecrecy statute cannot leave the question of when the doors shall be opened or closed to the very officials who have a stake in secrecy. It must be clear cut and precise.

If it does allow secrecy in broad, general cases—for example, "when national security requires it"—then the agency or official involved should be required in some way to prove in writing just why the national security does require secrecy.

So, in a general way, I would suggest that any bill which the subcommittee agrees to be carefully drafted so that it does not contain any general language which can be used as an excuse for secrecy. And I would urge that you keep before you the basic principle that the burden for justifying secrecy rests with the official or agency involved. The newspaper reporter, or the attorney for an affected business or individual, or the private citizen trying to gather facts, should not have to prove his right to governmental information. The law should declare his inalienable right to have such information, promptly, and then, when necessary, specify those few instances where responsible government does require the withholding of information.

Secondly, I would urge that this bill designate some office or some official to whom an aggrieved party could turn in those cases where secrecy is invoked unjustifiably.

In gathering information on government, a crucial element is time. If news media are to inform the public on swift moving events, they need access to information immediately. An agency or a bureaucrat which knows that the only recourse is a lawsuit can merely stall until the information is no longer

of any value to the reporter, then grant the request and eliminate any basis for a lawsuit.

I would urge that we designate someone to whom the press or the public could turn immediately for an interpretation of the law, someone who could open the doors at once when some overzealous or frightened official slams them shut without justification.

To avoid secrecy in government, we must have a continuing review of the subject. If we designated an official or an agency to receive complaints, this office could also provide this continuing review. This office should be directed to make annual reports to a congressional committee, detailed instances where unjustified secrecy was charged and the explanations offered by the agencies involved.

This would give the Congress itself an opportunity to subject the excuses for secrecy to detailed scrutiny. This should provide an effective deterrent to misguided secrecy, while still allowing agencies to withhold information in those rare instances where they are prepared to justify it.

I believe that bill S. 1666 represents a major step forward in protecting people's right to know. With some slight modifications, I believe it could be made even more effective and I believe the citizens of the Nation would quickly feel the benefits of real open-door government.

The Wisconsin idea in government, which has become nationally famous, is that government must constantly remind itself that it exists to serve the interests of all the people. Open meetings, open debates, open records are a vital part of the Wisconsin idea. We would like to see this same idea established as national policy.

THE STATE OF WISCONSIN, OFFICE OF ATTORNEY GENERAL, MADISON

(December 30, 1960)

SYNOPSIS OF OPINIONS INVOLVING ANTI-SECRECY LAW

For some time now this office has been receiving requests for interpretation of Wisconsin's Anti-Secrecy Law. Many of such requests have come from private persons. While this office does not ordinarily advise such persons, I have answered many of these requests and explained my views in regard to the proper interpretation of this law because I believe so strongly that there should be no unnecessary secrecy in government. This problem is of such great importance that I have decided to summarize the views which I have expressed on this subject and issue a formal opinion which will be published with our other formal opinions so that it will be available to district attorneys, city attorneys, and attorneys for school boards and other public agencies, who may be called upon to advise public bodies regarding the necessity of conducting public business in open meetings which interested members of the public can freely attend.

The Wisconsin Anti-Secrecy Law is found in sec. 14.90, Wis. Stats. That statute reads as follows:

"14.90 Open meetings of governmental bodies. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.

"(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind shall be introduced, deliberated upon or adopted at any closed executive session or closed meeting of any such body.

"(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employee or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employee or person charged, investigated or otherwise under discussion;

"(c) Probation, parole, crime detection and prevention;

"(d) Deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive, or bargaining reasons require closed sessions;

"(e) Financial, medical, social or personal histories and disciplinary data which may unduly damage reputations;

"(f) Conferences between any local government or committee thereof, or administrative body, and its attorney concerning the legal rights and duties of such agency with regard to matters within its jurisdiction."

By this statute the Legislature has declared that it is the public policy of this State that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business. The statute requires that all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind may be introduced deliberated upon, or adopted at any closed executive session or closed meeting of any such body. There are certain specific exceptions. Public agencies may hold closed meetings in the following situations:

(1) The deliberation after hearing or trial by a judge, jury, or administrative agency;

(2) Where personnel problems are discussed, unless a public hearing is requested by the employe concerned;

(3) Certain areas of crime detection and prevention, and probation and parole matters;

(4) Sessions where business matters which for competitive or bargaining purposes require closed session;

(5) Deliberations or negotiations on purchasing of public property or investing public funds; and

(6) Conferences or information passed between a public agency and its legal counsel.

All meetings of all public agencies must be conducted in public, except where the subject matter falls squarely and clearly within one of the above exceptions. Any doubt whether a matter falls within one of these exceptions should be resolved in favor of open, public meetings. Any public agency, finding it necessary to conduct any business in private, should first make a finding of fact, resolution or statement that matters to be discussed will fall within one or more of these exceptions, before going into executive session. Matters not falling within the exceptions should not be discussed or acted upon until the meeting has been opened to the public.

There is no statutory penalty for violation of the Anti-Secrecy Law. It is merely an admonition to public agencies that they shall conduct their meetings in public so that the public and the press may attend and be informed. In all probability, however, a person improperly denied access to a meeting which should be open to the public could apply to a court for a writ of mandamus to require the public agency to open its meetings to the public.

REGENTS AND FACULTY OF THE UNIVERSITY OF WISCONSIN

In applying the Anti-Secrecy Law we have given the opinion that the meetings of the Regents of the University of Wisconsin must be open to the public. We have also concluded that the debates of the University faculty on the subject of compulsory ROTC must be open to all and, since the statutes clearly constitute the faculties of the several colleges of the University as the governing bodies of these colleges, it is our opinion that all faculty meetings must be open.

In a recent opinion to the University Board of Regents we said that the exception relating to considering employment, dismissal, compensation of public employees, etc., applies only where a specific employe is being discussed or considered, relevant to one of the items set forth in sec. 14.90(3)(b), Wis. Stats. This exception does not apply where personnel or management policies are discussed generally. The purpose of the exception is to protect a particular employe who is being considered or discussed and not to protect the public agency involved. We advised that if the Dean of the Medical School had resigned and the only question to be discussed was whether to retain him in employment, then the meeting could be closed to the public, after the board had made the necessary

finding or declaration on the record to show that the subject matter would come within the exception. If, on the other hand, the resignation or continued employment of the Dean was merely incidental to the policy problems of the Medical School administration and recruiting, then the meeting should be open to the public. The mere fact that items of public policy or future personnel relations are to be discussed is not a sufficient reason for a secret meeting. It is, in fact, a reason for holding an open meeting.

CITY COUNCIL

Likewise the Anti-Secrecy Law requires the meetings of a city council to be open to the public. This requirement is also specifically made by sec. 62.11(3)(c), Wis. Stats. It is also our opinion that so-called "informal" meetings of a city council must be open to the public, unless the subject matter thereof falls squarely within the language of one of the exceptions of the Anti-Secrecy Law. Likewise special meetings of a city council must be open to the public. Section 62.11(2), Wis. Stats., requires that six hours' notice of special meetings be given. Any device to give this notice in such a way that the public and the press are not able to attend would be contrary to the public policy declared by the Legislature in the Anti-Secrecy Law. The City Council of the City of Sheboygan has solved this problem by adopting a rule that notices of a special meeting shall be served upon representatives of the press in the same manner as they are served upon council members. I believe this is a good practice in keeping with the purpose and intent of the Anti-Secrecy Law.

JOINT SEWERAGE DISTRICT

We have expressed the opinion that a joint sewerage district cannot hold secret meetings. Section 144.07(4)(d), Wis. Stats., provides that the commissioners of a joint sewerage district shall proceed as a common council. As pointed out above, the meetings of a common council are required by sec. 62.11 (3)(c), Wis. Stats., to be open to the public. It follows that meetings of a joint sewerage district are likewise required to be open to the public. Also, the minutes of these meetings are open to public inspection as provided by sec. 18.01(2), Wis. Stats.

COUNTY BUREAU OF PERSONNEL

We have also considered the following problem: A County Bureau of Personnel had prepared a survey report on salaries and job qualifications. This report was to be discussed at a meeting of the personnel committee. Questions were asked whether such a meeting must be open to the public under sec. 14.90 Wis. Stats., and whether the report itself is a public record under sec. 18.01, Wis. Stats.

As to the first question, it is clear that there is no exception in the law which applies to compensation of public employes. The exception which is most closely related to compensation is the one that appears at sec. 14.90(3)(b), Wis. Stats.:

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;".

It is the opinion of this office that the purpose of this section is to protect *individual* public employes so that reports as to conduct, compensation of an individual, charges against him, etc., can be discussed privately in order that there may be no damage to reputation which could result if unsupported assertions were made in a public meeting.

Our belief that this is the intent of the exception is further fortified by the additional proviso that an open meeting may be requested by the employe or person charged, investigated, or otherwise under discussion. In short, it is our opinion that this exception is a shield, not a sword, and that its purpose is to protect an individual employe and is not to be used for the concealment of information or to prevent employes as a group from knowing what personnel or compensation policies are being considered by the county board of supervisors or its committees.

Under certain circumstances I believe that a municipal board could close the meeting if it were to make a finding of fact that its actions in a closed meeting come squarely within the exception. For example, subsec. (3)(d) of sec.

14.90, Stats., provides that a closed meeting may be held when "conducting other public business which for competitive or bargaining reasons require closed sessions;". In the event the board of supervisors was conducting labor relations negotiations and a report had been submitted to its regarding wage adjustments or inequities and the board wish to give its private consideration to the report prior to a public discussion or bargaining session, it is my opinion that the exception would apply. In any event, we have advised other state and municipal boards that prior to going into a closed session they should in a public meeting make a finding of fact that the matter to be discussed is one that comes within the exception and state the facts that would qualify a closed meeting.

For example, we have given an opinion to the faculty committee of the University of Wisconsin that the meeting held to consider whether intercollegiate boxing was to be abolished must be an open meeting. The faculty committee members informed us that part of the matter to be discussed was the medical history and records of the University boxer who died following an intercollegiate boxing match. The committee was advised that a closed session could be held for the purpose of this discussion but that prior to closing that portion of the meeting it should go on record stating that the medical history of the person involved would be discussed in the closed session.

We also concluded that the survey report prepared by the County Personnel Bureau was a public record under sec. 18.01 (1) and (2), Wis. Stats.

SCHOOL BOARDS AND COMMITTEES

We have also advised that all meetings of a school board and the meetings of its committees must be open to the public, even where preliminary matters are being discussed. Similarly we have said that a meeting to discuss generally the salaries for teachers should be open to the public. The provisions of sec. 14.90(3)(b), Wis. Stats., which provide that there may be closed executive sessions, refer to individual cases and do not give the right to a public body to close the meeting where salary schedules in general are being discussed.

Very truly yours,

JOHN W. REYNOLDS,
Attorney General.

Caption: Under sec. 14.90, Wis. Stats., all meetings of all public agencies must be conducted in public, except where the subject matter falls squarely and clearly within one of the statutory exceptions. Any doubt whether a matter falls within one of these exceptions should be resolved in favor of open, public meetings. Any public agency, finding it necessary to conduct any business in private, should first make a finding of fact, resolution or statement that matters to be discussed will fall within one or more of these exceptions, before going into executive session. No matters, not falling within the exception, should be discussed or acted upon until the meeting has been opened to the public.

Senator LONG. Our next witnesses are Eugene S. Pulliam, of the American Newspaper Publishers Association, and I understand that Senator Hartke is with him and we will ask Senator Hartke if he will introduced him to the committee.

Senator HARTKE. Mr. Chairman, I would like to introduce to you Mr. Eugene Pulliam, Jr., who is the editor of the Indianapolis News and who is also one of the outstanding newspaper people in the State of Indiana and a very good friend of mine. I think that you will find his information very enlightening and very educational.

Senator LONG. Thank you, Senator Hartke.

With Mr. Pulliam we have Mr. Creed C. Black, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, and a distinguished journalist.

We have brief biological sketches of both Mr. Pulliam and Mr. Black which we will insert in the record at this point.

(The sketches referred to follow:)

EUGENE S. PULLIAM, JR.

Born: Kansas, 1914.

Education: A.B., DePauw University, 1935.

Experience: Reporter, United Press (Chicago, Detroit, Buffalo bureaus), 1935–36; news editor, radio station WIRE, Indianapolis, 1936–41; city editor, Indianapolis Star, 1946–48; Indianapolis News, 1948 to present.

Member: Central Newspapers, Inc., American Society of Newspaper Editors, Board for Fundamental Education, Associated Press Managing Editors Association, Delta Kappa Epsilon, Sigma Delta Chi, Rotary Club, University Club.

Coauthor of textbook.

Served as Lieutenant, U.S. Naval Reserve, 1942–46.

CREED C. BLACK

Born: Harlan, Ky., 1925.

Education: B.S. with highest distinction and honors in political science, Northwestern University, 1949; M.A., University of Chicago, 1952.

Experience: Reporter, Paducah (Ky.) Sun-Democrat, 1942–43; copy editor, Chicago Sun-Times, 1949, Chicago Herald-American, 1950; editorial writer, Nashville Tennessean, 1950–57, editor, 1957–59; vice president and executive editor, Savannah (Ga.) Morning News and Evening Press, 1959–60; Washington (Del.) Morning News and Evening Journal, 1960 to present.

Served with 100th Infantry Division, U.S. Army, World War II—decorated, Bronze Star.

Member: National Conference Editorial Writers, American Society of Newspaper Editors, Sigma Delta Chi, Kappa Tau Alpha, Rotary, Wilmington Country.

STATEMENT OF EUGENE S. PULLIAM, ASSISTANT PUBLISHER, THE INDIANAPOLIS STAR AND NEWS, ON BEHALF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; ACCOMPANIED BY CREED C. BLACK, VICE PRESIDENT AND EXECUTIVE EDITOR, THE WILMINGTON MORNING NEWS AND EVENING JOURNAL, ON BEHALF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

Senator LONG. Were you intending to proceed first, Mr. Pulliam?

Mr. PULLIAM. Yes, Mr. Chairman, if I may.

Senator LONG. You may proceed, Mr. Pulliam. We will be happy to hear you.

Mr. PULLIAM. My name is Eugene S. Pulliam. I am assistant publisher of the Indianapolis (Ind.) Star and the Indianapolis News. I am appearing today on behalf of the American Newspaper Publishers Association, as a member of the ANPA Federal Laws Committee.

The ANPA is a nonprofit trade association of daily newspapers with more than 870 members having about 90 percent of the total daily newspaper circulation in the United States.

I am testifying for the ANPA today on bill S. 1666 which would amend section 3 of the Administrative Procedure Act entitled "Publication of Information, Rules, Opinions, Orders, and Public Records."

Mr. Chairman, Senator Ervin has already said much of this, and it would be a little forward of me to repeat what has been put in the record already, and said better than I could say it; but if I may proceed, I shall although I may leave out some of this.

The ANPA strongly favors enactment of this legislation.

Our association, through both Democratic and Republican administrations, has been concerned with the increasing secrecy which surrounds many activities of Government departments and agencies, and the resulting difficulties which newspaper reporters face in keeping

the public informed at all times about how public servants are conducting the public's business, and how they are spending the public's money, your money, and my money to be specific.

The Administrative Procedure Act, as Senator Ervin has already said, governs the conduct of Federal regulatory agencies. It resulted from complaints of arbitrary, capricious, and oppressive action by a host of these more than 100 agencies. The act itself represents a long period of study; it contains many compromises and generalities and some ambiguities and it is full of uncertainties, especially in its application to public inspection and public information.

One of the primary purposes of the act was to prevent Government agencies from imposing secrecy on administration actions. However, it has been interpreted to mean that it grants these public servants the authority to keep information hidden not only from the public but facts from the Congress as well.

Now, this phraseology is repetitious, but according to the present act, information can be kept secret "in the public interest," or for "good cause found," or because it relates to "internal management." Matters of "official record" may be available only to "persons properly and directly concerned."

As far as the ANPA has been able to ascertain, there are no court decisions on what constitutes "matters relating solely to the internal management of an agency," what are matters of "official record," or what is "good cause" for holding confidential such matters.

And what does the phrase "persons properly and directly concerned" mean? Does that include or exclude the public or a newspaper reporter? Personally, I think any citizen is "properly and directly concerned" in affairs of his Government. The trouble is that most agencies don't think so, as testimony before congressional committees has shown. And furthermore, the decision as to whether a person is properly and directly concerned is left, not to the Congress, not to a court, not to a citizen but to the agency which becomes both judge and jury.

Every newspaper in the United States of which I have any knowledge that is worth its salt has had some problem in connection with access to the kind of Government information which properly should be available to the public. Newspaper editors and reporters have no rights or privileges in this particular area beyond those of any other citizen. But it's the nature and necessity of our business and profession to constantly pursue the various types of nonsecurity Government information—and we emphasize "nonsecurity." Our interest is in serving the public by making available information our citizens must have so that they can express intelligently their views on the operations of their Government.

This, incidentally, isn't a matter of us wanting to sell more papers. There's nothing more deadly—or as little read—as much of the news of bureaucratic government. We can fill our columns with much more interesting fare if we so choose.

As a matter of fact, several Senate and House committees are making much more interesting news today, more interesting than what will be heard here and which will hit the headlines.

But this information should be reported if we are to have an informed society. And the newspaper is the only medium in this

country which makes available in lasting printed form the necessarily lengthy and informed details about the operation of the biggest business in the world, the U.S. Government.

As Senator Ervin has already said our country was born out of the concept of the right of our people to know what their Government is doing and why. That concept assumed that an informed citizenry would be better able to govern its own affairs. We believe that concept should not be forgotten and we believe that the ever-increasing number of bureaucratic agencies pays only lipservice to that concept, that some agencies—not all, but some—have tried to cover up their own maladministration, claiming that to give the public such information would affect our national security. This often is another way of saying that someone's feelings might get hurt. It's absurd, but it has happened before and probably will happen again.

What are some instances of withholding information from the public?

In his memorandum of August 12, 1963, on S. 1666, Senator Long related some instances where information has been withheld from the public under the excuse that it was "submitted in confidence." These instances are:

A list of private offices rented by the Federal Government in Philadelphia was denied the public because the information from the landlords was confidential.

The names of persons granted the privilege of a Federal export license are withheld because the information filed to qualify for the privilege is "submitted in confidence."

Details of compromise settlements for liquor law violations were covered up because they involved material of a secret nature.

A list of military installations where liquor could be sold by the bottle to servicemen was withheld because it involved information of a personal nature.

We cite additional examples:

The Defense Department kept the press away from the Pacific test site when atmospheric nuclear testing was resumed in 1962. (Source: Moss Subcommittee on Government Information.)

Only after the Moss subcommittee intervened did the Rural Electric Administration disclose applicants' names, amounts, and purposes of loans it makes from Federal tax funds.

The Board of Army Engineers holds its meetings behind closed doors and casts votes on important projects in secret. This agency of the U.S. Army passes on hundreds of millions of dollars worth of local river and harbor improvement subprojects which the Federal Government finances. (Source: House Government Information Subcommittee.)

Officials of the Federal Public Housing Authority refused to make public a review of the Denver Housing Authority. As a result of intervention by the House Government Information Subcommittee, the head of the Housing and Home Finance Agency, which has responsibility for the PHA, promised to make the survey public as soon as it becomes "an official record" under Federal laws. (Source: Speech by Representative Moss, October 9, 1963, to County Supervisors Association of California.)

When Senator Williams of Delaware referred to the Agency for International Development a report which charged that under our foreign aid program we were furnishing gasoline for use by Soviet planes flying to Cuba, he received a reply from Mr. David E. Bell, the Administrator of the foreign aid program, denying the allegation. However, according to Senator Williams, the reply he received from Mr. Bell was marked "secret" and could therefore not be made public. (Source: Congressional Record, Sept. 9, 1963, p. 156331.)

Incidentally, I have another collection of instances here, if any of you want to ask some questions about them later.

It is obvious from the above incidents that information withheld affected many Americans in all geographic areas, not alone in Washington, D.C.

Bill S. 1666 is a step in the right direction to put a stop to the withholding of information by Government agencies.

First, it would call for publication in the Federal Register, by each U.S. agency, of places where the public may get information concerning it, the purposes of the agency, the general policy. Next it would make available for reading or copying, final agency opinions, policies, and decisions. Third, it would require an index of opinion, rules, orders, etc., and deny the agency the right to use any order not so listed. It would force agencies to specify times, places, and procedures for inspection of records, and, lastly, require them to make public individual votes of commission or agency members on decisions.

District courts, under the bill, would be granted authority to order the production of improperly withheld records by agencies. We believe that the clause referring to legal recourse to district courts should be as strong as possible. Legal recourse, we believe, should not only include "agency records" but should apply equally to agency opinions and rules, or to agency proceedings, including the individual votes of each member. This right of legal recourse to the district courts should obtain not just for newspapers or their reporters, but for all citizens.

All this may sound wordy and complicated, but the fact is that Federal agencies now can deny almost anyone access to many decisions, facts, and votes. The devious means of concealment used are in many respects almost beyond belief. Newsmen trying to pry facts out of Government agencies are stymied repeatedly by the incredible maze, the evasions, the absurd labels of "confidential" attached to the most routine files.

Should this law be enacted by Congress, and we certainly hope it will, such enactment would not be a victory for the press, but for the public which the press tries to serve. The news media are simply channels to information which our people need to know.

As Senator Long said in his memorandum of August 12, the history of bills embodying the principles of S. 1666 shows a turbulent and fruitless past. Just for example, I dug out of my files a survey conducted by this same Senate Judiciary Committee during the 86th Congress. The subcommittee was headed by the late Senator Thomas C. Hennings, Jr. It concerned "withholding of information from the public and press" and the committee print, which I still have, ran to 706 dreary pages. This wasn't testimony. This was simply various Government agencies explaining what they had withheld and why.

Typical was the response of the Department of Agriculture. After spending one paragraph declaring that the Department of Agricul-

ture followed an "open door policy of making all information possible available except where legislative restrictions forbid," the Under Secretary spent 28 pages—not paragraphs, mind you, 28 pages in very small print listing all the regulations, orders, directives, and statutes which were used to withhold information. The same sort of stuff came from 48 other major departments and agencies.

Again this isn't just the problem of a newspaper reporter trying to get information. These agencies withhold information not only from newspapermen and the general public, but from the Congress itself. I am sure you are aware of it but I would like again to call your attention to the so-called Porter Hardy amendment which has been in and out of mutual security or foreign aid bills for the past 4 years .

This amendment, basically, attempts to guarantee that the Congress and the General Accounting Office will be given access to information relating to the expenditure of funds in the foreign aid program. To me, this illustrates bureaucratic insolence of the worst sort, when the Congress must pass specific legislation in order to obtain information about the spending of funds which the Congress itself authorizes

This kind of past experience indicates there will be loud objections to your legislation from the bureaus and departments and commissions and agencies.

When they start to complain to you—as they undoubtedly will—may I respectfully suggest that you quote to them a statement the President of the United States made before he was a nominee for that office and repeated after his election:

> * * * within the rather narrow limits of national security the people of the United States are entitled to fullest possible information about their Government—and the President must see that they receive it.

I am hopeful the legislative branch will help the executive branch carry out the President's pledge.

The ANPA is confident that passage of this bill will have a salutary effect here in Washington and throughout the country. It will demonstrate the active interest of the Congress in a free flow of information to the American people, it will encourage more active participation in Government by the American people, and it will say to Government agencies that the Congress of the United States which provides funds for their operations wants its constituents to know how these funds are being spent.

The ANPA respectfully urges approval of the bill now before your subcommittee.

Thank you.

Senator LONG. Thank you, Mr. Pulliam. Our staff members, I believe, will want to ask some questions of you.

I have a message here from Senator Bayh. The Senator was flying back from Indiana to be with us here this morning. He is one of the very valued members of this committee and one of the sponsors of this bill, but he was grounded at Morgantown, W. Va., and has been unable to get here, and he wanted me to express his regrets at not being able to be here at this time. He had hoped to meet with you.

Mr. PULLIAM. Thank you, Mr. Chairman. I talked to him from his office, and I asked him what he was doing campaigning in West Virginia. [Laughter.]

Senator LONG. I understand, Mr. Black, that you desire to make a statement now before we begin questioning.

Mr. BLACK. Yes, and we might answer the questions together, if that is satisfactory.

Senator LONG. Yes. We will be happy to hear your statement.

Mr. BLACK. Thank you, Mr. Chairman.

My name is Creed C. Black. I am vice president and executive editor of the Wilmington (Del.) Morning News and Evening Journal. I am appearing today as chairman of the Freedom of Information Committee of the American Society of Newspaper Editors.

First, I want to endorse the comments Mr. Pulliam has just made on behalf of the American Newspaper Publishers Association in support of S. 1666.

He has directed your attention to those ambiguous phrases in the Administrative Procedure Act which authorize secrecy in Federal agencies. He has also cited some specific instances of such secrecy and pointed to the difficulties the press has encountered at other times before finally dislodging information from reluctant public servants. I presume that still more such examples will be called to your attention during these hearings.

I would, therefore, like to turn to the suppression that cannot be documented here in chapter and verse for the simple reason that it has accomplished the secrecy desired by the officials who imposed it.

Despite the difficulties cited by Mr. Pulliam, confidence in the Washington press corps prompts the observation that a tenacious reporter who has a lead or a tip can sooner or later get most of what he's after.

I think you had an example of that yesterday in the testimony by Mr. Mathis, who got it after 8 days.

This is not to minimize the difficulties and the delays encountered. On this ground alone an amendment to the Administrative Procedure Act is overdue, for there is no reason any American citizen should have to dig for months to uncover information about his Government that should have been available to him as a matter of course.

But I do want to say that no one in this room—or anywhere else outside the agencies involved—has any way of knowing how much information has been so thoroughly buried under the authority of the Administrative Procedure Act that not even a clue to its existence has come to the surface.

Even if the Federal agencies cheerfully and promptly answered all questions asked of them on the basis of tips or leads, the problem of the information about which nobody knows enough even to ask questions would remain. The agencies, in this respect, would still be in the position of someone holding up a grab bag and saying, "I'll give you this if you can tell me what's in it."

Again we should like to think that the press, in its traditional role of watchdog, is alert enough to prevent anything of significance from being hidden indefinitely. But why, gentlemen, should that be a subject of hope or speculation?

The fact is that in the present situation the burden of responsibility is fundamentally misplaced. It should not be up to the American people—and the press, as Mr. Pulliam has pointed out, 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.

If fixing this responsibility was a purpose of the so-called public information section of the Administrative Procedure Act—and it was the purpose as Senator Ervin has stated—

> * * * it was drafted to insure that the public could obtain information about the operations and procedures of Government agencies.

I say, if this was the purpose, and it was, it has not worked out that way.

Almost two decades of actual experience support Senator Long's statement that "time and interpretation have shown that it is woefully inadequate today" and Representative John E. Moss' lament that "it actually has served throughout Government generally to suppress information rather than make it available."

What are the lessons of this experience? I think that we can draw four rather quickly.

The first is that too much discretion was left to the individual agencies when they were authorized, as Mr. Pulliam has already pointed out this morning, to decide for themselves what information should be kept secret in the public interest or "for good cause found" or because it relates to "internal management."

We can assume that the framers of the act intended these qualifications to be used judiciously, as Senator Ervin pointed out. But unhappily, as the late Dr. Harold Cross wrote in his book "The People's Right To Know," "no sooner had the act taken effect than erosion of its ideals set in." That being so, it is not surprising that the erosion has continued to such a point that the American Law Section of the Library of Congress can say:

> The several qualifications of the act have enabled agencies to assert the power to withhold practically all the information they do not see fit to disclose.

I am pleased to see that S. 1666 goes far toward the elimination of the elastic phrases in the act, but I recommend, as Senator Ervin did, that this committee consider striking them altogether. Specifically, that would mean a further change in section 3(a) requiring publication in the Federal Register—

> except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency * * *.

A second lesson is that the act was too restrictive in limiting the availability of certain information to "persons properly and directly concerned."

Mr. Pulliam has already questioned the meaning of this.

It is not enough to open proceedings and records only to litigants and their counsel. Dr. Cross—who, incidentally, wrote his book under the sponsorship of the organization I represent here today—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 vested in the general public—that mass of citizens who may not meet the description of "persons properly and directly concerned" in administrative proceedings—and in the public's chosen organs of information.

Here I would underscore Mr. Pulliam's point that newspapermen claim no rights beyond those of all other American citizens. But we do claim that citizenship itself confers a right to know which should be protected by law, not thwarted by it. In this respect, I consider as he does, the recourse to the courts one of the most important features of S. 1666.

Still a third lesson I would call to your attention is one noted by Vermont C. Royster, editor of the Wall Street Journal and a former chief of its Washington Bureau. He sees the influence the Administrative Procedure Act has had on Government officials as a major reason it has deprived the American people of information they might otherwise have. His reasoning, as explained in a letter to me, is this:

> Any Government official talking to a reporter has hanging over his head the risk that if he tells the reporter anything which his superiors later object to, he may be subjected not just to a bawling out but to some sore of reprisal under the law. In short, the official risks becoming a law violator and this is naturally going to make him much more closemouthed than he might otherwise be.

Finally, a fourth lesson learned since 1946 has been stated by J. Russell Wiggins, who both as editor of the Washington Post and as a former president of the American Society of Newspaper Editors has been a leader in the freedom of information fight for many years. In his book "Freedom or Secrecy," he writes:

> The enormous growth of the executive establishment has multiplied rather than diminished the necessity for disclosure and the wisdom of supplying information to the people. The executive, however, has changed not only in its sheer size but in function as well, and by delegating to it rulemaking powers and judicial powers, Congress has added reasons why the executive should be conducted more in conformity with the principles of disclosure that prevail, under law, in courts and in legislative establishments.

One of the major contributing factors to adoption of the Administrative Procedure Act in the first place, you will remember, was the proliferation of Federal agencies. But if it was important then to try to legislate safeguards against secrecy, how much more important it is today.

Despite the disappearance of such wartime agencies as the Office of Price Administration, the War Assets Administration, and the Reconstruction Finance Corporation, there were 213,703 more Federal civilian employees within the United States on August 1 this year than in 1946. That's enough people to populate such cities as Providence, Des Moines, Syracuse, or Tucson. It's almost half as many as there are in my whole State. And while Federal employment has been increasing, new agencies with new tasks have emerged. Even a new Cabinet department—Health, Education, and Welfare—has been created, and existing agencies and departments have assumed expanded roles in many areas of our national life.

There is no need to labor this point, for you gentlemen are certainly familiar with it in infinite detail. But it does seem pertinent while examining the growth of the Federal bureaucracy to underscore my earlier statement that we should be concerned not only with the secrecy that has been documented but with that which has not.

The experience of living with the Administrative Procedure Act for almost 20 years has also taught us, as Mr. Wiggins points out, that it is not easy to prescribe, in complete detail and specifically, all

the Government information that should be divulged and all that properly may be withheld.

But it is possible, as he further says—

> 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 firm belief that S. 1666 would encourage such as climate, I join Mr. Pulliam in respectfully urging its favorable consideration.

Thank you.

Senator LONG. Thank you, Mr. Black.

As both of you gentlemen know, the act that we presently operate under has been in effect for about 18 years now. Let me ask you, Mr. Black, or you, Mr. Pulliam, whichever is best able to answer the question:

In the event that the Senate amends section 3 of the proposed bill, would you think it would be helpful simply to repeal or revoke the law that we have now; should it be revoked or should we leave it like it is? What is your suggestion, if you have a suggestion?

Mr. BLACK. Well, I think it would not, for the reason that the spirit of the act, as I say in my statement and as Senator Ervin has said, was proper. It was an attempt to move in the right direction.

I think that it would be an admission of failure on the part of the Congress, in a sense, to simply repeal the act and say, in effect, "Well, the people in the Federal agencies are smarter than we are"—or perhaps too devious in going around the spirit of this law.

Senator LONG. We wouldn't want to admit that.

Mr. BLACK. I would not think so.

Senator LONG. But you have suggested that in this bill, you and some other witnesses have, that under the present law as it is today, that some of the agencies and departments have found that they can use the provisions of the present act to withhold information.

What I am interested in is whether we would be better off not to have this act or this section in the act at all. It seems to me, if we go back to what we had in 1946, it would remove part of the cover that they use.

Mr. BLACK. Well, I cannot see that it would make any more information available by eliminating this provision of the act altogether.

Senator LONG. But then they would not be able to cite this as a ground for withholding information. It seems to me that they are using it for that purpose.

Mr. BLACK. As I indicated in my testimony——

Senator LONG. As a cover.

Mr. BLACK. As I indicated in my testimony, the people I have discussed this with find that not often do these agencies actually come out and say, "We are refusing to give you this information because of the Administrative Procedure Act."

And I do not believe that eliminating it would make any change in availability of information. I think it would be a backward step, so far as trying to create the proper climate, which to us seems to be a most important thing.

Mr. PULLIAM. Mr. Chairman, may I comment?

Senator LONG. Yes.

Mr. PULLIAM. The details, it seems to me, of this type of legislation are difficult to get into words, because the minute you say that there are certain things which can be kept secret—and I am sure that everybody knows that there are such things, and I don't think that any intelligent person would think that everything in the world ought to be made available to the public or to the newspapers—but if the access to the courts provision is in there, then this seems to me to be a sound way for this to be determined. I am sure that it would have the effect of improving this climate.

However you phrase section 3, if you have access to the courts, and if you ask for something and the guy says, "No, I am not going to give it to you," the mere fact that you can say to him, "Well, I would like for a court to determine whether that information should be made public"—I think that would change the situation completely.

We had a similar thing in my State, a right-to-know law which has been discussed in the Congress. It has never been tested in the courts but it has been effective in making people in Government offices sit up and take notice and think twice before they refuse to give information. It makes them careful to be sure that they are on safe ground—and that is all we ask.

Senator LONG. Mr. Fensterwald, do you have questions?

Mr. FENSTERWALD. A couple of questions, Mr. Chairman, thank you.

One is prompted by Mr. Pulliam's suggestion about access to the courts. I wonder, Mr. Pulliam, if you think that simply adding access to the courts to the present law would be of any help. What I mean is, with the loopholes in the law as it now stands, and with such vague phrases as "good cause found" and "public interest," what would there be for the courts to decide?

Mr. PULLIAM. Well, to determine what is the "public interest."

Mr. FENSTERWALD. Yes.

Mr. PULLIAM. In other words, as it is now, the guy that makes the decision not to disclose the information says, "Well, this isn't in the public interest." And there is no way to argue with it. He is judge and jury.

Mr. FENSTERWALD. I see the point you are trying to make. You mean if there is access to the court, even if you cannot plug up all the loopholes, just the very fact that you can go into court and get a determination upon the loose language might be helpful?

Mr. PULLIAM. Yes, sir.

Mr. FENSTERWALD. Another question: This one can be for either or both of you gentlemen; and it is whether, in the past or in preparing for this hearing, you found any reluctance on the part of reporters, editors, or publishers to document cases of withholding; and, if so, why you think such reluctance exists.

Mr. BLACK. Well, I did not find any reluctance, Mr. Fensterwald. As I indicated a few moments ago, I have discussed this with a number of representatives of our organization—editors from representative newspapers, some of whom have the largest and strongest Washington bureaus. I certainly don't think there is any reluctance on their part.

And certainly the newspapers of this country are every bit as inter-

ested as the Congress in getting disclosure of as much information as possible.

What I did find, as I tried to indicate in my statement, was a difficulty on the part of newspapers to come up with examples that would indicate specific cases in which the reporter has tried to get information and has been turned down by an official who says, "Well, we can't give you this because of such and such a section of the Administrative Procedure Act."

While there are such examples, the practical fact of the matter is that it usually doesn't work that way.

You have heard Mr. Mathis yesterday. Nobody ever told him he couldn't have this information. It was just delayed to the point where the timelessness of it was gone.

It seldom happens that the sort of example that would make the kind of testimony that we would like to be able to produce here today comes along. As Gene Pulliam indicated, we would like to have something that would compete with some of the more attractive or sensational hearings elsewhere on Capitol Hill. But this is, in some senses, a dreary and routine business, of trying to ferret out this information.

But I don't think there is any reluctance on the part of newspapers to present such examples when they do occur.

Mr. FENSTERWALD. Do you have any comment, Mr. Pulliam, on this?

Mr. PULLIAM. There are newspapers, newspaper editors and publishers who disagree among themselves on almost everything on God's green earth; and there are some newspapermen, some editors, and some publishers who do not get excited about this. They argue that a good reporter will always get the information. As Creed has said and I agree, eventually, they will get it.

You will hear from one of them, and he has received a considerable amount of information which I think has been informative to the Congress and helpful to the Government, but I am sure that he would have gotten that information quicker and perhaps more information if this type of legislation were on the books.

Now, as I say, eventually it does come out. And there are people, reporters who say, "Well, I will get it sooner or later." And they say, "I don't want to be asking the Congress to help me."

There are those people. But I don't think any of them have said, "No, I am not going to cite you chapter and verse, I know about it, but I am not going to tell you."

Mr. FENSTERWALD. The reason I ask this question is that, because as you can well imagine, and because of our interest in this subject, reporters do come to us with examples. Our normal advice would be to find out under what authority the information was being withheld. Well, almost inevitably they will not do this and, furthermore, they are not interested in testifying as to particular examples with any number of various explanations.

Mr. PULLIAM. Well, sir; I don't know who those are, but I am sure that we—I am sure that our Washington Bureau here has got a stack of stuff this high [indicating] and I don't want to bore you with this and keep you all day, but, just for an example, here is a man from Connecticut who cannot find out how much they paid for land up

there in a redevelopment area, and there was Federal money involved in it, and still they are not going to tell him what they paid for the land.

And we had a reporter who came down here once, this was a couple of years ago, to find out about an REA loan, and the head of the agency wouldn't even talk to him and our Washington man called the pressman at REA, "Will your boss talk to him if he came down there?"

And he said, "No."

And our man said, "Well, will you ask him when he will talk to him?"

And the guy says, "No, I wouldn't even ask him."

So our man made a call to Charlie Halleck and this man was out next morning in the hallway looking for our reporter.

So—sure, you can get it done. But why should we have to call Charlie Halleck to get them to talk to a guy about some public business that he is running.

Mr. FENSTERWALD. Would you care to put some of those examples into the record?

Mr. PULLIAM. Surely, I would be glad to. I just don't want to go on forever.

Senator LONG. You can put in as many as you care to in the record.

Mr. PULLIAM. Well, a lot of this, actually, came from Earl Wilson, who has had several run-ins with the Navy Department on the way that they write specifications for a variety of radios.

Senator LONG. We would be happy to have you put all of them in the record, if you will.

Mr. PULLIAM. Yes, sir; I would be glad to.

Senator LONG. We would be glad to have them.

(The documents referred to follow:)

INDIANAPOLIS NEWSPAPERS, INC.,
Indianapolis, Ind., November 1, 1963.

Mr. BERNARD FENSTERWALD, Jr.,
Chief Counsel, Subcommittee on Administrative Practice and Procedure, Senate Office Building, Washington, D.C.

DEAR MR. FENSTERWALD: As you and Senator Long requested, I am forwarding, as enclosures, some additional specific examples of withholding of information by a variety of Government agencies.

They include:

1. The refusal of the Meriden (Conn.) Redevelopment Agency, which receives Federal funds, to permit access to records containing appraisals for the acquisition of land and the disposition of land.

2. An attempt by a reporter for the Indianapolis Star merely to interview Mr. David Hammil, REA Administrator.

3. A release from the U.S. Department of Health, Education, and Welfare, dated February 28, 1963, stating that 23 recommendations for ways to improve the flow of health information had been made public. As of the date of my testimony, October 29, HEW still had taken no action on the recommendations.

4. A statement about secrecy conducted by the Federal Housing Administration during the Eisenhower administration.

5. Refusal of the Post Office Department to release information about details of long-term leases for postal facilities even though a General Accounting Office survey indicates this is costing the Government sizable amounts of money.

6. Refusal of the Internal Revenue Service to make public a list of attorneys disbarred from practice before agencies of the Treasury Department. (I have not included documentation, but this agency, also, has made it almost impossible for reporters to learn the details of settlements of tax cases.

This information, it seems to me, should be available to the public, since the facts of compromise and the sums involved are an invitation to connivance.)

7. A brief review of the campaign carried on by Representative Earl Wilson, Republican, of Indiana, to insist that Defense Department procurement practices be revised to enable more than one manufacturer to bid on Government contracts. This has nothing to do with freedom of information as it affects newspaper reporters. But it has considerable to do with freedom of information as far as businessmen are concerned, also with the cost of purchases made by the Defense Department.

These samples were obtained for me on short notice by two of the members of our Washington bureau, Benjamin R. Cole and Louis Hiner, Jr., 408 Albee Building, Washington, D.C. I feel sure that many other examples are available if they are desired by your subcommittee.

From a legal and investigative standpoint, it is unfortunate that in each instance the withholder has not been asked to furnish in writing the authority for withholding. Newspaper reporters simply don't think about this means of getting their information, because it is too slow. The quicker way is to work through a cooperative Member of Congress or a trusted news source. In short, the reporter is primarily concerned with obtaining information, not with building a case.

Finally, I appreciate the privilege of having been permitted to testify before your subcommittee and your courtesies. If I can furnish further information, I will be happy to do so. Having been interested in the area of access to information for a number of years, I am hopeful that S. 1666, with its strong bipartisan support, will be approved by your subcommittee, the full committee, and the U.S. Senate.

Respectfully,

E. S. PULLIAM.

THE MERIDEN RECORD CO.,
Meriden, Conn., October 24, 1963.

Mr. STANFORD SMITH,
General Manager, American Newspaper Publishers Association,
New York, N.Y.

DEAR STAN: Recently you asked if we had any experience with a Federal agency where disclosure of information was refused.

Just this week the Meriden Redevelopment Agency, which is supported by Federal and State funds under the Federal urban renewal program and the State Cooperative Act, refused the Meriden Journal access to its records containing appraisals for the acquisition of land and the disposition of land in Meriden's central area project.

We made the request in writing under the Connecticut right-to-know statute, a copy of which is enclosed. We even made it easier for the agency by pointing out that we did not wish to see the appraisals until after the transactions which they affected were completed.

The denial was made under the exemption in the Connecticut law which states "shall refuse permission * * * if such inspection or copying would adversely affect the financial interests of the State or any of its political subdivisions."

The local agency stretches the point even further by indicating that they may continue to withhold these appraisals even after the entire project is completed, which project contains over 200 transactions, and they may even continue to withhold the appraisals until another project in an entirely different section of the city is initiated and completed. This seems to be going way beyond the intent of the law.

There is a Federal aspect to this in addition to the fact that Federal funds of over $5 million are involved in that the regional counsel of the Urban Renewal Administration for the New York regional office (Charles Horan, regional director) has advised the local agency that the URA has consistently taken the position that the right of public inspection may be denied for appraisals before any given transaction is completed. And, further, he recommends that the appraisals be withheld from the public until all the real estate in a given urban renewal program has been bought and sold.

This would seem to indicate that this is a nationwide problem under the URA.

It would seem to me that the public should be entitled to this information before a total project is completed, so long as the particular phase involving

the particular appraisals has been completed. How else can the public evaluate the progress of these urban renewal projects?

This information should be submitted to the congressional subcommittee studying the right to know subject.

Cordially yours,

CARTER H. WHITE, *General Manager.*

P.S.—Enclosed is a clipping from the October 24 issue of the Morning Record of Meriden, Conn., giving the story on this refusal of information. No decision has been reached as to whether the newspaper will appeal under the Connecticut statutes.

C.H.W.

[From the Meriden (Conn.) Morning Record, Oct. 24, 1963]

MRA WITHHOLDS APPRAISAL RECORDS

The Meriden Redevelopment Agency intends to keep its appraisal records confidential until all property transactions in any given redevelopment program are completed.

Even then, the MRA may withhold the appraisals from public perusal if it decides that release would prejudice transactions in subsequent redevelopment programs.

THE REQUEST

This decision was made by the MRA at its monthly meeting last night following receipt of a letter from Carter H. White, general manager of the Meriden Record Co., in which White made a formal request to examine the appraisals under Public Act 428 as amended—the so-called right-to-know law.

In the letter, White noted that an identical request had been made by the editor and city editor of the Meriden Journal last March—a request which, White said, had been ignored. He repeated previous statements of the Journal editors that the newspaper would not expect to examine the appraisals until the individual purchase or sales to which they applied had been completed.

FOUR APPRAISALS EACH

Four appraisals are made on each transaction. Two made while a parcel is still in private hands determine the price the MRA is willing to pay for it. Two more are made of the value of cleared land to determine what price the MRA should sell it for to developers.

In a letter of reply, Francis S. Noonan, executive director, said the March request had been discussed by the MRA and had been in the hands of the agency's attorney, L. Steward Bohan, ever since.

COUNSEL'S OPINION

Bohan, who called the whole question a thorny one, made his report last night.

He noted that under the act the agency must refuse public access to public records if this access "would adversely affect the public security or the financial interests of the State or its political subdivisions."

He read an opinion by the regional counsel of the Urban Renewal Administration over the signature of Charles Horan, regional director, which stated that the URA has consistently taken the stand that the right of public inspection may be denied before any given transaction is completed.

Further, it believes that even after completion, public inspection of the appraisals of any given parcel might "adversely affect" negotiations on other parcels.

Accordingly, Horan recommended that the MRA keep its appraisal files closed until all the real property in a given program has been bought and sold.

This recommendation was adopted unanimously by the agency.

McRae Curtis then noted that it was possible that in the present Meriden situation, publicized appraisals of Central Area project property might make acquisition and sale of 6A Connector project property diffcult, if and when the second project is approved.

Bohan pointed out that Horan's letter stated that even after a project is completed, the appraisals could be released only if public security or financial interest

were not adversely affected by factors unknown to him when he wrote the letter.

The agency agreed that the influence of one project on another might be such a factor, and that this possibility would have to be discussed when the Central Area project is completed.

The decision means that it will probably be at least a year before the MRA is ready to consider release of the appraisals.

Under the right-to-know law, the agency must reply to White in writing. He then has 15 days in which to appeal the denial to circuit court.

CONNECTICUT RIGHT-TO-KNOW STATUTES

(As effective October 1, 1961)

Section 1–19. Access to public records. Except as otherwise provided by any federal or state statute or regulation, all records made, maintained or kept on file by any executive, administrative, legislative or judicial body, agency, commission or official of the state, or any political subdivision thereof, whether or not such records are required by any law or by any rule or regulation, shall be public records and every resident of the state shall have the right to inspect or copy such records at such reasonable time as may be determined by the custodian thereof. (1957, P.A. 428, S. 1.)

Section 1–20. Refusal of access. Appeal. Notwithstanding the provisions of section 1–19, the body, agency, commission or official who has custody or control of any such public record shall refuse permission to so inspect or copy such record or records if such inspection or copying would adversely affect the public security or the financial interests of the state or any of its political subdivisions or if such denial is necessary to provide reasonable protection to the reputation or character of any person. Any such denial of such right of inspection shall be made to such resident, in writing, generally stating the reason therefor within fifteen days of the request for such inspection. Any person aggrieved by such denial may appeal therefrom, within fifteen days, to the circuit court for the circuit wherein such body, agency, commission or official is located. If such court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter such order for disclosure as it deems proper. Such appeals shall be privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by or on behalf of the state, including information on the relation of private individuals. Nothing in this section shall deprive any person of any rights he may have had at common law prior to January 1, 1958. (1957, P.A. 428, S. 2, as amended by 1961, P.A. 521.)

Section 1–21. Meetings of governmental agencies to be public. The meetings of all administrative and executive boards, commissions, agencies, bureaus, committees and other bodies of the state or any of its political subdivisions sball be open to the public when in session and shall be open to the public when in executive session when so voted by a majority of the members of such body present and voting. The votes of each member of any such body upon any issue before such body shall be recorded in the minutes of the session at which taken, which record shall be available for public inspection at all reasonable times. (1957, P.A. 468, S. 1.)

Memo to: Mr. E. S. Pulliam.
From: Ben Cole.
Subject: Freedom of information.
Agency: Rural Electrification Administration.

The Star, in the course of developing a story about a controversial REA loan application, sent Lester Hunt to Washington to interview David Hammil, the REA Administrator.

Our Washington Bureau phoned the REA to arrange an appointment for Hunt and was referred to the press office. The information officer refused even to give Hammil the request. The correspondent, however, enlisted the aid of Representative Charlie Halleck.

Next morning when Hunt went to REA, Hammil actually was going up and down the corridor looking for him.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
PUBLIC HEALTH SERVICE,
Washington, D.C., February 28, 1963.

Twenty-three recommendations for ways to improve the flow of health information were made public today with the publication of the report of the Surgeon General's Conference on Health Communications.

Recommendations range from a proposal to establish a worldwide drug information system to a suggestion for better use of audiovisual media and techniques.

"These recommendations will be given careful study by the Public Health Service," Dr. Luther L. Terry, Surgeon General of the Public Health Service, said in releasing the report. "We are seriously concerned about the lag between the development of new knowledge and its application to the needs of people. Better health communication is certainly one of the answers. We are grateful for the serious attention given to this matter by the experts who participated in the conference. Their report will be of great help to the Service in its efforts to improve communications in the health sciences."

The Conference on Health Communications was held November 5–8, 1962, at Warrenton, Va., and was attended by 39 consultants and staff members of the Public Health Service and other Federal agencies engaged in disseminating health information.

Single copies of the report (Public Health Service Publication 998) are available upon request from the Public Health Service, Washington, D.C.

Memo to: Mr. E. S. PULLIAM.
From: Ben Cole.
Subject: Freedom of information.
Agency: Federal Housing Administration.

Background: At the outset of the Eisenhower administration, Albert Cole, new FHA Director, found borrowers under an apartment building program called section 408 were mortgaging out—that is, borrowing sums far in excess of their investment in apartments and pocketing the windfalls. An investigation was conducted and eventually the Government recaptured some of this illegal money. However, before Eisenhower took office, a number of newspapers were tipped off that this abusive practice was common. Reporters—including me—sought to see FHA records on specific properties in order to determine the facts. The records were tightly secreted, and a reporter could do no more than interview an FHA official. The official would receive questions, consult the data in the file, then answer or not as he chose. The Agency held that it was denied the right to open its records by congressional action (doubtful) and that the inspection of the papers by newsmen might somehow injure the credit standing of borrowers.

The truth of the matter is that the secrecy sheltered a crooked practice which, even at the time newsmen were seeking information, was justified by FHA on grounds that its appraisal figures were all necessary to establish the mortgage sum—if a builder could build a $1 million apartment for $10,000, he could get a $1 million mortgage insured by the United States.

The Senate investigation showed all kinds of corruption inside the FHA and proved conclusively that it was secrecy that provided the warm, dark place for corruption to grow.

Memo to: Mr. E. S. Pulliam.
From: Ben Cole.
Subject: Freedom of information.
Agency: Post Office Department.

Background: From time to time since the start of the Eisenhower administration and continuing to the present, the Post Office Department makes long-term leases for facilities. First the Post Office goes out and buys a site which it transfers to the successful bidder when the lease contract is awarded. Leases run for 20 years or longer at stipulated annual rental fees. For a time, leases in Indiana were handled entirely in Cincinnati and questions about the leases were referred there. Officials of the Cincinnati office insisted they were prohibited from disclosing the lease payments. Washington would authorize this upon demand, but the word never got down. For 8 years no information of any kind ever was available on the rental charges for these facilities. When

James F. Kelleher became Assistant to Postmaster General Day, he listened to and promised to correct complaints on this matter. But the Post Office never has complied, although Kelleher on occasion could blast the figures loose. The latest press release on one of these from the Post Office Department was issued a week ago relative to a new lease in Jeffersonville, Ind. Not even Kelleher, now a lameduck, could get the figures on this.

Argument: Concealment of lease arrangements for public facilities can do nothing except promote fraud. The General Accounting Office in a quick study of 100 of these leases found over 10 years the Government could have saved $610,000 and owned the real estate afterward. Projected over some 14,000 such leases the amount is staggering. The Post Office argues that leases keep the property on local tax rolls; General Accounting Office drily notes that the same money has to pay the taxes, whether they come out of the taxpayers' Federal tax pocket or his local tax pocket.

Comment: This is a particularly dirty piece of business that needs to be stopped quickly. The GAO representatives were disturbed to hear that the money sums are kept secret. Even when Senator Hartke recently demanded and got the figures on just one of these post offices, he was asked not to give the information to the press. He defied the request.

Memo to: Mr. E. S. Pulliam.
From: Ben Cole.
Subject: Freedom of Information.
Agency: U.S. Treasury Department.

Background: Formerly, the Internal Revenue Service bulletin carried from time to time a list of attorneys disbarred from practice before agencies of the Treasury Department. On one occasion, the name of an attorney from Valparaiso, Ind., appeared. Inquiry why he was disbarred met with complete frustration. The IRS information office took up the question with the IRS General Counsel, and he in turn sent it up to the General Counsel for the Treasury Department. It was held that the reason for disbarment could not be disclosed.

Argument: The Treasury Department's rationale in this case was that to disclose the reason for disbarment would embarrass the attorney. No reply was ever made to the question how disclosure of the reason could be more embarrassing than the fact of disbarment.

History: This case was submitted by me to the Moss subcommittee which asked an explanation. The matter languished a number of years and finally was mooted when the Treasury Department which, first, quit publishing list of disbarred lawyers notified the Moss subcommittee it no longer took such official action but obtained withdrawal of attorneys' appearances before Treasury agencies. Since disbarment no longer existed, the matter could not be pursued further.

Danger: Disbarment from practice before the Treasury's agencies was a punitive action taken against American citizens for cause. Failure of the Treasury to permit publication of its reasons for taking such action put these proceedings in the star chamber category and the public at large could never make certain whether the Federal Government was justified in disbarring the attorneys.

Memo to: Mr. E. S. Pulliam.
From: Lou Hiner.
Subject: Freedom of Information.
Agency: Department of Defense.

For the past several years, Representative Earl Wilson, Republican, of Indiana, has been complaining that certain Defense Department procurement practices are denying necessary information to manufacturers.

The Congressman has illustrated his arguments scores of times with examples. These generally involve competitive bids on equipment for the various services.

Possibly oversimplifying, the pattern is this:

The Army needs a certain new man-pack-type radio. The equipment is designed and the necessary drawings are prepared. The Army then advertises for bids on the equipment. However, it declines to make available to qualified bidders the necessary drawings. The successful bidder in most instances is

the company that prepared the drawings in the first place. The other bidders have no chance to bid because they can't see the drawings.

Several times, Wilson has been successful in getting the drawings released, and afterward the competitive bidding has produced considerable savings to the taxpayer.

This type of freedom of information is in the direct interest of the taxpayer.

Mr. FENSTERWALD. Thank you. I have no further questions.

Senator LONG. Well, thank you, gentlemen, both, for appearing before us here with your testimony and we are grateful to you for having come.

Mr. PULLIAM. We appreciate the invitation.

Senator LONG. The Chair would like now to note the presence of the distinguished minority leader, Senator Dirksen, of Illinois, who is also a member of this committee.

Senator, we appreciate your being here and we will be happy to have a statement from you, if you would like to make one, or if there are any questions you would like to ask.

Senator DIRKSEN. No, thank you, Mr. Chairman. I do have a statement.

Senator LONG. Fine.

(The statement referred to follows:)

STATEMENT OF EVERETT MCKINLEY DIRKSEN, U.S. SENATOR FROM THE STATE OF ILLINOIS, ON THE RIGHT OF THE PEOPLE TO KNOW

Mr. Chairman, I am delighted that this subcommittee has embarked upon the all-important and significant task of a thorough overhaul of the Administrative Procedure Act. I have said often that it is a difficult task, but a task that must be done because the act, which is only 11 sections in all and takes up so few of the thousands of pages in the United States Code, governs the manner in which all the myriad departments and agencies in this Federal Government administer the programs and the laws passed by the Congress. Even a good program or a good law can be made unbearable if it is unfairly administered, and a bad program or a bad law will be less onerous if it must be administered justly. That is the essence of the Administrative Procedure Act, to provide a fair and just administration of the laws and programs as they affect the people of this country.

I think, too, that you have started off at the right point by holding these hearings on section 3 of the act because fair and just administrative proceedings require, first of all, that the people know not only what the statutory law is, but what the administrative rules and regulations are, where to go, who to see, what is required, and how they must present their matter. They must be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter and whether these decisions were unanimous or divided. And, they should have the same right to the inspection of the information which the Government may use against them as they would to inspect the information which some private party might use against them. In addition, section 3 of the Administrative Procedure Act has a broader purpose. It provides the means by which the people of this country can become informed and thus be able to scrutinize the activities and operation of their Government.

Mr. Chairman, in these few words I have probably summed up the basic elements of section 3 of the Administrative Procedure Act as Congress intended it to be when it passed that bill just 3 years short of two decades ago. It was made crystal clear at that time in the report of the Judiciary Committee which said:

"The public information requirements of section 3 are in many ways among the most important, far-reaching, and useful provisions of the bill. For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it * * *

"The introductory clause states the only general exceptions. The first, which excepts matters requiring secrecy in the public interest, is necessary but is not

to be construed to defeat the purpose of the remaining provisions. It would include confidential operations in any agency, such as *some* of the investigating or prosecuting functions of the Secret Service or the Federal Bureau of Investigation, *but no other functions* or operations in those or other agencies. Closely related is the second exception, of matters relating solely to internal agency management, which may not be construed to defeat other provisions of the bill or permit withholding of information as to operations which remaining provisions of this section or of the whole bill require to be public or publicly available."

With respect to subsection (a) the committee said:

"The subsection forbids secrecy of rules binding or applicable to the public, or delegations of authority."

Concerning the need for subsection (b) the committee said:

"Some agencies published sets of some of their decisions, but otherwise the public is not informed as to how and where they may see decisions or consult precedents."

And with respect to subsection (c) the committee said:

"This provision supplements subsections (a) and (b). The requirement of an agency rule on availability of official records is inserted for the same purpose as in subsection (b). In many cases, the interest of the person seeking access to the record will be determinative."

The Judiciary Committee of the House, in a report submitted by the late Representative Walter, who was active in this field up to the day of his death, said:

"The public information provisions of section 3 are among the most useful provisions of the bill. The general public is entitled to know agency procedures and methods or to have the ready means of knowing with certainty. This section requires agencies to disclose their setups and procedures, to publish rules and interpretations intended as guides for the solution of cases, and to proceed in consistent accordance therewith until publicly changed."

With respect to subsection (a), the report stated:

"Mimeographed releases of many kinds now common should no longer be necessary since, if they contain really informative matter, they must be published as rules, policies, or interpretations."

And yet, even today, there are thousands upon thousands of mimeograph machines in this Federal Government cranking out mimeographed releases of every kind, shape, and form by the hour.

The distinguished Senator Pat McCarran, who was then chairman of the Judiciary Committee, in debate on the floor of the Senate on March 12, 1946, as he presented the Administrative Procedure Act to the Senate emphasized the broad scope of section 3 rather than the exceptions. He said that it:

"* * * provides that except as statutes may require otherwise, or information may be held confidential for good cause, *matters of official record are to be made available* to persons properly and directly concerned * * *"

In describing the bill on the floor of the House of Representatives, on May 24 of that same year, the late Francis Walter said:

"* * * public information requirements of section 3 are among the most important and useful provisions of the bill. Excepted are matters requiring secrecy in the public interest, such as *certain* operations of the Secret Service or FBI, and matters relating *solely* to the internal management of an agency."

And, with respect to the public records subsection he said:

"Section 3(c) also requires agencies to make matters of official record available to inspection except as by rule it may require them to be held confidential for *legal* cause."

Now what do we have today? Refusal on top of refusal of Government agencies and departments to make available to the public that information which affects the public. In overruling the contention of a Federal agency, a judge of the U.S. district court said earlier this year:

"If the report of the experts employed by the Commission is accurate, then the public has a right to know these facts."

Just the other day I noted an article under a headline "Secrecy is Criticized on Federal Projects." This charge was leveled by the chairman of the Arlington County Board who was reported as saying:

"It is always a secret, closed meeting when Federal projects are discussed. They don't make it public knowledge, so that when it is all ready the President can present a fact accompli."

"That is fine for the President," he said, "but it certainly fouls up any planning we do for the area." So we have a situation where Federal Government agencies keep their plans for spending the people's money secret, at taxpayers expense because the local governments cannot take these Federal plans into account in their own planning.

Then Mr. Chairman, we have another type of example which I consider even more significant because it must effect every citizen of this country, as an individual, at one time or another. The particular example which I am going to cite involves something as simple as crop acreage allotments. The work is performed by local committees under the direction of the Department of Agriculture. A little over a year ago I received a complaint from one of my constituents that he felt his corn acreage allotment had been unfairly reduced. He had asked the local committee why and they said they had information against him. He asked what that information was in order that he could meet it with his own evidence but they denied his request. Then he brought his complaint to me. I took the matter up with the Department of Agriculture, asking that an investigation be made of his complaint that he had never been shown the evidence against him. In due course I received a reply which said:

"Included in the records of this case are statements from farmers having knowledge of the history acreage of this farm which were obtained by the county committee on a confidential basis. For county committees to divulge the source of information received in confidence, when release of the information would impair the legitimate interest of persons supplying the information, would not in our opinion be proper and would result in less effective administration of programs at the local level."

I was not satisfied with this reply. It is a basic tenet of our law that if a man is accused, he is entitled to know the evidence against him and to confront his accusers. I, therefore, requested from the Department of Agriculture "the specific authority relied upon by the Department in connection with its position on this matter."

This time the answer came back from the head of the Department, Secretary Freeman. I want to read to you from that letter:

"This is in reply to your letter of July 17, 1962, requesting advice as to specific authority relied upon by the Department of Agriculture in withholding from a producer the names of persons supplying information adverse to him in connection with his participation in the feed grain program.

* * * * * * *

"Department regulations governing the availability of information from records comply with the requirements of section 3 of the Administrative Procedure Act, 5 U.S.C. 1002. Such section provides as follows:

> "'Section 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of the agency * * *.
>
> * * * * * * * *
>
> "'(c) Public records. * * * Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned *except information held confidential for good cause found.* [Emphasis supplied.]

"536(b) [of the Department's regulation] constitutes a statement of those matters considered to be confidential."

Thus, the Department of Agriculture is saying that the evidence against any farmer in this country can be withheld from him because it is "information held confidential held for good cause found." No wonder the late Francis Walter was interested in revising the Administrative Procedure Act as we have it in this bill, to protect against such departmental and agency abuse. Why, if Pat McCarran were here today, this room would reverberate with his protest against such departmental action.

Senator LONG. Our next witness will be Mr. Simmons of Newsweek. We have a biographical sketch here of Mr. Simmons. Without objection it will be put in the record at this time.

(The biographical sketch referred to follows:)

SIMMONS, HENRY T.

Experience:

Newsweek magazine, Washington Bureau, 1957 to present: science and general technical reporting with primary emphasis upon the U.S. space program.

American Aviation Publications, Washington, D.C., 1955–57: military correspondent with emphasis upon aviation and missile activity.

Wall Street Journal, Washington Bureau, 1951–55: industrial and military reporting.

Education: B.A. in English literature, Yale University, 1950. Law degree, Georgetown University, 1956.

Organizations: Aerospace Writers Association.

Military: U.S. Army Air Corps, 1945–46; honorable discharge.

Miscellaneous: 36 years of age; married; no children.

STATEMENT OF HENRY T. SIMMONS, NEWSWEEK MAGAZINE

Mr. SIMMONS. Gentlemen, I appreciate the opportunity to discuss certain aspects of the Government's information policies. I want to talk specifically about the handling of news and information in the U.S. space program, an area which I have followed closely since the mid-1950's.

Commencing with the Vanguard project in 1955, the U.S. space effort was virtually wide open. This project was conceived as a peaceful scientific undertaking in connection with the International Geophysical Year. It had no military significance beyond the fact that the U.S. Navy was its executive agent. When it failed so dismally on its first orbital attempt on December 6, 1957, some had cause to regret the freehanded information policy which had been in effect, and there were attempts to close off Cape Kennedy, Fla., from the inspection of newsmen assigned to report U.S. missile and space activities.

In a general sense, the policy of reasonably free access to information on all aspects of the U.S. space program, military and civil, remained in effect for the next 4 years. For the civil programs of the National Aeronautics and Space Administration, this policy did not change, but commencing in November and December of 1961, the first "secret" military satellites were launched. Instead of identifying the payloads, the Air Force merely announced that Atlas-Agena boosters had launched satellites from Point Arguello, Calif. Presumably these involved either or both the Samos photoreconnaissance satellite and the Midas infrared early warning satellite.

Although these projects had been named openly in prior tests, and some information had been released on performance, the Government by this time felt a need to provide additional security. Perhaps the Samos was approaching an operational status and it was felt that the United States should no longer advertise each shot—any more than it would announce each U–2 espionage mission when that was still a viable project.

The process of restricting data on military projects has intensified since that time. In a secret directive issued in March 1962, the Pentagon sharply reduced the volume of information to be released on all military programs. This document specified that launches would be announced, the booster and launch site would be identified, and the public would be told whether the launch involved a satellite or a space

probe. The payload would not be identified, even by a popular name, nor would the Pentagon confirm whether the shot had succeeded. Effect of this was to sweep the experimental Discoverer program under the rug along with Samos and Midas. The Navy's Transit navigation satellite program was not affected at this time.

Even with the curtain descending on the bulk of U.S. military space activity, it was still possible to keep this area under a sketchy surveillance. The principal device for this was the Satellite Situation Report, issued twice monthly by the NASA Goddard Space Flight Center. This document purported to carry current U.S. tracking information on all objects placed in earth orbit. By cross-checking between the periodic military launch announcements and the orbital elements published in this document, it was possible to learn the success or failure of military launches as well as the probable identity of the payload—Discoverer, Samos, or Midas.

Even this meager information would probably have dried up if it had not been for a mixup in signals between the Pentagon and the State Department. During the period in which the Pentagon was tightening controls on space information, the State Department was negotiating a U.N. resolution (General Assembly Resolution 1721) requiring the space-launching nations to publish relevant data in a Space Register established in the U.N. At one time, for example, the Pentagon reportedly insisted that satellites which reentered the atmosphere would not be reported to the U.N. This would have wiped out virtually all information on the reconnaissance category of satellites which are fired into short-lived, low-altitude orbits and employ special recovery capsules to return their data to the earth a few days after launch. Fortunately, this move was turned back and the United States today is presumably announcing every one of its satellite launches. At least, that is the position of the U.S. Government and I have no substantial evidence to the contrary.

The Satellite Situation Report is an apt illustration of the tenuous grasp the public is allowed to have on the military space activity. Although issued by the Goddard Space Flight Center, all the data it contains is compiled and released by the North American Air Defense Command (Norad) in Colorado Springs, Colo. It is practically useless to demand that Goddard provide additional information for it has no control over the generating of data. Similar pleas to the Pentagon are turned aside with the remark: "Goddard has the sole responsibility for releasing space-tracking information".

Like the classic shell game, this arrangement is deliberate and it is clearly calculated to prevent reporters from locating the nugget of information they want. The arrangement has proven particularly onerous during the Soviet twin-cosmonaut launchings, when no official U.S. guidance was available on whether the Russians were actually performing a rendezvous in space.

At times, the Pentagon has seen fit to withhold obviously nonsecret information from the Situation Report. Effective September 1, 1962, for example, Norad suppressed information on all Soviet space activity, even in instances in which the Russians themselves acknowledged the shots. The Goddard report was suspended for 6 weeks, and when it resumed publication on October 10, 1962, it no longer referred to any new Soviet launchings in its chronological listing.

Where such shots had taken place, the Goddard report simply left a gap in its numbering sequence. This remarkable state of affairs persisted until April 30, 1963, when reporting of Soviet activity was resumed.

Here was a situation in which the U.S. public was not even being told what the Russians themselves were doing—and were even telling the world about in some cases. The restriction obviously could not protect the U.S. tracking system (an argument offered by White House Press Secretary Pierre Salinger), since the power of this system had been minutely demonstrated over the preceding 5 years. For example, the U.S. tracking system has identified 206 separate pieces of a Transit satellite rocket stage which evidently exploded in orbit after a launching on June 29, 1961.

The real reason for the suppression, it seems, was a childish inclination to play a cat-and-mouse game with the Russians. In August and September of 1962, the Soviet Union had tried three times to send interplanetary probes to Venus. All three got stuck in parking orbits around the earth and shortly thereafter decayed into the atmosphere. None were acknowledged by the Russians. Two of three Soviet Mars probes met the same fate in October and November of 1962, as did a lunar shot on January 4, 1963. These three failures were similarly ignored by the Russians.

It was not until June 6, 1963, shortly after Goddard resumed publication of Soviet space data, that the American U.N. representative, Ambassador Adlai Stevenson, publicly chided the Russians for failing to live up to the terms of the U.S. Resolution 1721 which created the Space Register. He explained that the United States had left gaps in its numbering sequence on the theory that the Soviet Union would report the six failures, but that it had failed to do so. In straightening out the record, he also noted that there had been erroneous speculation in the press that some of the objects had been launched by the United States.

As one member of the press who did speculate that these objects were United States in origin, I would like to observe that I was led to this inference by the very suppression of the information by the Pentagon. It was simply beyond my comprehension that the United States would remain silent on three Soviet Venus failures at a time when its own Marine II probe was swinging toward that goal.

The refusal to blow the whistle promptly and loudly on Soviet failures only added to my conviction that the missing entries in the Situation Report U.S. shots. Here was a case where news management backfired. Though there may be some wry satisfaction in that, the larger issue is the question of the public's right to know in an area which cannot be considered as part of the domain of legitimate U.S. security interests. The public is being asked to support huge Federal outlays for military and civil space endeavors, and it seems to me that it is entitled to immediate and honest information on what the Russians are doing in space. This is essential if the public is to make an informed decision on the appropriate scope of the U.S. program.

Although Soviet activity is now reported, there have been further losses of space information in other areas. After being conducted for 3½ years in the open, the Navy's Transit satellite was abruptly

classified last spring, a year after the Pentagon's original secrecy directive was issued. Assistant Defense Secretary Arthur Sylvester explained that the Transit was always meant to be included in the security order, but was mised by an oversight. At any rate, an attempt to place a Transit in orbit from Point Arguello failed on April 5, 1963, and for the first time a Transit launching was not formally identified by the Pentagon. Nor have two subsequent attempts been disclosed, although it has been possible to identify the launchings on the basis of other information.

One is at a loss to understand why Transit should be slipped under the rug after so many years of openness. My impression is that Transit is not being classified because of any intrinsic security significance it may possess, but because of its proximity to other military space programs. In other words, by announcing the Transit shots as these occur, the Pentagon presumably makes it easier for a foreign intelligence agency to pinpoint U.S. satellites of an information-gathering character.

Senator LONG. At this point we will take a short recess.

(Short recess.)

Senator LONG. The committee will be in order.

I apologize to you for this interruption. Will you please continue with your statement?

Mr. SIMMONS. Yes, sir.

It seems to me this is a dangerous road to take. Professionally, I regret the classification of any information, but I can readily understand the overriding national considerations for security precautions in the intelligence area. On the other hand, the suppression of information from the mere desire to confuse the opposition or make his analytical job more difficult is extremely questionable. Where does this tactic end? Do we go on to suppress all information on military space development and procurement programs? Do we classify the identity of Pentagon officials working on space problems? The end result of this approach is to deprive the public of all understanding of U.S. military capability, and we are headed in that direction right now.

Furthermore, I think this is taking place despite the fact that the Pentagon has stated a contrary policy. In a directive November 21, 1962, Assistant Defense Secretary Sylvester stated:

> It is the policy of the Department of Defense to disseminate to the public * * * all possible information about military space programs consistent with the protection of security information * * * the Department of Defense * * * will seek to disseminate maximum information in this area on a periodic basis as unclassified information becomes available.

On September 27, 1963, the Air Force orbited a Thor-Able-Star vehicle from Vandenberg Air Force Base. The Atomic Energy Commission announced a few days later that a 25-watt SNAP–9A radioisotope battery had been placed in orbit. Since this was designed originally for the Transit, it was an easy matter to infer that the launch involved another Transit navigation satellite. But it was also obvious that the size of the rocket permitted one or more "piggyback" spacecraft to be placed in orbit at the same time. It appears, in fact, that this was accomplished, and that the additional payload is purely scientific in nature with no specific military application. Yet nothing

has been said of extra spacecraft despite Mr. Sylvester's directive for release of unclassified information.

Still another example involves the launching October 16, of an Atlas-Agena from Cape Kennedy, Fla., with a pair of Vela-Hotel nuclear test detection satellites. Despite the fact that this program had been conducted in the open since its inception, and the fact that there was not even the "proximity" argument to justify the suppression of information, the shot was conducted with all the secrecy surrounding the more arcane efforts at Vandenberg and Point Arguello. It is difficult to imagine why this was the case, but one may speculate that once the engines of secrecy are set in motion, momentum alone prevents the release of information which would be clearly in the national interest to place in the hands of the public.

Even in cases where there is a major leak of sensitive information, the result is not always as black as the guardians of this information would have us believe. In July 1962 the eminent Mr. Hanson Baldwin touched off an extensive investigation when he reported that the United States had "obtained evidence" that the Soviet Union was beginning to harden a new generation of intercontinental ballistic missiles by placing them in horizontal revetments or "coffins" similar to those used in the early squadrons of the Atlas ICBM program. He also reported that the first generation of Russian ICBM's was concentrated in soft sites above the ground, with two ICBM's assigned to a single launch pad.

Mr. Baldwin's story in the New York Times clearly implied that the United States was obtaining pictorial data over the Soviet Union—presumably by means of the Samos reconnaissance satellite since the U–2 had gone out of business 2 years earlier. While this revelation may have troubled the Pentagon because it suggested the progress of a crucial national program, I submit that the long-term effect of the story was generally favorable. In the showdown that came just 3 months later over the shipment of Soviet missiles to Cuba, it was essential that the Russians understand the extent of U.S. targeting information. Mr. Baldwin's article had made it plain to the Russians that their strategic missiles could no longer rely upon concealment as protection against a far superior U.S. ICBM force. To the extent this was the case, I believe Mr. Baldwin's report was beneficial to the United States, even though it may have involved security information.

It is my conviction that the American public is not receiving a complete picture of the U.S. military space program within the reasonable bounds of military security. Nor has the public been given adequate information on the Soviet space program. During Soviet triumphs, Americans have had to rely upon the output of 500 enthusiastic Soviet press agents for their information; during Soviet failures, all they hear is silence—both from the Russians and from official U.S. sources.

If an informed public is essential to the democratic process, our present policies leave a great deal to be desired. I thank you for the opportunity to appear before you and I would be happy to answer any questions.

Senator LONG. Thank you, Mr. Simmons.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. Mr. Simmons, I was rather interested in the passage, I think it is on page 7 of your text, from the directive of the Defense Department. Could you explain exactly what that means? It looks to me like a good example of bureaucratic gobbledygook.

Mr. SIMMONS. This can be interpreted in many different ways. If it is interpreted positively, I think that we would receive much more information than we do have, but a negative interpretation just drops the curtain over the whole operation and it becomes increasingly difficult to find any fragment of information, the release of which would become consistent with national security. I think it is important and more a matter of attitude than language.

Mr. FENSTERWALD. Doesn't it, in effect, authorize the withholding of information that any particular Government official would wish to withhold?

Mr. SIMMONS. Well, I would hesitate to say that this language here would permit that and I have not seen the complete secret directive and that document I understand specified only those types of information which can be released about each military satellite or space shot, but the use of the document to permit an individual to withhold, just because of a whim, I am not aware that that has taken place.

Mr. FENSTERWALD. Which secret record were you talking about?

Mr. SIMMONS. The first one was issued in March 1962. The directive itself was classified. I do not have a copy of it, but I think I know generally what it states.

Now, the second directive on November 21, 1962, was a part of the original directive which was reissued in public form because this part at least was unclassified.

Mr. FENSTERWALD. Are you free to tell us what you think the first directive said?

Mr. SIMMONS. I think basically—just judging by the results that have taken place since March 1962, that the original classified directive specified four or five pieces of information which could be released with each military space launch, that is, the booster, rocket booster used in the launch, the base—launch site—and the date. Also, a statement as to whether the shot was a satellite or a space probe. The directive barred the use, however, of popular names for the payload or any description of the payload and the directive apparently barred any statement by the military services as to whether the object had gone into orbit or not.

Mr. FENSTERWALD. Can you think of any reason why that directive should be classified?

Mr. SIMMONS. I cannot see why, no, sir.

Mr. FENSTERWALD. Do you know of any authority under which they did classify that directive?

Mr. SIMMONS. No, sir.

Mr. FENSTERWALD. I have one other question. Over the past 5 years, taking everything into account, have you found a difference in the attitude of both military and nonmilitary people with respect to information regarding space?

Mr. SIMMONS. The flow of information has been constricted drastically within the past 2 years, I would say, more particularly in the past year and a half. The people that I deal with are simply carrying out Pentagon policies established by Defense Secretary McNamara and

Assistant Secretary of Defense Sylvester. But the top-level policy has changed markedly in the past 2 years.

During the Eisenhower administration, for example, because of the blow to our prestige from the Soviet space triumphs, the policy then was to put out a maximum amount of information about all of our space programs, even to the extent of releasing some outright intelligence information. That has changed, as I say, very sharply since the Kennedy administration, since Mr. McNamara became Secretary.

Mr. FENSTERWALD. But no one has really enunicated in writing what the information policies are, have they?

Mr. SIMMONS. No, except for the classified directives, which I am afraid I haven't seen, I am not aware that there is any public statement on what will be released, which is in fact responsive to what has occurred.

Mr. FENSTERWALD. Those are the only questions I have, Mr. Chairman.

Mr. KENNEDY. I think Mr. Simmons said—he stated quite well when he said that once the engines of secrecy are set in motion there is no telling where the momentum was going to take it. I wondered if one of the examples from Mr. Pulliam's statement might not indicate where momentum can go when he gave an example of a list of military installations which sold liquor by the bottle to servicemen and that this information was of a personal nature.

Mr. SIMMONS. Yes, indeed.

Mr. KENNEDY. Thank you.

Senator LONG. Thank you, Mr. Simmons. We appreciate your time and appreciate your patience. Thank you, sir.

Mr. SIMMONS. Thank you, sir.

Senator LONG. Our next and last witness this morning is Mr. Clark Mollenhoff.

Will you come around, please, sir?

We have a biographical sketch of Mr. Mollenhoff here which will be put in the record at this time.

(The document referred to follows:)

CLARK R. MOLLENHOFF

Born: Burnside, Iowa, 1921.

Education: Student, Webster City Junior College, 1938–41; LL.B., Drake University, 1944; Nieman fellow, Harvard University, 1949–50; LL.D., Colby College, 1959; L.H.D. (honorary), Cornell College, 1960; Litt. D. (honorary), Drake University, 1961.

Experience: Reporter, Des Moines Register & Tribune, 1941–50; Washington Bureau, Cowles Publications, 1950 to present.

Member: American Bar Association, Iowa Bar Association, Sigma Delta Chi, National Press Club.

Awards: National Sigma Delta Chi Award, Washington correspondent, 1954, 1955; Sigma Delta Chi Public Service Award, 1958; Raymond Clapper Award, 1956; Heywood Broun Award, 1956; Pulitzer Prize for National Reporting, 1958; Eisenhower Exchange fellowship for study Africa, Middle East, and Europe, 1960; Elijah Parish Lovejoy fellowship, 1959; Headliner Award (magazine writing), 1960.

Author: "Washington Cover up."

Senator LONG. The committee will be happy to hear you at this time.

STATEMENT OF CLARK R. MOLLENHOFF, COWLES PUBLICATION, IN BEHALF OF SIGMA DELTA CHI

Mr. MOLLENHOFF. Mr. Chairman, I am sorry I wasn't able to prepare a statement, but we do have the Sigma Delta Chi report for 1963 which I would like to have included in the record. I am referring to the first section of it dealing specifically with the Federal Government and the problems in the Federal Government.

Senator LONG. Without objection, that will be so ordered.

Mr. MOLLENHOFF. I am appearing on behalf of Sigma Delta Chi. Mr. Newton was unable to be here.

From the standpoint of this legislation generally, I wanted to say first this morning something which we should be interested in as newsmen. I think this is "good government legislation." It is a good government bill because it deals with the problem of orderly government as a step to obtain honest government. It creates a situation where those in our Government, in power, have to make a record of everything they have done and the reasons at the time. And that we as reporters can go in at a later stage if they do it properly and find out the basis for decisions. In those cases where military security is involved the Congress can go in at a later stage.

Now, there are some points of difference. Sigma Delta Chi raised some question relative to some of the phraseology. This is not for purposes of trying to change what you have here, but more to draw attention to the fact that in the past phrases have been picked up from legislation that was intended to make records available and perverted to other uses. The housekeeping statute was the key case that we had several years ago. It was necessary to pass legislation that stated specifically that this section was not to be used as a basis for withholding any information.

Now, let me say, to start with, that the history is filled with examples of part of the record being hidden. We had this in the Tea Pot Dome scandals where there was the transfer of oil lands from the Navy Department over to the Interior Department and the whole record of how this transpired was thrown into a drawer and was kept from the public. This was later pulled out by a congressional committee, and it was documented, and I think it took 2 or 3 years before they proved the payoffs were involved in the whole matter.

Now, that was not an isolated case. We can see through the years what has taken place in this same area. In the Truman administration there were some problems in the RFC where parts of the record were withheld from the public and some cases were held from the Congress and things other than merit went into the decisions. It was extremely difficult—I was one of the several dozen reporters working on that at that stage and it was very difficult to get information relative to RFC loans. It is not necessary to go into this in detail here. There are committee records showing this.

The tax scandal situation was a similar problem. In this case you had section 55 of the Internal Revenue Code which was used and overused to try to include everything within the Internal Revenue Service.

Under the last administration we had the case of the Al Sarena timber problem where an individual at high level in the Interior Depart-

NOTE.—The Sigma Delta Chi report was be found in the appendix at p. 218.

ment reached out and got new information into the procedures at the highest level to change the decision of subordinates. That is precisely the thing that your Administrative Procedure Act is set up to stop and the publication of this is to make it available to the press and to others because that will make people think twice before they make wrong decisions, before they make decisions that are not supported by fact.

Now, in the present administration there are a good many other examples I could make reference to, but it is only necessary to make reference to one case. I think that the TFX case is the grand example of bad government, and it involves problems of information and inaccurate information, misleading information over quite a period of time.

What took place in this case has been examined in full by the McClellan committee for other reasons. They are looking into it from the standpoint of weighing all the evidence.

I think it would do well for this committee, though, to examine it from the standpoint of information, from a standpoint of administrative procedures. Here we have a case where 18 months to 2 years of study was involved with hundreds of employees of the Defense Establishment, engineers, metallurgists, and top military people involved in making recommendations. In the end they came to a conclusion that the contract should be awarded to the Boeing Co. This was the high-level Pentagon source selected for this—it is the Pentagon Selection Board—and it was a unanimous decision. This was overruled. The McClellan committee is now in the process of determining upon what basis it was overruled. As they have explored this they have found a great difficulty in determining the decision points and the information that was before the various officials at the time they made the decisions.

For example, Secretary McNamara made a general decision that the Boeing Co. had not engaged in cost realism. He was asked what he had to support this.

The General Accounting Office people went to his office and he said that he got the figures "out of his head," he made a "rough" estimate. In this case the Comptroller General said that he did not feel that this procedure was good government on a multibillion-dollar contract. That's putting it about as mildly as I think one can.

There are a number of other matters relative to this case. I think it would do this committee a lot of good to review the problems involved with the staff of the McClellan committee because it goes to the heart of proper administration of government, making decisions on fact. The questions in this case involve what reports were available to the Secretary of Defense at the time he made his decision. I am not prepared to say today just what reports were available to him. Because the whole area has been so hazy that the McClellan committee with almost a year of investigations and hearings behind it has had a difficult time and has some controversy with the Defense Establishment as to precisely what was available.

Now, on multibillion-dollar contracts I would think that there should be a more precise record and I would think in some of these areas that the record—at least certain aspects of the record—should be available to the press.

Now, granted, that in the Defense Establishment, national security is involved. Under those circumstances we also have an interest—not as of that day, but as of 6 months later or a year later when the security wraps can be taken down and when the congressional committee comes into it. There should be some way of forcing the agencies in all cases to have proper material available for the public.

Now, one of the things that is particularly important in this legislation that you have here now, that is not in the legislation that exists today is a court process for obtaining information—for forcing the hand of the executive branch of the government. I think that in addition to what you have here, there should be something else. I don't want to clutter up the legislation—and I would not ask that—but I think this is something the Congress should keep in mind.

The Congress should be in a position from which it can independently obtain information under the laws it passes without always relying upon contempt of Congress and this type of procedure. It should also be able to do this without relying upon the Attorney General who always has a relationship with the executive branch. At the present time there may be a special relationship, but under normal circumstances the Attorney General is out of the official family of the administration. He cannot be expected under these circumstances to proceed in a totally objective way in looking out for the rights of the Congress to information.

I think that probably takes care of the basic presentation. This of course is in addition to the material which we have outlined in this report relative to specific inaccuracies in the TFX investigation that are well documented in the McClellan committee hearings. There is no particular purpose in going into the whole thing in any more detail here today.

Senator LONG. Thank you, Mr. Mollenhoff.

Mr. Fensterwald, do you have any questions?

Mr. FENSTERWALD. I have just a couple of questions, sir.

Mr. Mollenhoff, you probably heard me say earlier that I had some difficulty in getting reporters to document cases of withholding and even after they had been documented of presenting them to the Senate. Can you think of any particular reason why reporters would be reluctant to come in and help in this project?

Mr. MOLLENHOFF. This would depend to a degree upon the reporter and what his beat was. There is a real problem for the reporter who might be in a position where his work was dependent to a large extent on a relationship with an agency or where he didn't want to irritate people he worked with, and wanted to have the maximum cooperation from the Government agency. He might not see fit to want to come forward and make an issue out of it. When you come forward and make an issue out of it there is always considerable criticism one way or another. Some people don't like controversy. That's it, I think, to a large extent.

Mr. FENSTERWALD. This doesn't seem to inhibit you.

Mr. MOLLENHOFF. No, I can't say that it has. I might say that it has not always won press support across the board. I would say by and large, that there is fine support across the press in this area. But there are some people in the press who don't recognize their rights are contingent upon the rights of Congress. I happen to be one of those

who believes that my right of access to the executive branch of the Government is contingent to a large extent upon the power of Congress to force its way into the executive branch. I know that it isn't my pleasant personality or anything like that that goes me information down the other end of the avenue. There are people down there who feel I am just the type of fellow who, if I don't get the information, will come right up here to some proper committee and say that I can't get the information and raise quite a little howl about it, and I am just that kind of fellow.

Mr. FENSTERWALD. But you don't contend that that is the way the system should operate?

Mr. MOLLENHOFF. It shouldn't have to operate this way at all. It will to a degree, always be contingent, in the end, upon the ability of Congress to force the issue. We have seen the use of the executive privilege in the past. Senator Hennings, who was chairman of this committee several years ago, did some studies on this. This was an arbitrary action by the executive branch and at that stage the legislative branch had no device short of going into an impeachment of going into contempt of Congress action to do anything about it. This created a very difficult problem. It was almost impossible to expect that the Attorney General would take action and administer the laws in an objective fashion. In fact, the Attorneys General to the contrary have always turned around and written legal opinions in many cases with absolutely no support in law, no support in decisions of the Supreme Court. Most of these opinions are just self-serving declarations that there is a right of the executive to withhold anything that they think is a working paper, internal management of Government—an executive right.

Mr. FENSTERWALD. Nothing has changed since the hearings with respect to that?

Mr. MOLLENHOFF. There was a period, I might say, when the administration, the present administration, came into power, when there was a much better attitude. It extended for a period of months. It was in this period of time that Congressman Porter Hardy obtained the records that had been hidden for 2 or 3 years involving the foreign aid scandals in Peru or Laos—I forget which. The record was hidden up to that point. At that stage he was able to get the President of the United States to give his personal assurance that these records would be made available. They were made available. They did document a scandal. I do not believe that the officials of the past administration, the people at the top level were involved in the scandals. However, lower level officials, some of them involved directly or indirectly were using the executive privilege to hide what was wrong with an agency and this was permitted by higher level officials.

Mr. FENSTERWALD. I have one last question: Do you think it is proper for newspapers to have a policy that their reporters or employees should never testify voluntarily before a congressional committee on any subject?

Mr. MOLLENHOFF. Well, I wouldn't want to get into the situation of voluntary testimony. I think if requested, we all should testify. We are all citizens. Though we are newspapermen, we are also citizens. I think that every citizen has a right and an obligation, if he knows anything that is helpful to the Congress or to a court or to any

other official body. When they are operating within a proper jurisdiction we should come in and testify fully. Certainly there are circumstances as a matter of policy in some organizations that might preclude testimony, but one would have to examine that in detail. I, personally, think that we should be helpful wherever we can.

Mr. FENSTERWALD. That's all, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. I have no questions, Mr. Chairman. Thank you.

Senator LONG. Mr. Mollenhoff, thank you very much, sir. Sorry we had to run this late today.

The committee will stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 12:30 o'clock p.m., the subcommittee was in recess, to reconvene at 10 o'clock a.m., Wednesday, October 30, 1963.)

FREEDOM OF INFORMATION

WEDNESDAY, OCTOBER 30, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 o'clock a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh, Long of Missouri, and Burdick.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Kathryn Coulter, special assistant; Donald V. Nangle, assistant counsel; Charles Helein, assistant counsel; Carlos F. Lucero, staff assistant; Joan Miller, staff assistant, office of Senator Long.

Senator BAYH. The hearing will please come to order.

Our first witness this morning is Mr. Howard Bell, who is vice president for planning and development, and an assistant to the president of the National Association of Broadcasters.

I have a rather lengthy, well-documented biography of Mr. Bell. Without objection, I will submit it for the record.

(The biography referred to follows:)

HOWARD H. BELL, VICE PRESIDENT FOR PLANNING AND DEVELOPMENT AND ASSISTANT TO THE PRESIDENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Howard H. Bell was named vice president for planning and development and assistant to the president of the National Association of Broadcasters on July 12, 1962.

Mr. Bell joined the association in 1951 as assistant to the vice president for television and was elevated to the post of assistant to the president in October 1954. He later was assigned additional duties as coordinator of State association activities and was named assistant to the president in charge of joint affairs in January 1958.

On May 12, 1960, he was appointed director of industry affairs and was named vice president for industry affairs a month later.

Mr. Bell has responsibility for projects and activities within the association which jointly concern both radio and television. He is in charge of staff planning and development of projects and programs, particularly those designed to serve the long-range goals and objectives of the association and the needs of the industry. He also is in charge of planning for the national conventios, fall conferences, board of directors' meetings, and joint committee projects.

His assignments include work with the NAB Committee on Editorializing, as well as the NAB Freedom of Information Committee in whose behalf he coordinates the continuing efforts to gain equal access for broadcasting in the coverage of public proceedings.

He is a member of the accrediting committee of the American Council on Education for Journalism.

A native of New York City, he is a graduate of the University of Missouri School of Journalism and currently serves as a member of the board of the university's freedom of information center. He holds a degree in law from the

Catholic University of America, and is a member of the Bar of the State of Maryland.

His introduction to broadcasting came at station KFRU, Columbia, Mo. Prior to joining the association, Mr. Bell was sales promotion manager of WMAL and WMAL–TV, Washington, D.C., for 4 years.

He is a member of the American Bar Association, the Federal Communications Bar Association, the Washington Advertising Club, the International Radio and Television Society, the Broadcasters Club, Alpha Delta Sigma professional journalism society, and Pi Kappa Alpha social fraternity.

A World War II Navy veteran, Mr. Bell is married and the father of three children, Mary Elizabeth, Jeffrey, and Laurie. He resides in Rockville, Md.

Senator BAYH. Mr. Bell, I understand you have a message for the committee this morning.

We are glad to have you here.

STATEMENT OF HOWARD BELL, VICE PRESIDENT FOR PLANNING AND DEVELOPMENT OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. BELL. Thank you very much. I am happy to be here.

Mr. Chairman and members of the subcommittee, my name is Howard Bell. I am vice president for planning and development of the National Association of Broadcasters. The association membership as of October 23, 1963, includes 1,931 AM radio stations, 674 FM radio stations, 426 television stations, the 4 national radio networks, and the 3 national television networks.

I appreciate the opportunity you have afforded me to comment on the proposed legislation, S. 1666, to amend section 3 of the Administrative Procedure Act of 1946. The association and its freedom of information committee have long been opposed to all barriers to a free flow of information from Government to the American people.

As Chairman Long has stated:

> The public is helpless if it cannot obtain the facts about its Government. Without the facts it will inevitably excuse the errors of its public officials. And public officials in all ages and places are prone to hide their errors behind a cloak of secrecy.

This association applauds the objectives of the bill, which, in the words of its sponsors, are—

> to make information in Government agencies more readily available and to delineate more clearly the areas in which and the purposes for which information may be withheld.

While it is recognized that one of the basic purposes of the Administrative Procedure Act is to require agencies to keep the public informed about agency proceedings, there has been legitimate concern over the years that the exceptions and qualifications in the public information section of the act have served in some cases to suppress information in which the public has a legitimate interest, rather than to make it available.

For some years now, there has been pending in the Congress legislation in one form or another designed to treat with the problems of Government news handling and dissemination. In the 85th Congress an amendment to the "housekeeping" statute (5 U.S.C. 22) was enacted to prevent agencies from using this statute as a basis for withholding information—a measure actively endorsed and supported by

the National Association of Broadcasters. However, past efforts to enact legislation defining in adequate terms a general public information policy for Government agencies have not been successful. It is hoped that the current proposal will receive favorable consideration by the Congress. For we do not believe that any information which is of legitimate public-interest concern should be withheld by a governmental department behind a cloak of secrecy or privilege. The democratic process is strongly dependent upon unhampered availability and dissemination of information to the public.

The language of the present section 3 permits such a wide latitude of interpretation that it can be, and often is, used as the basis for withholding information, rather than making it available as was the original purpose of section 3. The proposed bill deletes many of the phrases which administrators rely on in this connection. The bill also has the desirable feature of providing to a complainant improperly denied access to agency records or information a course of court action. Additionally, it contains certain exceptions revolving around the concept of national security and internal management. We would suggest another exception in furtherance of the bill's objectives.

In the broadcasting industry, there are increasing demands from the licensing agency for information of a confidential business nature. Often the information requested imposes unnecessary burdens on the licensee and unnecessary costs on the administrative agency. Specifically, we are concerned here with information with respect to financial activities and business operations. Presently under section 0.406 of the Rules of the Federal Communications Commission this information is not open to public inspection. This policy is, of course, consistent with that expressed in section 6103 of the Internal Revenue Code wherein it is provided that for reasons of public policy tax returns are not open to examination and inspection, except upon order of the President and under rules and regulations prescribed by the Secretary of the Treasury and approved by the President. We do not believe that such information should lose its confidential classification because it is filed in response to a request of the FCC rather than the Internal Revenue Service.

Privacy has historically been respected by the Government in financial matters which, for competitive purposes, should not be made publicly available. As far as broadcasters are concerned this information, when filed with the FCC, would lose its confidential status under the bill, as it is not protected by statute but only by discretionary rule of the Commission.

We recognize the difficulties that arise when an attempt is made to balance the equities of access to information and invasion of personal privacy. However, we do feel that some provision must be made in the law to preclude any unwarranted invasion of personal privacy when information is required by adminstrative rule and is submitted in confidence. In our view, in such a case the equities are on the side of not requiring disclosure because the public value is nil, while the damage of such disclosure to a business enterprise could be substantial.

There are no compelling public interest considerations that warrant the publication of personal business information on file with Federal agencies. The public at large has no interest in such information. It is only in relation to common carrier matters that there is a rather

obvious purpose for making financial matters public. In such cases, public inspection is consistent with the accepted concept of regulation of carriers where rates are set and the general public is affected by the business arrangements and practices of the enterprise.

Thus, while in full accord with the overall purpose of the proposed legislation, we recommend that a further exemption be provided in section 3(c) wihch would pertain to financial or other business matters which are "submitted in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy." This would not curtail information that is of legitimate concern to the public, but it would remove from public scrutiny financial information which would be of concern only to competitors.

We believe that the passage of S. 1666 will constitute a milestone in efforts to eliminate the growing trend toward secrecy in Government. This trend has been increasing in proportion to the size and complexity of the Federal Government. And it is a trend evident at the State and municipal levels as well. The skilled reporter is not satisfied merely with the Government "handout," and this, too, is a growing policy in Government news. He is interested in the facts behind the release. Too often attempts to secure those facts have been thwarted by bureaucratic interpretations of the law. At a time in our history when an understanding of Government policies and the facts upon which these policies are based is so essential to informed public opinion on the great issues of the day, we can no longer afford a public information policy which supports and protects nondisclosure of the public's business.

And as media of communications upon which the public relies more and more as a source for its news, we have an obligation to provide in depth the fullest coverage of the events which shape our lives and affect our destinies. Only in an atmosphere of full and complete access to Government information can we discharge this responsibility to the American people. This is why we respectfully urge the Congress to enact the legislation presently before your subcommittee, together with the amendment recommended in this statement.

Thank you, again, Mr. Chairman, for the opportunity to present this statement to you this morning.

Senator BAYH. Thank you for your well thought out presentation.

Would it be fair to say that you agree with the general purpose of this legislation but that you have a particular problem because you are in a regulated industry?

Mr. BELL. To the extent we are licensed by the Federal Communications Commission, we are in a somewhat different posture than the other news media with respect to certain information that is required to be supplied. We believe that only information which is of a financial business nature, of an internal business nature for the benefit of the Commission in supplying information to the Congress should be guarded.

Senator BAYH. Information, I suppose, that would be of help to your competitors.

Mr. BELL. Yes, that is right.

Senator BAYH. Is there any danger that in withholding this information you might also withhold facts that would be pertinent to Congress and administrative agencies as far as some situations where you

might have a conflict of interest that should be made public knowledge so as to prevent this conflict of interest?

Mr. BELL. Mr. Chairman, actually, the information that is supplied to the FCC is not withheld from the Congress because it makes an annual report, and it also releases the financial data with respect to the radio and television industry publicly. But they release it in general terms, industrywide statistical terms rather than disclosing the financial statements of each individual licensee. And, of course, the Commission has the responsibility to see that there are no conflicts of interest or other aspects that would require investigation of the station's operations in the public interest.

So that I think there is a protection of the public in the Congress here, but it is a question, as you say, of protecting the broadcaster individually from competitive information being released.

Senator BAYH. You would not suggest that the names of the people connected with the station or the incorporators of the station, that these names would not be held in secrecy but just the financial data?

Mr. BELL. No. As a matter of fact, that is public information now at the Commission, and whenever there is a change in the ownership of a station, the requirements of the FCC are that they must be advised immediately of any such transfers of control or change in ownership or additional personnel in the ownership picture, and that is public information. That is not kept confidential.

Senator BAYH. That is made public now just the same as the information which you want to keep confidential is also confidential under a ruling of the Commission?

Mr. BELL. That is right.

Under a rule of the Commission, they could, in their discretion at the present time, release the financial information on a particular licensee, and it might well become an issue in a hearing or in a situation that raised the public interest question.

But the present bill that we are discussing in effect would wipe out that section of the Commission's rules.

Senator BAYH. Mr. Fensterwald?

Mr. FENSTERWALD. Mr. Bell, just to stay on the same point for a minute, as you know, there is an exception in the statute for information which is exempt by statute, by another statute. For example, the Federal Trade Commission, which gets information similar to that requested by you, or the Federal Communications Commission has statutory exemptions. When this bill (S. 1666) was drafted, it was the view of some of the sponsors that most of the agencies that require an exemption had it by specific statute. As it turns out, we find many of them do not.

I would like to ask you whether an exception in the bill, a new category labeled "trade secrets," would cover the problem that you have.

Mr. BELL. If trade secrets were interpreted under the law to include financial data of the type that is normally submitted to the Internal Revenue Service for tax information which is confidential, then I would say that would probably cover this situation, yes.

Mr. FENSTERWALD. The term "trade secrets" has a fairly clear meaning in the law at present, and I think putting it in the bill, plus an explanation in the report as to generally what we mean, might take care of that difficulty.

I might say it was thought that this was already covered generally by the other exemption that we put in.

Mr. BELL. Right.

Mr. FENSTERWALD. On another subject, would you say that the present law, the present section 3 of the Administrative Procedure Act is a disclosure statute or a withholding statute?

Mr. BELL. I think the intent of the section was to promote the disclosure of information. In actual practice, it has worked the other way.

It has proved, because of the general language, "for good cause" and so forth, as a means of administrative agencies denying information on the basis that good cause was not shown and such similar general language, and also the interests, personal interests of the person requesting the information. And there has been no recourse if the information has been denied, as there is in the proposed bill where the complainant can go into the Federal court.

I think it was designed to be a measure to promote freedom of information, but I don't think it has worked that way.

Mr. FENSTERWALD. Do you think Government agencies as a whole have perverted the intent of the law?

Mr. BELL. I think that they have at times, in certain situations, found the law to be an easy excuse for not disclosing information which they felt for one reason or another they did not want to disclose.

Mr. FENSTERWALD. Without asking you to comment on every provision in the present bill, S. 1666, if we cannot drastically change the present section 3, do you think anything would be lost if we simply repealed it and put the law back to where it was before 1946?

Mr. BELL. I am not certain what the effect of repeal would be. If that would then leave it to the discretion of each agency without any direction from the Congress, I think that would be unfortunate.

Mr. FENSTERWALD. Isn't that just exactly what the situation is today, though, under the language of the present section 3?

Mr. BELL. Yes, I think it is, in that the agencies have been able to get around any instance where they did not want to release the information.

Mr. FENSTERWALD. Those are all the questions I have, Mr. Chairman.

Senator BAYH. Mr. Kennedy, do you have any questions?

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Bell, in his example, suggested one solution which might be worth further exploration. Referring to the Internal Revenue practice, he said that the Internal Revenue Code provides that certain information for reasons of public policy are not open to examination and inspection except upon orders of the President, and under rules and regulations prescribed by the Secretary of the Treasury and approved by the President.

That is quite similar to one of the provisions in section 3 which provides that matters relating to the national defense can be kept secret by Executive order.

I would like to ask Mr. Bell whether we might not adapt that Internal Revenue concept to this type of information in section 3 with a provision that if the matter is required to be submitted by agency rule or order it could be kept secret pursuant to agency rules which were approved by the President.

Would that meet the general need that you have and still provide enough safeguards so that the information which should be available would be available because the President wouldn't approve such a withholding?

Mr. BELL. I am not sure that it would, sir, because it doesn't clearly, then, define what information or on what basis the information would be withheld or disclosed at the discretion of the President.

If the President then decided that all financial data should be disclosed, we would not be protected under that arrangement. It is obvious with respect to Internal Revenue information for tax returns of the individual taxpayer, of the type of information you are talking about, the personal tax and financial status of an individual, which is a private matter. It would not be obvious what information we are talking about with respect to giving the President the discretion to withhold or release information.

Mr. KENNEDY. Then, if the President decided all financial matters should be withheld, that would be equally bad because some of it should be open to the public view, is that right?

Mr. BELL. Yes, some of it should be, and also the Congress under the act, the Communications Act, should be informed on the business with which the Federal Communications Commission is responsible, charged with responsibility.

Mr. KENNEDY. How well does the Internal Revenue Code provision work. It rests upon the same basis, as I read your statement of it—rules and regulations prescribed by the Secretary of the Treasury and approved by the President. Does it work in that area?

Mr. BELL. Well, I am not familiar with the detailed workings of that act and the rules pursuant thereto, but I am not aware of any situation where indiscriminately taxpayers' financial data have been made public, unless, of course, there is a good cause as tax evasion or hearing or a proceeding against the taxpayer in which he may be accused of certain wrongdoing.

I am not an expert in that field, however, sir, so I can't respond with any degree of accuracy as to the workings of the code.

Mr. KENNEDY. So it is an area we should explore as a technique?

Mr. BELL. Yes.

Senator BAYH. Thank you very much, sir. We appreciate your helping us with the hearing.

Mr. BELL. Thank you.

Senator BAYH. The next witnesses are Mr. Theodore Serrill and Mr. Walter Potter, of the National Editorial Association.

Gentlemen, come forward, if you please.

I might note that we have biographies of both these gentlemen presently in hand. Without objection, I will place them in the record of the hearing.

(The biographies referred to follow:)

BIOGRAPHY OF THEODORE A. SERRILL, EXECUTIVE VICE PRESIDENT, NATIONAL EDITORIAL ASSOCIATION

Theodore A. Serrill is executive vice president of the National Editorial Association, trade association of 6,000 weekly, semiweekly, and daily newspapers in the hometown field. Serrill was named to that position January 1, 1961, after serving as employee relations department director of the Grocery Manufacturers of America, Inc., New York City.

The National Editorial Association, founded in 1885, moved its headquarters to 1025 Connecticut Avenue, Washington, D.C., from Chicago in 1959. NEA operates two wholly owned subsidiaries, one the Weekly Newspaper Representatives, Inc.—the "One Order-One Bill-One Check" national advertising representation for 7,200 hometown weekly newspapers. WNR headquarters are in New York City, with branches in Detroit, Chicago, Atlanta, and Los Angeles. The second subsidiary is Newspaper Advertising Service, Inc., providing materials and services to members.

Serrill, before going to New York in 1960 to establish an employee relations department for Grocery Manufacturers, was for 3 years executive director of the Washington, D.C., Newspaper Publishers Association. Prior to that he was an executive for the Pennsylvania Newspaper Publishers Association, Harrisburg, Pa., for 13 years.

While in Harrisburg he served as general manager of PNPA from 1950 through 1956. In that time he directed the program that led to the financing and construction of a headquarters office building at 2717 North Front Street. Under his guidance the truth-in-advertising laws and libel laws of the State were amended. He was an active member of the Harrisburg Rotary; Advertising Club; Poor Richard Club (Philadelphia); Harrisburg Trade Association Executives (past president); Penn State Alumni (past area president and council member); Pennsylvania Society for Crippled Children (director); Pennsylvania Welfare Forum (director and editor); and Central Pennsylvania chapter of Sigma Delta Chi (past president).

Originally from the Philadelphia suburb of Hatboro, he received his B.A. in journalism and geology from Penn State University. Mrs. Serrill and he reside at 6411 Winston Drive, Bethesda, Md. One son, Ted, is a reporter on the Plainfield, N.J., Courier-News, and a second, James, a student at Penn State University.

Serrill is a member of National Press Club, National Association Executives Club, Quorum Club, Washington Trade Association Executives, Printing House Craftsmen, American Society of Association Executives (past director), and Torch, of Washington. He also holds memberships in Sigma Delta Chi, professional journalism society; Alpha Delta Sigma, advertising fraternity; and Phi Kappa Theta, social fraternity.

He is a past president of Newspaper Association Managers, the organization which sponsors National Newspaper Week. He served as chairman of Week for 1 year. As NAM president he served one term on the board of NEA.

His past experience includes work on the Washington, D.C., News, Charlotte, N.C., News, Easton, Pa., Express, and during World War II, with the War Loan Division, U.S. Treasury.

Early in 1960 he acquired part ownership of Brown-Thompson Newspapers, Cambridge Springs, Pa., publishers of five weekly newspapers in Erie and Crawford Counties. He is vice president and a director of that company.

BIOGRAPHY OF WALTER B. POTTER, CULPEPER, VA.

Editor, publisher, and owner, Culpeper Star-Exponent, daily except Saturday and Sunday; publisher and owner, Emporia (Va.) Independent-Messenger, weekly.

Born Emporia, Va., 1915. Graduate, Washington and Lee University, 1948, with bachelor of arts degree, magna cum laude, Phi Beta Kappa.

Worked for father on Farmville Leader (now merged with Farmville Herald) until father's death. Then manager Clarion Publishing Co. (job printing) for year and half before going to work for Farmville Herald. With Herald until called to military service in 1941. Second lieutenant with Virginia National Guard prior to World War II. Five years on active duty, 2½ in European theater, rising from second lieutenant to major. Now lieutenant colonel in Army Reserve. Awarded Bronze Star, Combat Infantry Badge, two invasion arrow heads, and five battle stars.

After war, attended Washington and Lee. Following graduation, managing editor Hopewell News, Hopewell, Va., to January 1951. In 1951, Virginia Star leased. In 1953, Culpeper Exponent acquired and merged with Star. Merged paper became daily March 1, 1963. Paper is published by Newspaper Publishing Corp. of which Potter is president and treasurer, wife is vice president and secretary. Acquired Independent-Messenger of Emporia in December 1961.

Past President Virginia Press Association and member board of directors of the National Editorial Association.

Director and first president of Culpeper Industrial Corp. and Culpeper Development Corp. Past president Culpeper Chamber of Commerce. Incoming president, Culpeper Lions Club. Director, Culpeper Retail Merchants Association, member, board of stewards and past chairman board, Culpeper Methodist Church, past director, Culpeper Memorial Hospital and Culpeper Country Club. member the Moose, Veterans Foreign Wars, American Legion, Omicron Delta Kappa, Phi Eta Sigma, Sigma Delta Chi, and Kappa Sigma.

Married to the former Miss Alice Katherine Hudson, of New Orleans. Two sons, Walter, Jr., 13, and Robert McLean, 10.

Senator BAYH. Which of you gentlemen is Mr. Serrill and which is Mr. Potter?

Mr. SERRILL. I am Mr. Serrill, and this is Mr. Potter.

Mr. Potter will make our presentation, and I am here to make comments and additional interpretations, sir.

STATEMENTS OF THEODORE A. SERRILL AND WALTER B. POTTER, ON BEHALF OF THE NATIONAL EDITORIAL ASSOCIATION

Mr. POTTER. Mr. Chairman, my name is Walter Potter. I am publisher of the daily Star-Exponent in Culpeper, Va. I am a director of the National Editorial Association and chairman of its legislative committee. I am appearing on behalf of the association, and am accompanied by its executive vice president, Mr. Theodore A. Serrill.

NEA would like to congratulate you, Mr. Chairman, for your sponsorship of the freedom of information bill, S. 1666. We would also like to thank the 17 other Senators who have joined Senator Long in cosponsoring this legislation. The newspaper profession is indebted to you gentlemen. We hope the bill passes as promptly as possible, and NEA will do everything it can to aid passage.

The National Editorial Association comprises more than 6,000 newspapers located in virtually every county of the United States. Over 5,500 NEA members publish weekly papers and more than 500 publish dailies. Forty-two State newspaper associations are affiliated with NEA.

All of these members have been informed of the bill under discussion today. NEA newsletters reported its introduction last June, carried an item on the luncheon held by Senator Long last summer, and published advance notice of these hearings. The current issue of National Publisher, official NEA magazines, includes an article explaining the Long bill.

Full discussion of it was held with representatives of some 1,000 newspapers at the fall meeting of NEA in Memphis during the past week.

As the voice of the hometown press, NEA is particularly concerned about denial of access to information at the local level. S. 1666 is concerned only with Federal departments and agencies but will have an important impact on local communities. In the first place, the Federal Government has representatives in every county of the Nation, all of whom would be affected by this bill.

For example, Mr. Chairman, there are at least a dozen Federal offices in my home county. In addition to those Federal offices in my county, there are numerous other U.S. officials headquartered elsewhere whose responsibility includes Culpeper County. For example, Wage and

Hour Division inspectors from the U.S. Department of Labor visit employers in my home county. All of these Federal officials are prospective news sources for my paper, and all of these officials are bound by rules established in Washington. This bill does not just affect the headquarters bureaucrats but those in the field as well.

A second reason for NEA's interest in this legislation is the byproduct effect that Federal practices have on State and local practices. News suppression at the national level begets news suppression at the local level. If the Federal Government invokes secrecy, the temptation is strong for State, county, city, and town officials to follow the example set in Washington.

Sometimes the Federal Government not only sets an example of secrecy but encourages local officials to follow the same course. Representative John E. Moss, chairman of the House Government Information Subcommittee which has done so much for the cause of freedom of information, gave an example of this recently. 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.

In a more recent case in Denver, the situation was identical, the local authority having been investigated by a Federal body. Reporters seeking the facts again encountered a secrecy policy both in Denver and in Washington. Happily, this Denver story has a happy ending. Due to efforts of the Moss subcommittee, the report on the Denver Public Housing Authority is being released. Information to which the public is entitled will be made available.

There are many other examples of how Federal secrecy affects the local community. Earlier this year, a weekly paper in upstate New York ran into a secrecy wall in connection with the efforts of local citizens to obtain Federal funds to rescue a bankrupt golf club. The public's money, to the tune of $800,000, was involved. The Federal official in the area would not disclose the full facts. A check at headquarters in Washington revealed the facts were considered "confidential." The newspaper sent a telegram to the Secretary of Agriculture, protesting the unwarranted secrecy. The telegram pried the information loose, the loan was promptly rejected as the paper had demanded editorially, and the full facts were spread on the record. Not all such incidents turn out that way.

If the Long bill had been on the statute books, it would have been illegal for the Department of Agriculture to refuse to disclose the facts on an application for Federal funds to bail out a bankrupt country club. There was no possible excuse for the secrecy in this case. A vigilant newspaper was able to smoke out the facts but it is anybody's guess how often such suppressions succeed in hiding information which should be disclosed.

It is axiomatic that no bill is perfect but we are confident that any freedom of information bill you pass will be a step in the right direction. There you have the wholehearted support of hometown newspapers. If there is anything the National Editorial Association can do to further the cause of this legislation, we are eager to help.

Thank you for the opportunity of presenting these views.

Senator BAYH. Thank you very much.

Mr. SERRILL. Senator Bayh, if I may at this time I would like to introduce a resolution which our association passed last week in Memphis.

We had an attendance of approximately 600, including from your own home State, Wray Fleming and Dick Cardwell of the Hoosier Press Association.

This resolution is very brief, and I would like to read it, if I may.

Senator BAYH. Please read it into the record.

Mr. SERRILL (reading):

Whereas S. 1666, a bill introduced in the U.S. Senate by Senator Edward V. Long, Missouri, with 17 cosponsors, including the late Senator Kefauver, greatly improves the language of the information section of the Federal Administrative Procedure Act (5 U.S.C. 1002) which it seeks to amend; and

Whereas S. 1666 should increase the availability of information from the departments and agencies of the executive branch of the Federal Government as was the purpose, poorly realized, of the act; and

Whereas S. 1666 is the best Federal public records bill that in likelihood can become statutory law; at this time be it

Resolved, That the members of the National Editorial Association meeting in annual convention in Memphis, Tenn., October 26, 1963, do hereby endorse S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946, to clarify and protect the right of the public to information and for other purposes; and recommend its enactment by Congress.

Thank you, sir.

Senator BAYH. That is now in the record.

I noticed attached to your testimony is also a newspaper article, "Empire State Weekly Blows Whistle on 'Farmers' Loan."

Mr. SERRILL. I have already provided in advance a photocopy of page 32 of the National Publisher of September 1963 which gives more details about this New York weekly newspaper incident. I have additional copies of this.

Senator BAYH. Without objection, I would like to incorporate this in the record, also.

Mr. SERRILL. I have no objection, sir.

(The article referred to follows:)

EMPIRE STATE WEEKLY BLOWS WHISTLE ON "FARMERS" LOAN

(EDITOR'S NOTE.—Editor T. Elmer Bogardus called upon the services of NEA's Bert Mills, Washington editor of National Publisher, to help dig out the necessary information from the U.S. Department of Agriculture to carry this investigation forward.)

When the Fayetteville (N.Y.) Eagle-Bulletin and DeWitt News-Times heard about a "hush-hush" application by former members of a defunct golf club for an $800,000 Farmers Home Administration loan, the newspaper began an exposé that resulted in the loan's being ruled as "not eligible." T. Elmer Bogardus is editor of the New York State weekly (circulation 3,393).

The loan was rejected within 24 hours after the newspaper told Agriculture Secretary Orville Freeman, by telegram, that New York and Washington FHA officials had refused to reveal details because they were "confidential."

The application for the loan was made by the Ledges Recreational Association, a group of former members of the private Ledges Golf and Country Club. The club ceased operation in March 1963.

Started 3 years ago on a scenic land area east of Fayetteville, the club completed a plush clubhouse, a championship swimming pool and 6 holes of an 18-hole golf course. Then the club ran out of money and the property reverted to the owner of the land.

The former members applied for the loan under the Consolidated Farmers Home Administration Act of 1961 on the basis that they were "farmers" living in a rural area, and that the land would be "diverted" from agricultural to recreational purposes.

Before the application was even filed, the former Ledges members expressed confidence that the loan was "in the bag," and that the club would be back in operation by September 1, Bogardus reports.

The newspaper learned that the golfers had been encouraged by FHA State officials to apply for the loan, and were more or less assured that there would be no difficulty in getting the Government money.

The Eagle-Bulletin and DeWitt News-Times carried three main stories—the first, that the Ledges contemplated a $750,000 loan; the second, that the actual application was for $800,000; and the third, the rejection.

Two editorials drove home the point that the loan was a "bailout" of private investments, and that the applicants were not "farmers" or living in a "rural area."

When the State FHA office and the Soil Water Division of FHA in Washington claimed details of the application were "confidential," the paper went directly to Secretary Freeman.

A telegram delivered to Freeman June 24 resulted in the "not eligible" decision the next day. Reasons given were that the land is already developed, the members of the association are not "the type of rural residents" the program is "designed to aid," and that a $200,000 clubhouse on the property is a little too "elaborate" for FHA "recreation" aid.

Senator BAYH. Do you have further items, Mr. Serrill?

Mr. SERRILL. That is all, Senator Bayh.

Senator BAYH. I would like to make an observation or two, if I might, and ask your thoughts on it and the thoughts of the National Editorial Association since this does cover all of our hometown newspapers, as you say, and it is a parent organization of all this local news that is so important to us.

Even the passage of this bill, which we hope sincerely will result from this hearing, is not going to guarantee this, and it is difficult for the Congress to continually watchdog all of the agencies in this respect. Those of you who are members of the NEA who are continuously in touch with the agencies involved can best bring to the attention of this committee and the Congress as a whole where we fall short of the goal that we hope will be followed in the bill.

I wonder if you have any thought as to how local hometown newspapers or national news reporting services or nationwide newspapers can be of assistance to us in seeing that this information is not withheld. Have you run into any reluctance on the part of members of the NEA, hometown newspapers, to divulge knowledge of such information as you reported very adequately here?

Mr. SERRILL. As far as I am concerned, sir, I have never come across an NEA member who isn't anxious to get access to the news that they carry in their newspapers.

Does that answer your question?

Senator BAYH. Yes.

Mr. SERRILL. Mr. Potter here, of course, is a working active newspaper publisher of both daily and weekly newspapers. It has been about 20 years since I actually sat on a news desk, so I would defer to him.

Mr. POTTER. We are certainly interested in all the information we can get. We would be most interested in reporting any instances in which we encounter difficulty in acquiring the facts, and we appreciate any help in the form of legislation that removes excuses for withholding information.

Senator BAYH. I would like to, without objection, include in the record at this time a newspaper article from Publishers' Auxiliary, the "Newsman's Newspaper," October 26, 1963, which is a report of this hearing opening and some of the preparation work that the very fine staff has done in making the hearings possible. In this article it discloses that the committee staff has had some difficulty getting the type of cooperation they would like from certain publications.

(The article referred to follows:)

[From the Publishers' Auxiliary, Oct. 26, 1963]

HARD FIGHT AHEAD: FOI BILL HEARINGS OPEN MONDAY MORNING

WASHINGTON.—Hearings are scheduled to open Monday morning on a freedom of information bill even its chief sponsor recognizes as being a difficult one to get passed.

The bill—labeled S. 1666—introduced in June (Auxiliary, June 8) by Senator Edward V. Long, Democrat, of Missouri, with 17 cosponsors, is aimed at suppression of nonsecurity information by departments and agencies.

It has strong support, and strong opposition. Among those endorsing the bill are the National Editorial Association and the American Newspaper Publishers Association. Representatives of these press associations—representing more than 8,000 daily and weekly newspapers—will appear before the Subcommittee on Administrative Practice and Procedure. Appearing for NEA will be Theodore A. Serrill, executive vice president, and Walter Potter, legislative chairman.

NEA's testimony is expected to center around the "bad example" theory, where quasi-official recognition of the right to suppress information could filter down not only to Government field offices but the State, county, and community government level, and thus directly affect even the smallest weekly newspaper.

Bills similar to this one have encountered in the past strong resistance and it is expected that some of those testifying will do so in opposition to the bill's passage.

Bernard Fensterwald, Jr., chief counsel for the subcommittee, in a meeting last week with Serrill, decried the reluctance of reporters to testify concerning withholding of information at the Federal level.

Fensterwald pointed specifically to the Wall Street Journal where he "went to the top" without success in having testimony, despite the fact that the Journal had carried at least three articles on restrictions upon news access.

Strong editorial support has been given the bill, and bulging subcommittee files indicate a high degree of public interest in it.

Scheduled to appear on the 28th through the 31st are Dean Earl English, of the University of Missouri; Jim Mathis, of the Newhouse Advance News Service, Washington, D.C.; Creed Black, Wilmington, Del.; Eugene Pulliam, publisher of the Indianapolis, Ind., Star and News; Clark Mollenhoff, of the Washington bureau of the Des Moines, Iowa, Register and Tribune; Howard Bell, of the National Association of Broadcasters; Robert Benjamin, of the American Bar Association; Paul Rand Dixon, of the Federal Trade Commission; counsel for the Treasury and Justice Departments; representatives from the American Civil Liberties Union and the Maritime Administration Law Association; a farmer from Illinois, a scientific writer for Newsweek, and several Senators. Testimony both for and against passage of the bill will be presented.

The bill last Tuesday gained the support of Senator Sam J. Ervin, Jr., Democrat, of North Carolina, who said that the Government seemed plagued by freedom of information problems, regardless of the party in office.

"The war against secrecy must proceed on every front," he said. "The amendment of one statute, unfortunately, will not remedy the more devious and dangerous forms of denial of Government information to the people which occur when executive branch officials withhold information from Congress or yield it too slowly to be of value, or when they manage the release of news to the public, and control its dissemination through various channels."

The chairman of the Constitutional Rights Committee pointed to the Central Intelligence Agency as a "more obvious instance of tax-supported secrecy."

Is the Wall Street Journal a member of your association?

Mr. SERRILL. No, it is not, sir.

Senator BAYH. I think there is no question about the caliber of news coverage and the great reputation of the Wall Street Journal. It has done a tremendous job in newspaper reporting for a number of years. More specifically, in this field of failure to disclose information, the Wall Street Journal has done a tremendous job of disclosing this failure to divulge knowledge of information.

Mr. Fensterwald asked Wall Street Journal Washington Bureau reporters to testify before the committee. In fact, as I recall, they carried this to the top [1] so to speak, of the Journal in an effort to get their expert testimony before us. But we were told that this was contrary to policy.

Do you know of any other publications that have this policy?

Is there anything that we can do in preparing this legislation that woud ease the minds of those who would have this type of policy?

Mr. POTTER. I don't know of any in our association that have a similar policy.

Senator BAYH. As a newspaperman, are there situations where cooperating with this committee or disclosing information would embarrass you? For example, would this cause sources of news to dry up?

Would it be more difficult for reporters to get information from the agency in question?

Mr. POTTER. That could be possible, but I am willing to take that chance, myself.

Senator BAYH. Mr. Fensterwald said if this is true, it might show that the legislation is needed even more than we think it is.

Mr. POTTER. Quite right.

Senator BAYH. You know of none of your members that have this attitude? It concerns me a bit because certainly the Wall Street Journal has a tremendous reputation for getting at the news.

I have no further questions. Mr. Fensterwald, you might care to pursue this further.

Mr. FENSTERWALD. I would, but, first, I would like to welcome Senator Burdick as a new member of the subcommittee and ask if he has any questions.

Senator BURDICK. Mr. Chairman, I arrived late, as you know. I believe that I will forgo examination along this line, but I assure the witnesses that I will read their statements in the record.

Mr. FENSTERWALD. Mr. Potter, I don't really have any further comment on this Wall Street Journal incident except that this was one of the rare cases where there was a completely documented case of withholding. The Wall Street Journal has pursued a disagreement they had with the Small Business Administration over a number of months, and with their large staff and facilities throughout the country they had actually gone and dug out the news that should have been made available to them in Washington.

I would like, though, as a result of our experience with them, to make a suggestion to you, and that is if it is possible that you suggest to all of your members that if they get a case where they think the news is wrongfully withheld even under the present statute, that

[1] NOTE.—Correspondence between Vermont Royster, editor of the Wall Street Journal, and Senators Long and Bayh, concerning this matter may be found in the appendix at p. 216.

they pursue it to the point that they ask the agency the exact statutory authority for withholding.

I think you will find in most cases that they have no authority, with the possible exception of the act that we are trying to change. If they can do this in writing, then we have a perfect foundation for rewriting this law from top to bottom.

As I said, this is a suggestion. I know it is a difficult one to carry out in practice, but I do think it would be helpful with your large organization and with the aim that you are trying to accomplish in pursuing this.

I have no questions, Mr. Chairman.

Senator BAYH. Mr. Kennedy?

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Potter, I gather from the examples that you have given us that you think it is important to the people of this country that they have the facts on matters like Government grants and loans as well as on other Government activities; is that true?

Mr. POTTER. Yes, the spending of the people's money is most important to the people.

Mr. KENNEDY. And therefore we should not put in some sort of an overall exemption on Government proprietary functions, which would permit all that type of matter to be withheld. It has been suggested that we exempt from disclosure Government proprietary functions such as Government purchasing, Government benefits, grants.

Mr. POTTER. Is that bids, or what?

Mr. KENNEDY. It would include, in some of the aspects, bids. How far should we go in requiring disclosure of Government purchasing?

The witnesses yesterday, for example, who testified about procurement by the Defense Department had difficulty getting the facts there.

You gave the example of the use of the public's money with respect to a bankrupt golf club, which would be a Government benefit.

Should that type of information be available?

Mr. POTTER. We feel it should, yes.

Mr. KENNEDY. Thank you.

Senator BURDICK. Mr. Chairman?

Senator BAYH. Senator Burdick.

Senator BURDICK. Along this line, I am intrigued, and I would like to ask a question.

As you know, there are many small businesses, small corporations that are beset with financial troubles and they make application for small business loans. I am just curious in view of this colloquy whether or not those applications and their contents, you would recommend that they be made available. Many of these small companies, as you know, are financially sick and perhaps a lot of things in these applications they wouldn't want their competitors or the public to know.

Is there any basis for having that be made a part of public knowledge?

I am just inquiring.

Mr. POTTER. I don't know without specific information on it. It could be that certain elements of the information should be made public. It is certainly not the Government's purpose to shore up businesses that have no economic justification for existence.

Again, it could be that all this firm needs is additional funds which the SBA was set up to take care of.

Senator BURDICK. I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public.

Mr. POTTER. I don't know about the provisions about providing balance sheets as a source of information. This might well come under the Internal Revenue type of exemption that was discussed earlier.

Senator BURDICK. Thank you.

Mr. FENSTERWALD. Mr. Chairman, I think it might be appropriate in view of Senator Burdick's question about small business loans to put into the record two articles that the Wall Street Journal published on this question of small business loans and withholding, the main point being that the Wall Street Journal had no desire to request of the Small Business Administration the details of these loans or the applications.

The question involved was the identification of which of the loans that the Small Business Administration made were self-dealing loans with a list of several thousand loans published semiannually.

But the Small Business Administration refused to identify for the Wall Street Journal which ones of these loans are self-dealing, although the Small Business Administration has to approve each and every one of these loans.

But there was no intention on the part of the Wall Street Journal to seek information which you would normally call trade secrets. They weren't asking to see the applications, or anything of that nature.

So I do think it would be appropriate to put those two articles with respect to this situation in at this point in the record.

Senator BAYH. Without objection, I would like to have those included, then, and also this other information we have as far as public material that has been developed by the staff.[1]

(The documents referred to follow:)

[From the Wall Street Journal, July 2, 1963]

DOUBLE STANDARD: USUAL FEDERAL FROWN ON CONFLICTS OF INTEREST ABSENT IN SBIC CASES

SBA APPROVES MANY LOANS BY INVESTMENT GROUPS TO OFFICERS' OWN COMPANIES—WHERE SOME TAX DOLLARS GO

(A Wall Street Journal News Roundup)

When the Government discovers what look like conflict-of-interest practices, it usually tries to stamp them out. But one adventurous Federal agency, the Small Business Administration, is taking a liberal tack: Officially, though in a shroud of secrecy, it is sponsoring intricate and interesting business arrangements which it designates as "self-dealing."

The small Business Administration pours taxpayer money into hundreds of small business investment companies (SBIC's) scattered around the Nation, and these in turn mix it with private funds and lend to little businesses. In

[1] NOTE.—A letter from Eugene P. Foley, Administrator of the Small Business Administration, to Senator Edward V. Long, regarding the above articles may be found in the appedix at p. 233.

many instances the agency is formally authorizing these SBIC's to grant loans to enterprises in which SBIC officers themselves have a personal stake. The phrase "self-dealing" refers to such interlocking intimacy between those who grant the money and those who get it.

Here's one sample of these perfectly legal arrangements:

James C. Nichols is vice president and secretary of Coast Small Business Investment Co., Pacific Grove, Calif. He put $50,000 into this SBIC, as did each of two other owners. The Small Business Administration put in $150,000, and guaranteed another $150,000 in funds obtained from a bank.

Mr. Nichols is also sole owner of Nichols Plumbing & Heating Co. in Monterey, Calif. This year he wanted to buy a new building for his plumbing firm, but says he found "banks aren't too free with their money." He turned to the SBIC and received $75,000, for 10 years, on terms which Coast SBIC Executive Secretary Robert W. Tuttle reports were more favorable than banks were willing to grant.

SURPRISED AT APPROVAL

"Obviously the loan wasn't made at arm's length," remarks Mr. Tuttle, though he and the two other SBIC owners throughly examined its soundness. "Frankly, I was not optimistic," he recalls, about getting the deal approval by Small Business Administration headquarters in Washington. He was surprised when the agency quickly okayed it, with an exchange of letters. But like others who are fostering such arrangements, he does consider them beneficial. "If the transaction is the kind you would have made with a stranger, then why not go ahead with your own people?"

Typically, SBIC officers, when seeking SBIC loans to ventures in which they have a personal stake, absent themselves from SBIC board meetings when their requests are being considered.

A majority of the Nation's 600-plus SBICs apparently still avoid self-dealing. But in Washington, the boss of the Small Business Administration (SBA), John Horne, heartily contends the practice is desirable, to give SBIC officials "flexibility" in investment. Deputy Administrator James Parris, who signs the letters authorizing specific SBIC self-deals, adds: "Our main concern is securing capital for small businesses. We don't want to bog small SBICs down with too many regulations."

This view contrasts with the proclaimed attitude of other Federal agencies, notably the Securities and Exchange Commission. Though all SBICs come under Small Business Administration jurisdiction, those selling shares to the general public are further scrutinized by the SEC—and its officials declare most such SBICs have "quit asking us to approve self-dealing because they know we won't." Privately, those SEC officials contend standards should be just as rigorous for SBICs that escape SEC rules. Without discussing actual cases, they maintain that self-dealing SBIC officers could influence lending to their own failing enterprises—or get a "free ride" for their own investments in ventures made profitable by the injection of SBIC money.

CHALLENGING SELF-DEALING

"It is not necessary to prove actual damage" to the lending company "or even actual profit to (an) individual" to challenge self-dealing, SEC lawyers contended in a recent court case. "It is sufficient that the transaction be fraught with the possibility that the company might be injured by action based upon something less than disinterested motives on the part of its fiduciaries."

Of course, no sinister motive need be implied by any loan application to an SBIC. The purpose of creating these lending institutions and giving them Governmental financial support is to make money available to small businesses when they can't get it from banks—or at least can't get it for so long a repayment period; or for so low interest charges. This can be motive enough, either for armslength borrowing or for self-dealing borrowing.

When the SEC does get requests for approval of self-dealing arrangements, it makes them public. The Small Business Administration reveals no details of self-deals submitted or approved; Mr. Horne says his lawyers advise it should not. According to its officials, self-dealing has been permitted by SBA ever since Congress created the SBIC program 5 years ago, and nobody knows how many such transactions have occurred. Only last October the staff began keeping a

current count, and by May discovered they had approved 33 self-dealing applications—at the rate of about one a week—while rejecting just three.

Pressed by Wall Street Journal reporters, the Small Business Administration did reveal the names of these 36 SBIC's—while refusing to state even how much taxpayer money has been handed to any of them. Deputy Administrator Parris quickly sent to each of these involved SBIC's a letter warning they might "receive inquiries" from the press and emphasizing that SBA, for its part, is keeping mum.

"It is not the present intention of SBA to release any information regarding the details of the specific transactions," he wrote. "We do not plan to provide information about the name or financial affairs of those who got the self-dealing loans. Nor do we plan to provide any explanation of how our general criteria in such matters were applied to specific cases. * * * Should you receive an inquiry on this subject the decision as to whether or not you release additional information rests entirely within your discretion."

Not surprisingly, many of the self-dealing SBIC's decided their "discretion" should take the form of telling reporters little or nothing.

"Ethical" considerations were cited by Benjamin Burdick, president of Midwest Small Business Investment Co., which shares quarters in Detroit with his law firm of Burdick, Burdick, Silverstein & Burdick and which has no full-time employees. He declared Midwest has engaged in two self-dealing affairs, one of them very minor and both entirely legitimate, but said revealing details about borrowers could result in "crippling companies that ought not to be hurt."

"I'd rather not discuss it because I've read some of the Wall Street Journal articles about small business investment companies and they've been uncomplimentary," said A. B. Simms, president of both the First Atlanta Investment Corp. and the Southern Regional Association of Small Business Investment Companies. His own SBIC has the same address and phone number as an Atlanta real estate consulting firm, A. B. Simms & Associates.

"NO PHONY BALONEY"

G. Wayne Leslie, general manager of Judson-Murphy Capital Corp. in San Francisco, reported this SBIC made one self-dealing loan with "provisions so there was no phony baloney." He warmly defended "internally generated situations" as "the natural result of a small company; we haven't got the money to justify the cost of finders" but said "we have a policy not to divulge information on any of our loans." Somewhat mystifyingly, the firm's president, Philip Murphy, insisted in a separate interview that this SBIC has made no self-dealing loans whatever, though it did seek an SBA opinion on what at first seemed a borderline case.

Greater Pittsburgh Capital Corp. has a distinguished board of directors including two vice presidents of Aluminum Co. of America. Its president, Wallace Kirkpatrick, an Allegheney Ludlum Steel Corp. executive, suggested there are "probably a lot of shady goings-on" among some other SBIC's, but said his own did better by engaging in two self-deals than it could have done lending to others. Nevertheless, no details were given out. Vice President Donald Collins explained details of deals are simply private and confidential matters, and besides, information about self-dealings by SBIC's can be "bad publicity" for the industry.

But spokesmen for a number of SBIC's appear glad to disclose such dealings, and laud their benefits.

Charles M. Fairchild, who deals in real estate and other ventures in Washington, D.C., is proud of his role in Citizens Small Business Corp. It was founded 3 years ago, and he joined some 40 other stockholders to provide a total of $150,000 in private funds, while the Small Business Administration provided an equal amount of Government money. Mr. Fairchild became one of the nine directors; his wholly owned investment counseling concern, Fairchild & Co., was granted a contract to manage this SBIC. By now, Citizens has put $106,000 of loans, more than a third of its capital, into two companies in which Mr. Fairchild has himself become an investor.

Recounting this, James Olah, an official of Fairchild & Co., gives further detail: Last year Citizens loaned $60,000 to Branch Mountain Timber Farms, Inc., near Moorefield, W. Va. Before long, Mr. Fairchild had personally bought one-third ownership of the lumber company. By December, Citizens had granted another loan, of $10,000.

LOANS TO ART FIRM

Two years ago Citizens had put $30,000 into American Society of Fine Arts, Inc., while Mr. Fairchild was investing $5,000 of his own in this firm set up to market art replicas. Last October Mr. Fairchild became president of the art company; in January it received another $6,000 loan from Citizens.

In all its investment program, Citizens has granted second-helping loans only to these two companies.

Comments Mr. Fairchild: "Branch Mountain would be bankrupt right now if I hadn't personally gone in; Citizens would have lost money." As for American Society, he says, "its original management tried a direct-mail advertising approach that didn't work, so I was made president; but then the company ran into legal problems with its franchisers and has not been able to get any merchandise to sell. This is undergoing arbitration now; if we win, we'll make money."

The Small Business Administration has put another $150,000 of Federal funds into Capital Investors Corp. of Montana, an SBIC formed last fall in Missoula, Mont., by 15 businessmen, each of whom invested $10,000. Among these was Keith Wright, who serves as director. With approval of SBA headquarters in Washington, Capital Investors made a $26,000 10-year loan to Wright Lumber Co., in which Mr. Wright then held a minority share of ownership.

The money, along with a bank loan and additional personal investment by Mr. Wright, went to buy out two of his partners, to put Mr. Wright in full control of the lumber company, and to finance its expansion—so report high officials of the lending institutions concerned. Mr. Wright himself, despite a red and yellow "Welcome" sign outside his lumber company, says he's too busy to "waste time" talking to reporters.

MONTANA CARS, INC.

Another director of Capital Investors is Leonard Senechal, who holds a 40-percent stock interest in Montana Cars, Inc. This auto leasing firm has received a loan of about $15,000 from the SBIC. "with 15 guys in business, at one time or another they are going to need money. It's natural to go where they have an investment," he remarks. Like Mr. Wright, he absented himself from the SBIC board meeting that approved his loan.

When Mr. Senechal helped found the SBIC, half his $10,000 share was actually money advanced by Mills Folsom, past president of the Missoula Chamber of Commerce. The SBIC subsequently granted a $20,000 loan for buying irrigating equipment to Folsom Co., Inc., a ranching enterprise owned by Mr. Folsom.

More recently, Mr. Folsom says, he found he needed to get back his original indirect investment in the SBIC. Since the SBIC could not immediately buy back these shares without impairing its required capital, the problem was resolved by a further SBIC loan to Mr. Folsom of $5,200 (his original investment plus interest); meanwhile his shares, nominally owned by Mr. Senechal, are in escrow. Says Mr. Folsom: "As far as I'm concerned, the stock is gone."

Some SBIC's, after gaining formal approval from Washington for particular self-deals, have been overwhelmed by doubts.

"COLD FEET"

"We got cold feet," says Gerado Joffe, president of Science Investment Co. in San Francisco. This year the Small Business Administration had OK'd the SBIC's plan to back a company formed to produce Tar Gard, a do-it-yourself cigarette filter which smokers could fit on the tips of regular brands. Mr. Joffe and Forrest Tancer, vice president of the SBIC, each personally owned 25 percent of Tar Gard Corp. After brooding, they decided to drop the SBIC deal and obtain their filter money elsewhere. Says Mr. Joffe: "If anything went wrong with the loan it would have been very unpleasant for us" with the other 21 SBIC stockholders.

Differing views about self-dealing are illustrated by Robert M. Nason, president of Arizona Capital Corp. in Tucson. One director of this SBIC insisted he did not want to borrow from it and obtained money elsewhere. But SBA approval has been sought and granted for a $60,000 loan to a company in which another director, F. C. Thum, holds an interest. Mr. Thum is president of this concern, John Porter Manufacturing Co. of Phoenix; the SBA letter of approval noted he owns less than 5 percent of its stock but holds an option which would give him 31 percent equity.

SBA officials say they apply three criteria to self-dealing applications. First, there must be noninterested persons in the SBIC with power to block the transaction if they wanted to. Second, terms of the deal must be "fair and reasonable." Third, the arrangement must "serve the purposes of the Small Business Investment Act of 1958." Though this may seem vague, and though officials refuse to elaborate, it has been used to reject a few proposals.

Neil Christopher, president of Southern Small Business Investment Co. in New Orleans, says Washington prohibited a $60,000 loan intended for Hammond Homes, a real estate development firm. SBA objected that Southern SBIC was controlled by a mortgage company in which Mr. Christopher and an associate together held 49.5 percent ownership; that the two of them owned all of Hammond Homes; that the projected deal "would constitute a use of the (SBIC) by its owners as a financing medium of their own undertaking."

Complains Mr. Christopher: "If the SBA was justified in turning down this loan, it should have turned down a lot of the others it has approved. I think a lot of SBIC's have gotten loans that were the same kind as mine. It might be that some of the others didn't furnish full information."

SBA OPERATIONS

How much information the SBA does demand remains obscure. Its officials say they do not normally attempt on-scene investigations before approving self-deals, though traveling examiners may later look into them during routine checks made every year or two. Washington operates mainly by correspondence. And its letters of approval seen by reporters merely recite back to the self-dealing SBIC the same information the SBIC has provided. Sometimes Washington takes months to make up its mind. But SBA took only 2 days to clear a deal for Chicago Capital Corp.; a director of this SBIC happened to be partner in a law firm serving as legal counsel for a company which obtained a loan, and he also served as a director and secretary of his borrowing company but he had no financial interest in it.

In some cases the Small Business Administration may be getting slightly less than the full story.

Gerald Hardwick, president of First West Texas Capital Corp., in Odessa, Tex., pulled out of the files for a visting reporter a letter from SBA authorizing a loan "in the amount of $62,500" to Rebel Pipe & Supply Co., Inc., partially owned by J. D. Ormand, a director of the SBIC. The loan actually granted was $85,000, however, he declared. He explained that after filing its application this SBIC had increased its capital surplus, which raised its ceiling on the size of any one loan so he didn't think further approval by SBA was necessary.

"If it hadn't been a good loan, I would have voted 'no' myself," commented Mr. Ormand. He declined to disclose earnings of Rebel, a small oilfield equipment concern. According to the SBIC's annual report, however, Rebel showed a profit of $13,960 at the end of its last fiscal year, August 31, 1962, and a loss of $9,533 through February 28 of this year. The SBIC itself operated at a $7,520 loss in the year ended March 31. It has received $470,000 in taxpayer money from the SBA.

MANY REAL ESTATE VENTURES

Though SBIC's on the SBA's list of "self-dealers" enter diverse ventures, they appear to find a special magnetism in real estate. And with full approval of the Small Business Administration—although this agency, when operating under a separate direct-loan program to small businesses, proclaims that it will not back "speculation in any kind of real or personal property" because of its "unique responsibilities as a lender of taxpayers' money."

"Congress should have been more specific in the type of investments it allows the SBIC's to make. I don't think they should allow real estate loans; there is plenty of venture money available for real estate development." So says Ezra Mintz, portfolio manager for Georgia Capital Corp., of Atlanta. Nevertheless this SBIC, which has drawn $600,000 in Federal funds, made two $60,000 loans last year to a real estate holding company whose president at the time was a vice president of Georgia Capital, he reports. Details are withheld because they are of "a personal nature."

In the Boston area, all three of the SBIC's which SBA reports as having received approval for self-dealing share their offices with real estate firms, and their transactions have involved real estate in some form.

Alan Zucker, treasurer of Chestnut Hill Capital Corp., says that when this SBIC took a third mortgage on a Boston apartment house owned by Diwal Trust, it granted an interest rate of 10 percent, somewhat lower than for other borrowers. The reason, he reports, is that Chestnut Hill's president, Robert Waldman, is as a stockholder entitled to a special rate, and he is a trustee of Diwal Trust. Says Mr. Waldman: "There was sufficient equity in the property to merit the loan."

COLONY HOTEL CORP.

Julian Cohen, treasurer of Massapoag Investment Corp., in Brookline, Mass., and partner in the real estate firm which shares office quarters, says that this SBIC's deal cleared by SBA did not really involve self-dealing. He states Massapoag granted a $54,000 mortgage for his brother, Bernard Cohen, on the Colony Hotel Corp., in Swampscott.

Bernard Berkman is a man of many interests who likewise denies any real self-dealing. He says he sells insurance and owns a liquor store and operates—within one office in Brookline—a real estate firm, Berkman Associates, Inc., and Pilgrim Capital Corp., an SBIC. He is president of both. Phillip Lemelman is clerk (secretary) and a director of the SBIC; his son, Herbert Lemelman, is clerk of Berkman Associates, according to Mr. Berkman; the Lemelmans have joint law offices.

Pilgrim loaned $17,500 to Wendell Realty Corp. last year on a Boston guest house, subject to a previous bank mortgage, according to Mr. Berkman. Treasurer of Wendell Realty is Phillip Lemelman: he declines to comment on the deal but his son, Herbert, says "my father is a substantial owner of Wendell."

Mr. Berkman declares SBA approval was also gained for a $30,000 second mortgage granted last September to Bayside Manor Nursing Home, Inc., of which Herbert Lemelman, was an incorporator. Pilgrim also has granted Bayside short-term loans from time to time, Mr. Berkman says, "Pilgrim agreed to buy 50 shares of Bayside stock, but the price has not been determined as yet," adds Mr. Berkman. Bayside's president, Richard Gens, states that Pilgrim has obtained the 50 shares, amounting to half ownership, paying nothing for his stock since it was granted in return for a "favorable" 8 percent interest rate on the loans. "They put in the venture capital and we put in the know-how," comments Mr. Gens.

Herbert Lemelman declines to confirm Mr. Berkman's statement that he or his father obtained SBA approval on behalf of Pilgrim for the Bayside and Wendell loans. "It is not a matter of public record," he comments. He insists neither he nor his father engaged in self-dealing. "We are lawyers and professional clerks and we do this all the time; we have no [investment] interest in Bayside or Pilgrim." Mr. Berkman states that he personally owns all of Pilgrim's stock, with $154,000 of his own capital and $150,000 borrowings from SBA. And he too insists none of Pilgrim's transactions constitute self-dealing.

Richard Felts, manager of Small Business Investment Corp. of Georgia, says it lent $45,000 last summer to Pleasant Hill Acres, Inc., which wanted to develop a trailer park at the edge of Atlanta. Two of this SBIC's directors owned 20 percent shares in Pleasant Hill. Since the SBIC had previously invested in a trailer sales agency, explains Mr. Felts, "I looked upon the creation of this mobile home park as a potential to sell some of our trailers." He adds: "We're not deliberately going into self-dealing transaction; we'd rather avoid them. It's going to be hard, because each of our 27 directors has diverse business interests around town * * * we don't want to turn down a good deal."

When SBA Deputy Administrator Parris officially approved a $60,000 loan to Crossroads Development, Inc., by Small Business Investment Co. of Hawaii, an SBIC in Honolulu, he wrote that "Crossroads is stated to be a real estate development company, with two projects currently underway and plans for continuing series of development projects." He noted, with his approval, that Crossroads was wholly owned by Robert D. Thomas, vice president of the SBIC. Mr. Thomas has invested $5,000 in this SBIC, according to its officials, while the SBA has put in $300,000.

[From the Wall Street Journal, July 8, 1963]

FLEXIBLE FEDERAL ETHICS

Some close scrutiny certainly seems in order when an agency of the Federal Government deliberately fosters conflicts of interest. As this newspaper reported the other day, that's just what the Small Business Administration is doing.

This activity involves some of the Nation's 600 small business investment corporations, private firms clustered under the supervisory wing of the SBA. When Congress authorized the SBIC's a few years ago, its aim was to provide a new source of capital for little companies. But despite tax advantages and Federal financial help, most SBIC's have found it unprofitable to lend to small firms; many such firms simply aren't good risks, and others require costly supervision.

In this situation, some of these small business lenders are seeking the right to lend to big business; others are folding up and selling out. But still others are trying another tack. They're lending to firms in which their own officials are interested. What's more, this practice in many cases is not merely condoned but encouraged by the SBA.

The Washington agency, to cite only one example, gave the go-ahead to a $60,000 loan by the Small Business Investment Co. of Hawaii to Crossroads Development, Inc., a real estate development company. The SBA was not deterred by the fact that the owner of Crossroads and the vice president of the SBIC happen to be one and the same.

Speaking of the general practice, which the SBA cheerfully labels "self-dealing," one of the agency's officials argues that it gives the SBIC's desirable flexibility. Another SBA man adds: "We don't want to bog small SBIC's down with too many regulations."

Though self-dealing is perfectly legal, and may even be profitable for the SBIC's, some Federal agencies fail to share the SBA's enthusiasm for it. The Securities and Exchange Commission, keeping an eye on SBIC's which have sold stock to the public, refuses to OK such loans; it fears that self-dealing officials could influence lending to their own failing enterprises or perhaps get a "free ride" for their own investments made profitable by injection of SBIC money.

It could be noted that the SBA is a dubious enterprise from many points of view, with its subsidized competition for private banks and its program of reserving Government business for small companies merely because they are small. It becomes even more dubious when it eagerly promotes flexible ethics.

Senator BAYH. Thank you very much, gentlemen. We appreciate your coming and representing your association.

Mr. SERRILL. Thank you, Senator.

Senator BAYH. The next witness is Mr. Lawrence Speiser, of the American Civil Liberties Union. We have a biography of Mr. Speiser, also. We will put that in the record.

(The biography referred to follows:)

LAWRENCE SPEISER

Lawrence Speiser, director of the American Civil Liberties Union's Washington office for the past 4 years, is a member of the bars of the U.S. Supreme Court, the District of Columbia, and the State of California. In addition to his responsibility in keeping abreast of legislation affecting civil liberties, he handles much of the ACLU's legal work in the District of Columbia. Mr. Speiser has specialized in litigation involving the testing of the constitutionality of various laws and governmental actions infringing on civil liberties and civil rights (freedom of speech, press, religion, due process, and equal justice under law). He has argued and won a number of cases before the U.S. Supreme Court. Prior to coming to Washington, he was the staff counsel of its Northern California affiliate for 5 years (1952–57).

Born in Toronto, Canada, in 1923, he obtained his legal education at the University of California's Hastings College of Law. He has also attended Brandeis University in Waltham, Mass., after being awarded one of the first Florina Lasker fellowships in civil liberties and civil rights. Mr. Speiser has spoken before numerous civic groups, schools, and colleges as well as on radio and television on civil liberties matters and has also written extensively for legal periodicals.

STATEMENT OF LAWRENCE SPEISER, AMERICAN CIVIL LIBERTIES UNION

Mr. SPEISER. Thank you, Mr. Chairman.

I do not have a prepared statement, but I would like to discuss two aspects of the problem of freedom of information: first, specific instances which have arisen in the past year showing the inadequacy of the present law, and, secondly, how the proposed bill, S. 1666 will correct these inadequacies.

Last May, there appeared in an issue of the American Civil Liberties Union News of Northern California a story relating how representatives of the Army Intelligence Corps admitted during the course of a recent industrial security hearing in San Francisco that they attempted to dissuade persons from being represented by counsel when they were interviewed. On the basis of this story, I wrote to the Defense Department and asked if this were true.

I received a reply which stated that while the Department had issued no written instructions specifying that a person being interviewed may have counsel present during the course of personnel security interviews, that such instructions had been issued by the Department of the Army on April 5 and July 17, 1963. However, I was informed that these instructions contain internal management guidance for investigators in addition to guidance regarding the presence of counsel and under Army policy may not be released. I wrote back and requested copies of these internal management guidances, and to date, they still have not been released.

A related problem also was revealed in this story in the ACLU News of Northern California, indicating that certain improper questions were asked during the interview. A statement was taken from a witness in this particular case, when she did not have counsel after being dissuaded from having counsel. Questions were asked of what her opinions were on Federal aid to education, on CORE and freedom riders in the South, civil rights for minority groups, and the Supreme Court's decision in the *School Desegregation* cases.

In the letter I had originally written to the Defense Department, I also raised the question of the propriety of questions of that nature. Subsequently, I discovered that the Defense Department had issued a memorandum to the Under Secretaries of the three services on this subject. The word "discovery" implies that it was being held secret. On the contrary, this was made available by the Deputy Under Secretary of Defense in Charge of Security Policies, Walter T. Skallerup, Jr. This memorandum was sent out to each of the three Under Secretaries of the services, on November 26, 1962.

It is a superb memorandum covering the subject of civil and private rights. It states that investigators, during security investigation and security hearings, should not ask improper questions. It states, for example:

> 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 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 inference cannot properly be drawn from refusal of a person to answer questions, the relevance of which has not been established.

In another place, it states:

Care must be taken not to inject improper matters into security inquiries, whether in the course of security investigation 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 affiliations with labor or unions are not proper subjects for such inquiry.

Attached to this memorandum were a number of questions which are entitled "Types of Questions Regarded as Improper or Irrelevant in Security Investigations and Adjudications, Whether Directed to the Subject or Another Individual."

For example, it forbids the following inquiries into religious matters:

1. Do you believe in God?
2. What is your religious preference or affiliations?
3. Are you anti-Semitic, anti-Catholic, or anti-Protestant?
4. Are you an atheist or agnostic?
5. Do you believe in the doctrine of separation of church and state?

Then, under racial matters, it bars the following questions as being improper:

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?

This memorandum, as I indicated, was issued on November 26, 1962, to the three Under Secretaries of the services, the Army, Navy, and Air Force. Yet, in May of 1963, there is a report of an interview which clearly violated this policy. Therefore it was important to determine whether the Under Secretaries of the services had issued instructions pursuant to this memorandum from the Deputy Under Secretary of Defense to investigators. To date, I have been unable to obtain the instructions which have been issued pursuant to this memorandum, covering this type of forbidden subject matter on the grounds that these are "internal management" matters. I received a reply from the Army refusing to turn over the instructions, and the Navy wrote back and said:

We have not issued any instructions pursuant to this because we have reviewed all the instructions that were in existence beforehand and found that no further ones were necessary.

I have written the Navy again saying—

What are your instructions to investigators with regard to staying away from improper and irrelevant questions during security investigations?

As yet no reply, and I have not yet received any reply from the Air Force, although I wrote all three services on September 25, 1963.

This is an example of how the "internal management" criteria in the present law is used as a blanket to refuse to release information on which there can be no possible reason for doing so. With the Defense Department itself sending a memorandum which is in the public

domain to the Under Secretaries, it is inconceivable to me that there is any reason why the instructions pursuant to it should not also be available.

Another example—last year, Charles Foster, a professor of political science at a university in Indiana, wrote to the Defense Department and requested the names and information about the members of the Central Industrial Personnel Authorization Board. This is the Board that makes determinations on whether security clearances should be granted to individuals who work in private employment in which they have to have access to classified material. He was refused this information and he wrote to me. I wrote to the Industrial Personnel Access Authorization Review Board:

> I would appreciate knowing the names of the members of the Board and any information you can give me about them and their qualifications.

I received a telephone call from the Executive Director of the Board, who wanted to know why I wanted this information. I said I didn't think it mattered, but I did tell him it was because this professor of political science was writing about the Board and wanted the information for an article.

Again, I did not immediately get the information. Then, finally, I received the names in a letter which stated:

> The request contained in Professor Foster's letter of September 26, 1962, was interpreted to mean that Professor Foster wanted background information regarding Board members, not the personal identity of the individuals involved. This background information was furnished to Professor Foster.
>
> By letter dated October 15, 1962, Professor Foster noted that the names of the Board members had not been included. Yet, he did not expressly request to have the names of the Board members. We regret that a misunderstanding occurred.

I think this explanation is nonsense on its face. When a person writes in and wants to know who the members of the Board are, to send them back information and not the names seems to me to be a deliberate attempt to withhold information and there is no reason for it.

Finally, the names were supplied with the background information, and that matter has been taken care of. But, this was an instance in which the information was withheld temporarily; ultimately, it was released.

A fourth instance—an employee here in the District of Columbia, working for an agency under the Department of the Navy was told to go through her personnel files and review the files. She found in her files a card indicating some false, derogatory information about the American Civil Liberties Union. She had made the union a beneficiary on her insurance policy. This card had a classification on it of "Confidential."

The employee contacted me. I contacted her superiors, and we went into the matter at some length. Ultimately, we received in response to a letter of protest to the Navy Department, a reply that it is not true that the Navy Department considers the American Civil Liberties Union in any way a detriment, as far as loyalty or suitability for Government employment, and referred to a letter that was sent by the Acting Secretary of the Navy back in 1955.

Now, this means that the Navy, in 1955, had made this determination, and yet today—and this was early this year—there is still classi-

fied information which indicates that it is considered derogatory information on the American Civil Liberties Union within Navy files. This is almost 8 years later. Security officers may not know of this letter of the Secretary of Navy, and for that reason these incidents are bound to arise again. This situation illustrates the following points: One, the Navy should not have classified the information in the first place. This was admitted by Navy personnel with whom I discussed the case.

Secondly, it is still classified.

Three, there is still a lot of deadwood in their investigative files that hasn't been cleared out, and the problem keeps popping up again and again.

Now, this is a problem concerned with overclassification and continued classification. There is no procedure, apparently, or if there is one, I fail to see why it wasn't followed in this particular case to cure the improper classification and to eliminate it.

These cases are illustrative of the problems which exist under the present laws. Therefore, we are definitely in favor of the bill, S. 1666, which you have proposed, Mr. Chairman, to attempt to alleviate these problems.

I think, as you recognized in your opening statement, this is not going to mean the millenium will have been reached. There are still problems which are bound to arise. Yet, certainly, the bill that you have proposed is going to go a long way toward solving the problems.

There are parts of the bill about which we have some misgivings, and I must confess that our misgivings do not provide us with the solution to attempt to eliminate these misgivings. I believe that you, as well, are aware of the fact that some of the exceptions, for example, that are written, may be suspectible to misuse.

I am not sure how this can be prevented. I suppose it means the continuation of committees, such as Congressman Moss' Foreign Operations and Government Information Subcommittee in the House, to insure that the spirit of this bill is preserved. and also the continuation of the interest of this committee, and also Senator Ervin's Constitutional Rights Subcommittee, of the Judiciary Committee.

In looking at the bill itself, I just have a few comments. In part 3(a), you have an exception concerning what must be published in the Federal Register. The exception covers any matter to the extent that there is involved, "any function of the United States requiring secrecy in the public interest."

Well, this is obviously a much broader standard than national defense, and if there are any two words which I think are capable of misuse by administrators, it is an administrator's determination as to what is or is not in the public interest.

As you may recall, in the history of these "freedom of information" bills, at one time, you had correspondence from the head of almost every agency opposed to the "freedom of information" bill that Senator Hennings had introduced and, in general, although they didn't use the phrase, but in general, their feeling was that it was not in the public interest.

So I think that this is susceptible to misuse. I recognize that there may be a tremendous problem of expense in requiring so much to be published in the Federal Register. Yet, I hate to see the criteria of

"secrecy in the public interest" for a determination as to what should not be published in the Federal Register.

Also, I hate to see the continuation of the term "internal management," in section 3(a) because of the incidents I have mentioned. Most of them arose under the internal management criteria that is in the present law. I think your sections on what should be printed in the Federal Register are more specific and more detailed than those previously encompassed within Senator Proxmire's bill in the last session—S. 1907. Under parts 3 (b) and (c), covering agency opinions, orders, rules, and records, there are three exceptions. The first with regard to those matters that are specifically exempted by statute, is fine.

The second one specifically required by Executive order to be kept secret for the protection of national defense, I think, is subject to abuse. I can't think of any language which would prevent this. I think it probably requires continual legislative oversight by Congress to insure that this is not used indiscriminately.

The third one, relating to internal employment rules and practices under part 3(b) and to internal memorandums of the members and employees of an agency, relating to the consideration and disposition of adjudicatory and rulemaking matters under subsection 3(c) present some danger because they may be broadened and considered in the same fashion as the "internal management" guides, under the present law. I would assume, though, that the control would be legislative oversight, as well as the provision for judicial review.

On the whole, your bill, S. 1666, would be a major step forward, and we are definitely in favor of its passage as soon as possible.

Senator LONG. Mr. Fensterwald, any questions?

Mr. FENSTERWALD. I have one comment and one question. Maybe I should make the comment first; it is with respect to the use of the term "public interest" in subsection (a).

You will note that subsection (a) in the bill is left almost exactly as it is in the present law, The reason for this is that there have been virtually no criticisms of what has been included in the Federal Register, and most of the criticisms that there have been is that there has been too much in it, rather than too little.

Mr. SPEISER. I recognize that that is the motivation for it. The only problem that I have is that when the term "secrecy" is used, you usually consider that in terms of classification, and I think that there is a tendency to blur something here, and so long as you are cleaning up the section, I would like to see the section cleaned up and remove language that, if it hasn't caused any problem as far as publication is concerned, perhaps could be made more specific.

I just am not happy about using that criteria "public interest" as being some sort of criteria for determination by administrators. It is subject to abuse.

Mr. FENSTERWALD. I appreciate the suggestions and we will take it into account.

The question I have is with respect to a directive of the Defense Department. It is dated August 5, 1963, and it has to do with military participation in public events. I wondered if this directive had been brought to your attention, and if so, can you tell us about it.

Mr. SPEISER. May I see it? [Handed to him.] No, I have not seen that directive before, Mr. Fensterwald.

Mr. FENSTERWALD. Mr. Chairman, I would like for the sake of completeness to put this Defense Department memorandum, and several newspaper articles, into the record. It is very much in line with the testimony which you have given, Mr. Speiser.

It concerns a Defense Department directive of August 5, 1963, which was withheld from the press until, I believe, September 16, when it was made public, and then it was withdrawn the next day. It is rather a long, complicated story and I don't want to take your time or the time of the committee to outline it here, but it deals with the same general broad area of nonmilitary aspects of the military services.

Mr. SPEISER. I might make a further comment on the memorandum that I referred to, which was sent to the Under Secretaries of the three services. Apparently, it fell within a never-never land. It was never classified, and it was available to the press, if some one knew about it, but no one really knew about it, and only by the fact that we were involved in cases and complaints to the Defense Department, were we made aware of it and it was made freely available to us at that point.

I checked at that point as to whether there was any reason why it couldn't be made available to the press, and was informed, there was no reason why it should not have been and there have been several newspaper stories on it.

Senator LONG. Without objection, the memorandum will be included in the record.

(The memorandum referred to follows:)

OFFICE OF THE SECRETARY OF DEFENSE,
Washington, D.C., September 24, 1963.

DONALD NANGEL,
Subcommittee on Administrative Practice and Procedure,
Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR MR. NANGEL: Following your request, I have checked into the facts concerning the release of information on the August 5, 1963, amendment to the DOD Directive 5410.6 concerning military participation in public events. The facts are as follows:

The Directorate for News Services is normally automatically advised by a phone call from the directives people of the pending issuance of all new directives, instructions, and changes thereto as they are published by the Department of Defense. These are then made available to newsmen covering the Pentagon.

The amendment to this directive, Change 4 to 5410.6, was signed August 5, 1963, and, had the system indicated above functioned as it should have, News Services would have been informed prior to publication. However, in this particular case, the directives people simply failed to telephone Directorate for News Services.

On September 4, the Air Force amended its Regulation AFR 190.5A. The change to the Air Force regulation was made available to newsmen. This change was picked up on September 16 by an Associated Press reporter who wrote an initial story pointing out the change in the Air Force regulation. Once that story appeared, the AP and subsequent inquirers were advised that this was not a unilateral Air Force action but merely the implementation of the August 5 change to the Defense Department directive, copies of which were made available to newsmen.

There was no deliberate intent to withhold information nor to hide it from public view, but merely an inadvertent failure of what had proved previously to be a workable system. Corrective measures have been instituted to insure that there will be no reoccurrence.

On September 17, United Press International filed a story based on the directive which stated, in effect, that the amendment applied to the National Guard.

This interpretation arose from a reading of the purpose stated in paragraph 1 of the directive and the amendment of August 5. The purpose was an integral part of the directive when initially written in 1955, and was not clarified with the incorporation of the August 5 amendment. In answer to subsequent inquiries, Directorate for News Services replied on September 20 that the August 5, 1963 amendment to Directive 5410.6 was not intended to and does not apply to National Guard units while in a State status. Any ambiguity on this point will be eliminated on republication of the directive, which is currently being rewritten and updated in coordination with the military departments.

Copies of the documents mentioned are attached.

Sincerely,

DAVID E. MCGIFFERT,
Assistant to the Secretary (Legislative Affairs).

[Reprint of 5410.6, with changes, through Apr. 15, 1958, incorporated]

SEPTEMBER 13, 1955.
NUMBER 5410.6.
ASD(PA).

DEPARTMENT OF DEFENSE DIRECTIVE

Subject: Armed Forces Participation in Public Events.

I. PURPOSE

The purpose of this directive is to define Department of Defense policies and establish procedures considered necessary for the most effective and economical use of Armed Forces personnel and equipment in connection with public exhibitions, demonstrations, ceremonies, and other events not connected with the functioning of the Department of the Army, the Department of the Navy, the Department of the Air Force, or the Marine Corps, the provisions of these policies and procedures to apply to any participation in public events or other activities in the civilian domain by Armed Forces bands, troops, exhibits, aircraft, or other equipment, including any aircraft or equipment of the National Guard, other Reserve Components or the Civil Air Patrol, which is provided, maintained, manned or fueled wholly or partially from Federal funds.

II. RESCISSION

This directive rescinds (a) the memorandum of 1 August 1950 from the Secretary of Defense to the Secretaries of the Army, the Navy and the Air Force, subject: Participation by the Armed Forces in Public Exhibitions, Demonstrations, Ceremonies and Other Events Not Connected with the Functioning of the Military Departments; (b) memorandum of 7 August 1950 from the Acting Director of Information to the military departments, subject: Monthly Military Participation Report, and Report Control Symbol DD–SD(M)8; and (c) any other orders, directives, memoranda, regulations or instructions which are inconsistent with the provisions of this directive.

III. EFFECTIVE DATE

This directive is effective immediately.

IV. IMPLEMENTATION

Service regulations will be amended to conform to and implement the provisions of this Directive. Copies of such amended regulations will be forwarded to The Assistant Secretary of Defense (Public Affairs), Department of Defense, within ninety (90) days of the effective date of this Directive.

V. GENERAL POLICY

1. As part of the continuing effort to satisfy public interest in the Armed Forces of the United States, to keep the public informed as to the state of preparedness of the Nation, to promote national security, to stimulate patriotic spirit, to further community relations, and to serve otherwise the public interest,

participation in public events and in other activities in the civilian domain is authorized under the conditions and within the limitations stated herein.

2. As a general policy, authority is delegated to the Services to participate in public exhibitions, demonstrations or ceremonies as follows:

a. In observance of Armed Forces Day, Memorial Day, Independence Day, and Veterans' Day and on other occasions which the Secretary of Defense may designate as appropriate for participation. Participation as appropriate by United States Forces on foreign stations on corresponding occasions in those countries.

b. In "Open House" programs on posts, camps, stations, ports, bases or other Armed Forces installations or activities.

c. In events of a local nature for the specific purpose of initiating or furthering a sound community relations program and/or to assist the recruiting and public information programs except as may otherwise be prohibited.

(1) Except in the Washington, D.C., area where authority for approval will be vested solely in the Secretary of Defense, authority to approve participation of color guards, guards of honor, bands, troops and equipment (other than aircraft), in events of only local importance and taking place within local post, camp, station or base areas, is hereby delegated to the Secretaries of the Army, the Navy and the Air Force, and may be further delegated at their discretion.

4. Armed Forces participation must not directly or indirectly benefit or appear to benefit or favor any private individual, commercial venture, sect, or political or fraternal group, except as may be specifically authorized by the Secretary of Defense.

5. In general, the cost of military participation in public events will not be borne by the Armed Forces, except the pay of military personnel and small incidental expenses for activities of a local nature within areas contiguous to camps, posts, bases and stations to which the participating Armed Forces units are assigned, and which areas are sufficiently adjacent to the post, camp, base or station as to be considered by the local commander to be part of the post, camp, base or station area.

a. Transportation and operating costs of equipment used, costs of transportation of personnel, housing and standard per diem allowances, and all other costs, when the activity is beyond the post, camp, base or station area, will be borne by the civil organization sponsoring the activity unless an exception is made by the Secretary of Defense.

b. With the approval of the Secretary of Defense, transportation costs may be excluded from the costs to be borne by the civil organization sponsoring the event when transportation can be accomplished by government aircraft on normal training flights.

6. Parachute jumps, and equipment drops, except those scheduled as part of regular training programs on Armed Forces installations, must be approved in advance by the Secretary of Defense.

VI. BAND, PERSONNEL AND EQUIPMENT (EXCEPT AIRCRAFT) PARTICIPATION

1. Use of Service Bands will be in conformity with Section 35, Act 3, June 1916 (39 STAT, 188; 10 USC 609, 34 U.S. Code 449; as appropriate.)

2. Commanders authorizing participation by military personnel and equipment for parade and demonstration purposes, and participation by the Armed Forces bands (except the U.S. Army Band, the U.S. Army Field Band, the Navy Band, the Marine Band, and the Air Force Band) in their official capacities and in the performance of official duties will be guided by the following conditions of suitability:

a. When participation is an appropriate part of official occasions attended by the senior officers of the Government or the Department of Defense, in their official capacities and in the performance of official duties.

b. For parades and ceremonies incident to gatherings of personnel of the Armed Forces, veterans, and patriotic organizations.

c. At public rallies and parades intended to stimulate national interest in the Armed Forces.

d. Fund drives for officially recognized Armed Forces relief agencies or charitable organizations such as the Red Cross, when the proceeds are donated to these agencies.

e. Athletic contests in which one or more Armed Forces teams are participating.

f. In connection with recruiting activities for the Armed Forces.

g. At official occasions and free social and entertainment activities held on or off Armed Forces installations, provided that such free social and entertainment activities are conducted exclusively for the benefit of personnel of the Armed Forces and their guests.

VII. EXHIBITS

1. Armed Forces exhibit participation is defined as any presentation of Armed Forces equipment, displays and exhibits, other than operable aircraft, at expositions, demonstrations, fairs, celebrations and similar events.

2. The Secretary of Defense reserves the authority to approve or disapprove Armed Forces exhibit participation in events of international or national character, or those requiring coordination among the Armed Forces or with other agencies of the Federal Government.

3. Authority to approve participation in events other than those for which authority is reserved by the Secretary of Defense is delegated to the Departments of the Army, the Navy, and the Air Force, and may be further delegated at the discretion of each Service Secretary.

4. Except as may be specifically authorized in advance by the Secretary of Defense, the sponsor of the occasion or event in which Armed Forces exhibits are requested, will be required to provide public liability and property damage insurance bond to safeguard the U.S. Government from any claims arising as a result of Armed Forces participation. The liability insurance policy must state clearly the intent to cover accidents caused by or resulting from the display, operation, or maintenance of equipment and displays owned by the United States Government, or resulting from acts of officers or employees of the United States Government acting within the scope of their employment.

"a. In local activities as authorized in paragraphs V2c and V2c(1) the insurance requirement is waived."

VIII. AIRCRAFT PARTICIPATION

A. Participation of aircraft is defined as any flight or display of Armed Forces aircraft, including participation by Air National Guard, Civil Air Patrol or other aircraft provided, maintained, fuelled or manned wholly or partially from Federal funds, in connection with public gatherings, demonstrations, ceremonies and similar events.

1. Types of Participation

a. Class I (The Flyover) : The aircraft depart an Armed Forces base and return without landing at site of the event.

b. Class II (Major Show) : Aircraft depart home station as necessary to arrive prior to event, participate, refuel as necessary and are based at a station other than home station for the duration of the event.

c. Class III (Open House) : Aircraft are displayed or demonstrated for public audiences on a Government owned or leased installation.

d. Class IV (Minor Show) : Aircraft depart home station, arrive at destination prior to event, remain on static display, and depart after the event for return to home station.

2. Authority

a. Class I, II, and IV participation may be approved by the Secretary of Defense only, except that authority to approve Class I and Class IV participation on Armed Forces Day, Memorial Day, Independence Day and Veterans' Day is delegated to the Secretaries of the Army, the Navy, and the Air Force, and may be further delegated at their descretion.

b. Class III Participation—Authority is delegated to the Secretaries of the Army, the Navy, and the Air Force, and may be further delegated at their decretion for suitable occasions as indicated in paragraph 3c of this section.

3. Suitable Occasions

a. Class I Participation :

(1) Civic sponsored local celebrations of Armed Forces Day on the Third Saturday in May, Memorial Day on 30 May, Independence Day on 4 July, and Veterans Day on 11 November, and such celebrations on other dates as may be specified by the Secretary of Defense.

(2) Memorial services for deceased nationally recognized dignitaries of the Armed Forces or the Federal Government.

(3) Celebrations or receptions for dignitaries of foreign governments.

(4) National conventions of bona fide major veterans organizations.

(5) Occasions which are primarily designed to encourage the advancement of aviation and are of more than local interest and importance.

b. Class II Participation:

(1) Occasions which are primarily designed to encourage the advancement of aviation and are of national or international importance.

(2) Occasions which are of more than local interest, are open to the public free of charge, and have sufficient public attendance to justify the participation of a military precision flight demonstration team.

c. Class III Participation:

(1) Such times or occasions as a Service Secretary or his properly delegated subordinate commanders deem to be in the interest of the Armed Forces.

d. Class IV Participation:

(1) Occasions which are primarily designed to encourage the advancement of aviation, such as airport dedications, or to support recruiting or major programs of other Federal agencies.

(2) Civic sponsored local celebrations specified in paragraph 3a(1) of this section.

4. Rules for Participation

a. General:

(1) Occasion must be sponsored by nonprofit civic agencies, public officials, or Federal agencies.

(2) No monetary gain shall accrue to any individual or organizations other than that which would be used in the interest of the general public or a bona fide philanthropy.

(3) Sponsor must provide information indicated in the standard Department of Defense Air Show Information Sheet and Questionnaire.

(4) Aircraft will not be flown in any race or engage in acrobatics except as specifically authorized by the approving authority indicated in paragraph 2 of this section.

(5) Aircraft may demonstrated such tactics as are justified by conditions and by pilot proficiency but are subject to Armed Forces or civil air regulations.

(6) Insofar as practicable, flying time devoted to aerial demonstrations will be utilized to the fullest extent for flying proficiency or training purposes. Decisions for aircraft to participate in any class event will be based on fuel allowances, operating schedules, safe operating radius and conditions, interference with normal operations and training, expenses of personnel and availability of suitable types of aircraft in the area of participation.

(7) In no case will participation be authorized without reasonable reimbursement by the sponsor to personnel participating for necessary expenses which may be incurred as a result of such participation.

b. Class I Participation:

(1) Must be a suitable occasion as defined in paragraph 3a of this section.

(2) Flights of aircraft will be scheduled and staged as normal flying proficiency or training missions from their home bases.

(3) No acrobatics will be flown.

(4) No insurance bond is required, nor is any financil obligation incurred by the sponsoring agency.

c. Class II Participation:

(1) Must be a suitable occasion as defined in paragraph 3b of this section.

(2) The airport must be adequate; approaches, lengths of runways and hazards to navigation must be such as to provide a wide margin of safety. Suitable firefighting, crush and communications equipment must be provided.

(3) Participating personnel must be sufficient in number and proficiency to care for and maintain aircraft.

(4) A nonparticipating rated pilot will be designated to act as liaison officer. On occasions where two or more Services are participating, the Office of the Secretary of Defense will indicate the Service to designate the senior liaison officer. The senior liaison officer will be detailed in time to

arrive at the properly appointed place sufficiently ahead of the participating units. He will be responsible for proper coordination between the sponsoring agency and the Armed Forces units. It will be his responsibility to require rigid adherence to all flight regulations and to insure that the insurance bond is properly executed. Officers in charge of participating units will report to the senior liaison officer immediately upon arrival, and will report to him again immediately prior to departure, at which time a complete written report of all discrepancies, violations, unsatisfactory conditions, expenditure of sponsor's funds, and expenditure of funds not provided by the sponsor, will be submitted. The senior liaison officer will prepare a consolidated "participation" report, with copies of all reports received appended thereto, for retention by the designated military department, in accordance with Section X. of this directive.

d. Class III Participation:

(1) Must be a suitable occasion, as defined in paragraph 3c of this section.

e. Class IV Participation:

(1) Must be a suitable occasion, as defined in paragraph 3d of this section.

5. Sponsors of Class II or Class IV activities

a. Sponsors of Class II activities must agree in advance to furnish fuel of Army, Navy, or Air Force specifications sufficient to cover flight demonstrations, including filling the tanks of the aircraft on arrival and again prior to departure.

b. Sponsors of Class II or Class IV activities must agree in advance to:

(1) Defray the expenses of suitable hotel accommodations, meals and transportation for all personnel who are required to be absent from their home stations in connection with the air demonstration or display.

(2) Negotiate an insurance bond.

6. Indemnity Insurance Requirements

a. Participation not requiring indemnity bonds:

(1) Demonstration flights conducted at installations owned or leased by the United States Government.

(2) Flight of aircraft to and from place of exhibition.

(3) Class I demonstration (Flyover).

(4) Class III demonstration (Open House).

b. Participation requiring indemnity bond:

(1) Class II air demonstrations and static displays and Class IV static displays at places not owned or leased by the United States Government.

c. Bond required:

(1) Type: A liability insurance policy will be considered adequate insurance bond coverage.

(2) Amount of indemnity or liability insurance endorsement to the extent of $50,000–$500,000 for personal injury or death and $250,000 for property damage in connection with flying demonstrations and/or static display is considered adequate for normal participation.

d. Scope of Coverage:

The subject bond or liability policy must state clearly the intent to cover damage or accidents caused by or resulting from the maintenance, use or operation of aircraft, equipment, or material owned by the U.S. Government, and officers or employees of the U.S. Government acting within the scope of their employment. Subject policy should contain the elements present in this sample endorsement:

Sample Endorsement:

(1) The coverage provided by this policy shall extend to any loss from liability imposed by law for any and all bodily injuries (or death resulting therefrom, including loss of services) to persons, or damage to, or destruction of property of every description (including loss of use thereof) caused by, arising out of, or resulting from the participation, operation, use, maintenance, or presence in or at the _____, of any aircraft, equipment, or materiel of any description owned by the United States Government, or caused by, arising out of, or resulting from any action or nonaction of the United States Government, its officers and employees acting within the scope of their office or employment.

(2) The coverage provided by this policy shall extend continuously from the first moment of arrival of the first aircraft, or piece of equipment or materiel of any description owned by the United States Government at any place or places reasonably r necessarily incident to participation in____

until the last moment of departure from said place or places of the last of said aircraft, equipment or materiel, and shall extend continuously during the presence at said place or places of the United States Government, its officers or employees acting within the scope of their employment.

(3) The coverage provided by this policy shall not extend to any liability for loss on account of the bodily injury (or death therefrom, including loss of services) of any officer or employee of the United States Government *acting within the scope of his office or employment* or to any liability for loss on account of any damage to or destruction of any aircraft equipment or materiel of any description owned by the United States Government.

(4) It is understood and agreed that the immunity to suit of the United States Government, its officers or employees acting within the scope of their office or employment, shall not constitute a bar to recovery nor be pleaded as such in the defense of any suit against the United States Government, its officers or employees, or by the underwriters when defending such suits in their behalf.

e. Submission:

(1) Subject Bond or insurance must be submitted to the Assistant Secretary of Defense (Public Affairs), Department of Defense, Washington 25, D.C., not later than thirty (30) days prior to the date of the event.

IX. AREAS OUTSIDE THE UNITED STATES

With respect to command areas outside the continental limits of the United States, the authority reserved in this directive to the Secretary of Defense over Armed Forces participation in events of national or international character, or those requiring coordination among the Armed Forces or with other agencies of the Federal Government, is delegated to the commanders in chief of the unified commands in such areas. These commanders in chief shall consult with the Assistant Secretary of Defense (Public Affairs) regarding requests or plans for participation in events of major international interest or importance.

X. RECORD KEEPING

Military departments will maintain records of participation of their members in public events as heretofore described (including performances by entertainers in hotels, clubs, and private homes). These records should be sufficiently detailed to provide specific information for the ASD(PA) when required. Such requests for information will be issued under appropriate report control symbols.

XI. DEPARTMENT OF DEFENSE AGENCY

The ASD(PA) is designated to act for and in the name of the Secretary of Defense in implementing provisions of this directive.

C. E. WILSON,
Secretary of Defense.

[Change—AFR 190–5A]

DEPARTMENT OF THE AIR FORCE,
Washington, 4 September 1963.

AIR FORCE REGULATION NO. 190–5A.

INFORMATION ACTIVITIES

AIR FORCE PARTICIPATION IN PUBLIC EVENTS

AFR 190–5, 11 January 1957, is changed as follows:

1f(5). Aircraft participation in public events with exceptions as noted in paragraph 4.

★1h. Partcipation by military units, equipment, or exhibits in any event or activity within the purview of this Regulation is authorized only if admission, seating, and all other accommodations and facilities connected with the event or activity are available to all without regard to race, creed, color, or national origin.

5d. *Extent of Coverage.* The insurance policy must * * * their employment. The policy must name the United States Government as coinsured and must use the following endorsement verbatim:

BY ORDER OF THE SECRETARY OF THE AIR FORCE:
OFFICIAL

CURTIS E. LEMAY,
Chief of Staff.

R. J. PUGH,
Colonel, USAF,
Director of Administrative Services.
This regulation supersedes AFR 190–5A, 5 May 1961.
Distribution: S.

DEPARTMENT OF DEFENSE DIRECTIVES SYSTEM TRANSMITTAL

Number: 5410.6–Ch 4.
Date: August 5, 1963.
Distribution: 5400.
Attachments: Page 3 and 4 of DOD Directive 5410.6, Sept. 13, 55.

INSTRUCTIONS FOR RECIPIENTS

The following page changes to Department of Defense Directive 5410.6, "Armed Forces Participation in Public Events," dated September 13, 1955, have been authorized:

Page changes:
Remove: Pages 3 and 4.
Insert: Attached replacement pages.
Changes appear on Page 3 and are indicated by asterisks.
Implementation:
DOD Components will take necessary action to disseminate the provisions of this amendment throughout their organizations within thirty (30) days, and forward two (2) copies of each implementing document to the Assistant Secretary of Defense (Public Affairs).

MAURICE W. ROCHE,
Administrative Secretary.

[Sept. 13, 1955 [1]—5410.6]

4. Armed Forces participation must not directly or indirectly benefit or appear to benefit or favor any private individual, commercial venture, sect, or political or fraternal group, except as may be specifically authorized by the Secretary of Defense.

*5. Participation by military units, equipment, or exhibits in any event or activity within the purview of this Directive is authorized only if admission, seating, and all other accommodations and facilities connected with the event are available to all without regard to race, creed, color, or national origin or activity.

6. In general, the cost of a military participation in public events will not be borne by the Armed Forces, except the pay of military personnel and small incidental expenses for activities of a local nature within areas contiguous to camps, posts, bases and stations to which the participating Armed Forces units are assigned, and which areas are sufficiently adjacent to the post, camp, base or station as to be considered by the local commander to be part of the post, camp, base or station area.

a. Transportation and operating costs of equipment used, costs of transportation of personnel, housing and standard per diem allowances, and all other costs, when the activity is beyond the post, camp, base or station area, will be borne by the civil organization sponsoring the activity unless an exception is made by the Secretary of Defense.

b. With the approval of the Secretary of Defense, transportation costs may be excluded from the costs to be borne by the civil organization sponsoring the event when transportation can be accomplished by government aircraft on normal training flights.

7. Parachute jumps, and equipment drops, except those scheduled as part of regular training programs on Armed Forces installations, must be approved in advance by the Secretary of Defense.

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[1] First amendment (ch. 4, Aug. 5, 1963).

VI. BAND, PERSONNEL AND EQUIPMENT (EXCEPT AIRCRAFT) PARTICIPATION

1. Use of Service Bands will be in conformity with Section 35, Act 3, June 1916 (39 Stat. 188; 10 U.S.C. 609, 34 U.S.C. 449; as appropriate).

2. Commanders authorizing participation by military personnel and equipment for parade and demonstration purposes, and participation by the Armed Forces bands (except the U.S. Army Band, the U.S. Army Field Band, the Navy Band, the Marine Band, and the Air Force Band) in their official capacities and in the performance of official duties will be guided by the following conditions of suitability:

a. When participation is an appropriate part of official occasions attended by the senior officers of the Government or the Department of Defense, in their official capacities and in the performance of official duties.

b. For parades and ceremonies incident to gatherings of personnel of the Armed Forces, veterans, and patriotic organizations.

c. At public rallies and parades intended to stimulate national interest in the Armed Forces.

d. Fund drives for officially recognized Armed Forces relief agencies or charitable organizations such as the Red Cross, when the proceeds are donated to these agencies.

e. Athletic contests in which one or more Armed Forces teams are participating.

f. In connection with recruiting activities for the Armed Forces.

g. At official occasions and free social and entertainment activities held on or off Armed Forces installations, provided that such free social and entertainment activities are conducted exclusively for the benefit of personnel of the Armed Forces and their guests.

VII. EXHIBITS

1. Armed Forces exhibit participation is defined as any presentation of Armed Forces equipment, displays and exhibits, other than operable aircraft, at expositions, demonstrations, fairs, celebrations and similar events.

2. The Secretary of Defense reserves the authority to approve or disapprove Armed Forces exhibit participation in events of international or national character, or those requiring coordination among the Armed Forces or with other agencies of the Federal government.

3. Authority to approve participation in events other than those for which authority is reserved by the Secretary of Defense is delegated to the Departments of the Army, the Navy and the Air Force, and may be further delegated at the discretion of each Service Secretary.

[From the Washington Post, Sept. 20, 1963]

SEGREGATION BAN ORDER INCLUDES NATIONAL GUARD

United Press International

Defense Secretary Robert S. McNamara's order forbidding military units from participating in events before segregated audiences apparently extends also to the 400,000-man National Guard, nominally under State control.

The ban applies "to any participation in civilian events or other activities in the civilan domain by Armed Forces bands, troops, exhibits, aircraft, or other equipment, including the aircraft or equipment of the National Guard."

For any event to qualify for military participation, the Secretary specified, "admission, seating, and all other accommodations and facilities connected with the activities" must be "available to all without regard to race, creed, color, or national origin."

McNamara's action was taken August 5, but only came to light Tuesday. It consisted of a one-paragraph "amendment" to a lengthy directive issued in 1955 by the late Charles E. Wilson, then Defense Secretary under President Dwight D. Eisenhower.

Even when they are not called to Federal duty and are under the orders of State Governors, many members of the National Guard wear uniforms and use equipment that is Federal property.

Mr. FENSTERWALD. I have no further questions, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, I would like to return at the moment to the problem Mr. Speiser posed, these internal memorandum instructions with which he had some difficulty obtaining and I gather, at least in some cases, he never was able to obtain.

Mr. SPEISER. That is correct.

Mr. KENNEDY. They were a problem for the subcommittee while the bill was being drafted, and you will note, Mr. Speiser, that in section (b), we do not include the internal management exception but merely internal employment rules and practices. We did include a provision that all rules, statements of policy, and interpretations adopted by the agency and affecting the public, be not only available but also indexed, so that people could find them.

That goes right to the heart of the problem of getting public information with respect to these internal manuals directing how the employees of the agency shall conduct matters which affect the public.

Mr. SPEISER. If it does that, then I think this will be a tremendous step forward, because this has been a very difficult problem all the way through for us. The ACLU and voluntary attorneys have handled a great many security cases and there has always been a tremendous problem in finding out what the procedures are, how you operate, what the rights are of individuals. To date, the best source for this is a nongovernmental source which is a "Loyalty and Security Manual" put out by the Bureau of National Affairs, and that, in most cases, is the only place you can go to find out where the material is and the guidelines.

But that source is not given for all the guidelines, obviously, and that source was not aware of this memorandum which I described of November 26 last year.

Mr. KENNEDY. Thank you.

Senator LONG. Thank you, Mr. Speiser, for being here this morning.

Mr. SPEISER. Thank you.

Senator LONG. You have presented a very helpful statement.

The Chair has a statement from Senator Bartlett, one of the cosponsors of the bill, that I would like to have included in the record at this time.

(The statement referred to follows:)

U.S. SENATE,
COMMITTEE ON APPROPRIATIONS,
October 29, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I congratulate you, Mr. Chairman, and your subcommittee, for carrying on the freedom of information fight waged so well in recent years by Senators Tom Hennings and John Carroll.

You are presently holding hearings on S. 1666, a measure which I am honored to cosponsor and on which I should like to give you a few of my thoughts. I would be pleased if you would make this letter a part of the hearing record.

The fight to insure free and unfettered access to public information is as old as the Republic itself. After all, a responsible electorate must needs be an informed one. It should be our purpose, and that of every Government official, to see that nothing is withheld from the people. The Government is the servant of the people. In a free country the people should have the full knowledge of

what their Government is and what it is doing as a matter of right, not privilege.

Time and again the Congress has attempted to guarantee this freedom of and access to information. Time and again the intent of the Congress has been evaded by a bureaucracy anxious to hide its errors, and to avoid awkward inquiries. Government agencies have given such limited interpretation to the laws guaranteeing the public's right to information as to render them almost meaningless.

I believe this history offers us a lesson for current action. The subcommittee should make it its purpose to create a measure so simple, so direct, so clear and precise that it will not easily be perverted by a willing bureaucracy. I well know how easy it is to say this; how extremely difficult it is to write such a law.

Let the subcommittee make it clear that access to information is the ordinary; that denial is the extraordinary. It is not for the citizen 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 the citizen.

I am pleased that your subcommittee is giving such careful study to S. 1666. In my reading of the measure I find two points which are not clear to me and which might lead to confusion or perhaps allow conscious obfuscation were this bill to become law.

Section (b) provides for the availability of agency opinions, orders, and rules. It specifically exempts those which relate "purely to the internal employment, rules, and practices of any agency." Is this exemption intended only for "opinions, orders, and rules" relating to employment or is it to apply to all personnel files, employment records, salaries, etc.? If it is intended to cover employment and personnel records—and I do not believe that it should—specific mention of the fact should be made, I believe, in section (c), "Agency Records." If it is not intended that personnel records should be exempt from public access, then I can see no reason for exempting internal employment rules. What can be so damaging about agency rules relating to employment? Why should they be secret?

My second point is perhaps more a matter of semantics or psychology than of law. I will, however, advance it for the subcommittee's consideration. The bill as it now stands is framed in a negative manner. Exceptions and exemptions are set forth without a clear and positive reassertion that all information held by the Government is public and available to the citizen. I know the Congress has said it before, but let the Congress say it again.

I am particularly pleased that S. 1666 contains provision for proceeding in district courts to obtain an order for the production of records improperly held by a balky bureau.

My best wishes to the subcommittee in its important work.

Sincerely yours,

E. L. BARTLETT.

Senator LONG. The next witness is Mr. Mark P. Schlefer, of the Maritime Administrative Bar Association.

(The biography of Mark Schlefer is as follow:)

MARK SCHLEFER

Born: New York City, 1922.

Education: Fieldston School (New York); Harvard, S.B., A.B.; Harvard Law School, LL.B.

Experience: Law clerk, Justice Gavagan, New York Supreme Court, 1949–50; associate in Paul, Weiss, Rifkind, Wharton & Garrison, 1950; Kominers & Fort since 1951, presently member of that firm.

Memberships: Administrative Practice and Procedure of Committee of Administrative Law, Section of ABA; vice chairman of Maritime Transportation Committee of Committee of Administrative Law, Section of ABA.

STATEMENT OF MARK P. SCHLEFER, MARITIME ADMINISTRATIVE BAR ASSOCIATION

Mr. SCHLEFER. Mr. Chairman, I appear here today on behalf of the Executive Council of the Maritime Administrative Bar Association—a group composed of lawyers who practice before the Federal

Martime Commission and the Maritime Administration. Our colleagues who are in Government service have not participated in the formulation of this testimony.

Our association generally supports the amendments to section 3 of the Administrative Procedure Act which are the subject of these hearings. However, we have suggestions for modifying the language of the bill to take into account problems peculiar to administration of the maritime and shipping laws or which might improve the statute in its impact upon administrative agencies generally.

General: It is probable that the maritime agencies are among the most secretive in Washington, with little or no national defense or foreign policy justification for their secrecy. Such at least, is their general reputation. Almost the only comment concerning the Federal Maritime Board in the 1960 "Report on Regulatory Agencies to the President-Elect" is that "A fog of secrecy also surrounds many actions of the Board * * * ."

There are, it seems to me, three interrelated reasons for this secrecy. First, it prevents adverse scrutiny of the agency's own work in reaching its decision; it may be thought to help preserve the agency's public prestige if criticism is screened off. Second, the agency would like to avoid controversy that introduces new issues (usually derived from other similar situations) which it does not deem pertinent to the case at hand. Finally, secrecy permits the agency to withhold the basis for its decision and affords a much freer hand to decide future questions in an ad hoc manner without having to reconcile its present with its past actions. Essentially decision created in darkness permits compromise, suppresses controversy, may cover shoddy workmanship, and permits unsupported assertion to be substituted for an articulation of policy. I don't suggest that every secret decision is bad on the merits. I say only that the inability of the public to know its grounds promotes poor decision and lack of confidence.

Examples: Most lawyers who have any substantial practice before the maritime agencies can readily produce examples of completely unjustified withholding of information. I have thought it best to confine my examples to matters of which I or my office has had personal experience; a number follow. Possibly, the necessarily abbreviated treatment of one issue or another may be oversimplified or overstated. But there cannot be much doubt of the resulting conclusion, that the maritime agencies operate behind a wall of secrecy that is much too high.

1. By letter dated December 13, 1963, the Chief, Office of Ship Construction, Maritime Administration, made certain rulings in a dispute between a steamship company and a shipyard concerning delayed delivery of new vessels. The basis of his ruling was "an opinion (that) has been received from our Counsel." When subsequently, a copy of Counsel's opinion was requested, the request was denied in a letter stating:

> I am sure you are cognizant of the fact that it is not the policy of the Maritime Administration to release legal opinions of its Office of the General Counsel.

Thus, the agency predicated a ruling upon the reasoning of its General Counsel and then refused to furnish the parties directly affected with a copy of that opinion.

2. The minutes of the Federal Maritime Board, the predecessor with respect to some of its functions of the Federal Maritime Commission, are records required to be kept by statute (sec. 201(c) of the Merchant Marine Act, 1936). They are therefore "official records" in the classic common law sense. Although under the common law, the Administrative Procedure Act, and its own rules of practices and procedure, persons interested are legally entitled to see and make copies of Board minutes, it has in fact refused this right.

One instance was the subject of litigation in an interlocutory motion in *Associated Banning Company, et al.* v. *United States of America*, 247 F. 2d 557 (C.A.D.C. 1957). It was an interlocutory motion and the opinion cited in my prepared statement doesn't deal with the subject. It is in the file of the court, of course.

That case arose on a review of an order of the Federal Maritime Board which, without hearing, opinion, findings, or explanation approved a section 15 agreement—section 15 for the committee's information covers agreements between carriers or between carriers and terminals and other persons subject to the act—and dismissed a portion of the complaint. Associated Banning was permitted to see the Board's minutes and discovered that in issuing its summary order, the Board reversed its staff recommendation and the recommendations of its chief examiner. It asked for a certified copy of the Board's minutes to file in the court proceeding; the Board denied the request. In the end, the court of appeals directed the agency to certify its minutes.

Prior to the ruling of the court of appeals in the *Associated Banning Company* case, supra, the Federal Maritime Board had made it a practice of including as a part of its minutes the staff memorandums and recommendations in connection with each matter upon which it acted in the course of the meeting. Since the court's order was limited to the minutes themselves, the Board and its successors changed their practice and now omit all the staff papers from minutes. The minutes merely state the bare proposition and the "aye" and "nay" votes without the slightest indication of the basis of the agency's action. The staff memorandums and recommendations which underlie and explain the action are confidential.

3. There is another interesting facet to the Associated Banning Co. litigation which was conducted one stage removed from reality because of secrecy on the part of the Federal Maritime Board. As indicated above, the case involved the question whether approval of a section 15 agreement could be granted over a protest without a public hearing. The Federal Maritime Board ruled that a public hearing was not required and summarily approved the agreement. At the time of that action, there was in existence a recent opinion of an Assistant General Counsel of the Federal Maritime Board holding that the Board could not legally approve a section 15 agreement over protest without an evidentiary hearing. This opinion was later printed in full in the hearings before the Antitrust Subcommittee of the House Judiciary Committee.[1]

Whether that legal opinion was right or wrong, the Federal Maritime Board would have been faced with an entirely different problem

[1] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st sess., series 14, pt. 1 (1959).

in approving the section 15 agreement in issue in the *Associated Banning* case if its own counsel's opinion had been publicly available. It might have disagreed with its lawyer, as it in fact did, but it would have had to deal with the arguments and reasoning of that opinion. The secrecy surrounding the opinion left the Board with the convenient power to decide the question without having to trouble with public justification for its decision.

4. On December 5, 1962, a majority of the Maritime Subsidy Board found in Atlantic Express Lines of America, Inc., subsidy application, trade route 5–7–8–9, "* * * there is no inadequacy of American-flag service on the combined trade routes 5–7–8–9." The same Board, on September 18, 1962 (between the time of the examiner's report and its own decision), in an undisclosed action upon an undisclosed application by another steamship line made precisely the opposite finding, namely, that U.S.-flag service on combined trade route 5–7–9 and on trade route 8 is inadequate and that additional U.S.-flag sailings were required thereon. Thus, on a public record, the Board made a diametrically opposite finding to that which it had made on a secret and undisclosed application. The inconsistency of contemporaneous decision could not be known by the parties since one was secret. It was not, in fact, uncovered until after the Secretary of Commerce had reversed the Subsidy Board's action, when the Maritime Subsidy Board made its minutes available upon demand.

5. In a case in the Court of Appeals for the Ninth Circuit, *Sealand Service, et al.* v. *Federal Maritime Commission and the United States of America*, the issue was whether a lease between a terminal and a common carrier by water was an agreement requiring approval by the Federal Maritime Commission. The Commission had determined that the leases there involved were subject to approval under section 15. It appears from the Commission minutes that, although no opinion, report, or other statement was issued containing the basis of the Commission's determination, the Commissioners made their deduction by means of yea votes upon a memorandum "from the General Counsel with respect to the applicability of section 15 of the Shipping Act of 1916 * * *."

As a result of its practice following the court's decision in Associated-Banning, the minutes do not contain the General Counsel's opinion upon which its decision was based. The court of appeals (at the Maritime Commission's own request) remanded the matter for further consideration; but the General Counsel's opinion, which deals with an important and far-reaching question of the Commission's jurisdiction and is the basis of its action in the case under review, remains a secret document.

6. In the litigation arising out of the applications of States Marine Corp. and of Isbrandtsen Co., the Board's dockets S–57 and S–60, respectively, interesting issues involving the secretary of documents arose. Udner the substantive law, the Maritime Administrator who was ex officio chairman of the Federal Maritime Board and is now, pursuant to Reorganization Plan No. 7 of 1961 and D.O. 117 revised, ex officio chairman of the Maritime Subsidy Board, must make a determination that the service or route for which subsidy is paid is "an essential trade route," under section 211 of the act. In both Isbrandtsen and States Marine, the Maritime Administrator, presumably act-

ing upon confidential staff recommendations, determined that the services in question were essential. Before a subsidy contract could be entered into, however, competing lines were entitled to a public hearing under section 605(c) of the act. The Board recognized that the determinations under section 211 of essentiality and under section 605(c) after hearing are "based on the same information." States Marine Corp.—Subsidy, Tri-continent Service, 5 F.M.B. 60, 64 (1956). Yet it refused to produce its own analysis and factual material which led to the determination of essentiality. Whether the information, if furnished, would have been admissible or helpful would have depended upon what it was; but clearly there was no reason to bury the study under a cloak of secrecy.

7. Actions of the Administrator are the Administration's counterpart of minutes of the Maritime Commission or of the Subsidy Board. Like minutes, these are required to be kept by statute under section 201(c) of the Merchant Marine Act, 1936; and they should be available under recognized doctrines of common law, the Administrative Procedure Act, and the rules. They are, however, in many areas kept completely confidential.

The administration of the Ship Mortgage Act (title XI of the Merchant Marine Act, 1936) illustrates the absurdity and the danger of this policy of confidentiality. Title XI is an introcate statute providing for Government guarantees on loans and mortgages to finance new ship construction. The Maritime Administrator is required to make a number of findings before issuing insurance under the act: there are 11 possible findings that must be made for a mortgage on a new vessel, 7 for a loan. Additional or parallel findings are required for a commitment to insure, and further findings are required with respect to insurance in connection with refinancing and ship conversions. Not only is the general public denied access to these findings; but the lawyers for the financing institution, the shipyard, and the ship operator in the very transaction have not been able to obtain a copy of the Administrator's action and are prevented from determining whether his findings comply with the requirements of the statute. They have been required to accept the word of the staff that he has done so.

8. I should like to close my list of examples with a word of praise. About 6 months ago, the Maritime Administration began making available on a regular basis news releases of actions taken by the agency. We still can't see the papers, but at east, there is now considerably greater knowledge of the fact of the agency action that had been the case in the past.

Recommendations: Lawyers as a class, of course, always desire more documents than they can use. But out of that curiosity comes the surest guarantee that agency decisions are consistent and are defensible. If the veil of secrecy is stripped from the grounds of decision of the maritime agencies, those decisions in all human experience will not only be better, but will command the greater public confidence.

If governmental administration and regulation are to be based to the greatest possible extent not only on the truth but upon a truth known to those affected, a heavy burden should be put upon the party claiming confidentiality. This principle of free discovery of all relevant facts has been for many years embodied in the Federal Rules of

Civil Procedure for the U.S. district courts. One of the original reasons for creating administrative agencies was that they offered a simpler and cheaper means of assembling the facts than the then highly technical court procedures. Today, however, at least in the Federal system, the situation is just reversed.

The proposals in S. 1666 would, in part, correct the imbalance. The kinds of documents generated by the Shipping and Merchant Marine Acts that should normally be made available to a properly interested person as a matter of routine in our opinion are:

(1) Final staff recommendations (or summaries of position) to the agency or the subordinate official empowered to make a decision together with the supporting studies, findings, and reasoning.

(2) General Counsel's opinions.

(3) Any document filed with the agency by a private party or by a Member of Congress or his staff in a matter as to which private parties have an interest.

(4) Actions of the Administrator.

I might pause here with respect to actions of the Administrator. This is an extraordinary agency, the Maritime Administration, in that formal actions of the Administrator is a confidential document. Indeed, the private party person involved can't get a copy, usually, of the action in order to see whether the action complies with the statute in the matter in which he is interested.

For example, in a financing transaction where elaborate and detailed findings have to be made by the Administrator to comply with the statutory requirement, the action itself is not furnished to the bank, to the party involved, and they merely take an assurance, an abbreviated assurance from the staff that the action complies with the law.

I know of no justificational basis in the present law or policy for keeping that secret.

(5) Minutes of the Federal Maritime Commission and the Maritime Subsidy Board.

The following kinds of documents, whether or not included in the above, probably require confidential treatment:

(1) The sources of data for studies of foreign ship construction and foreign-flag ship operating costs utilized by the Maritime Administration for computing construction and operating differential subsidy payments.

The reason for that, if I may interject here, is that the Maritime Administration has a great deal of difficulty. It has to come from foreign sources, and if it is disclosed, the future availability is impaired and the information is essential to the administraton of the statute involved.

(2) Any tentative or preliminary staff memorandum not furnished to the agency itself.

(3) Any memorandums or analyses made by a personal or special assistant to a member or members of the agency who holds a position analogous to the law clerk of a judge or justice.

(4) Any memorandums between or among individual members of the agency in the course of consideration of matters presented to it for decision.

Suggested modifications in S. 1666: The foregoing discussion deals principally with section 3(c), to which we have directed our concern. We would suggest three modifications in the language of the bill.

First, clause (3) should be modified so as to avoid confidential treatment of final staff recommendations and final staff summaries which are sent to the Commission whether or not they deal with adjudicatory or rulemaking matters. I appreciate the objective of the committee in clause (3). I am not sure that the test is whether the matter is adjudicatory or rulemaking. We feel that if a final staff recommendation is sent to the agency, it ought to be made available for comment before the agency decides probably, or certainly after the agency decides.

Mr. FENSTERWALD. May I interrupt at that point?

Mr. SCHLEFER. Yes.

Mr. FENSTERWALD. Why do you draw a line between preliminary and final?

Mr. SCHLEFER. Well, yes. We felt that the staff ought to be permitted to think on paper without having to disclose their tentative and preliminary thoughts. Many memorandums may go from one section of the staff to another without the thought that it is final, but simply to let the Division of Finance, or the Division of Traffic think about this problem. When all of these thoughts are brought together in a final recommendation to the agency, then, it seems to me, the outside private party should be entitled to have that, to comment on it, to criticize it, to point out errors of fact, law, or policy which it may contain.

But it seems to me there ought to be some privilege to kind of think on paper without having it disclosed prior to the time it has been finalized. Similarly, we thought that if one agency member writes a note to another agency member and says, "What shall we do about this case" and, informally, a note is written back, why, I would think that certain regard for the privacy of communications of the members of a Commission, for example, would dictate that that be retained as a confidential matter.

However, where the staff makes a formal, final recommendation to the agency at that point, the staff's thinking is crystallized and it should be made available to the parties. Indeed, as I point out in my statement here, the original purpose of permitting parties to file exceptions to recommended or initial decisions of examiners was to prevent this kind of secret recommendation to the agency by the staff which the parties were unaware of and which, obviously, carry enormous weight in the final decision.

Mr. FENSTERWALD. One reason I brought this point up is that as a matter of legal drafting, I have trouble with the term "final" as to whether it does have any meaning or not.

Mr. SCHLEFER. I think we have suggested language. Our test is whether it goes to the agency. If it goes to the agency, it is final. If it doesn't go to the agency, then it would be treated as preliminary and tentative.

Mr. FENSTERWALD. I see. Thank you.

Mr. SCHLEFER. I think I have covered some of this informally. The original purpose of permitting parties in hearing proceedings before a regulatory agency to file exceptions to a recommended decision of an examiner was precisely to expose for comment and criticism what might otherwise have been a secret communication which contained errors or which unintentionally misrepresented a party's position or arguments to the agency. The purpose of exposing examiners' recommended decisions to criticism is the same as that suggested here of

exposing any final staff recommendation; namely, to force the agency itself to make a decision and resolve upon ascertainable grounds the conflict between its staff and the parties. The reasons for an effort to compel an agency to accept personal responsibility for its decision applies in our view equally to purely executive matters as to rulemaking or adjudicatory matters.

Second, even where the matter under consideration is neither adjudicatory nor rulemaking, the staff and the Commission ought to be permitted to think on paper without running the risk that they will be compelled to disclose their informal thoughts: clause (3) of proposed section 3(c) ought to permit the staff to talk to itself on paper in confidence, with a like privilege to the agency. Accordingly, we suggest that clause (3) be modified to read as follows—we would modify present clause (3), which begins at line 5 on page 4 of S. 1666 to read as follows:

(3) the internal informal memorandums of the agency staff not intended to be presented to the agency and the written communications between a member of an agency and his personal or special assistant or another member;

A further exception should be included in section 3(c) to protect the right of the agency to hold sources confidential where the disclosure of the source would jeopardize future access to needed information. This would cover the Maritime Administration's problem with respect to foreign ship construction and foreign-flag ship operating costs. Accordingly, a further exception is suggested to read as follows—this would be clause (4):

and (4) records containing the source of information (or data from which such source can be inferred) not needed in any adjudicatory proceeding and where the agency makes a written finding that disclosure would seriously hinder its ability to obtain similar information in the future.

When we say in this clause "not needed in any adjudicatory proceeding," this raises a question with respect to any exceptions that may be engrafted upon section 3(c), and particularly, the suggestions earlier with respect to trade secrets. I don't think the committee or, ultimately, the Congress, would want to create an additional privilege in court proceedings or in legislative proceedings where it is not a recognized privilege such as the lawyer-client privilege or privilege against self-incrimination. I think it ought to be made clear, that an exception to section 3(c) does not create a blanket privilege against producing documents in court or before a congressional committee.

Mr. FENSTERWALD. Mr. Schlefer, you are aware of the provisions in section 6(f), of S. 1663 with respect to discovery, not in this bill but in S. 1663, which I think would cover some of the problems that you are bringing out under S. 1666?

Mr. SCHLEFER. The discovery provisions—is this S. 1663 you are talking about?

Mr. FENSTERWALD. Yes, sir.

Mr. SCHLEFER. Yes; the discovery provisions of section 6 of S. 1663 are very helpful, but I was directing myself to what would happen if this were—actually, I didn't consider them together. I was directing myself to what would happen if this bill were passed alone. It might create a problem in this respect.

Mr. FENSTERWALD. I understand.

Mr. SCHLEFER. A final restriction which we suggest is designed, in a limited area, to protect correspondence or reports concerning private

parties from disclosure to persons who have no proper interest where it might adversely affect the private party involved.

From the discussion that I heard earlier, I think this would apply to the financial records filed with the Small Business Administration and, possibly the question raised by the first witness this morning. We don't think that a blanket privilege to take care of information filed by private parties should be put into this statute, but we do think that where financial or similar information is filed by a private party, in confidence, it should be protected unless there is a proper interest shown by a party seeking it.

For example, in the maritime field, there are situations where governmental approval of dividends, borrowings, or other corporate transactions are required and should be protected until finalized. Otherwise, we will have all kinds of stock market speculations of one sort or another as to what may happen. We suggest a limited restriction in an additional sentence in section 3(c), after the first sentence which now ends at line 8 on page 4—we would insert the following sentence:

Where disclosure of correspondence and reports by or concerning a private party may, in the opinion of the agency, adversely affect a private party, the agency may restrict disclosure to persons having a proper interest therein, whether or not such interest be adverse.

Where the matter came up in litigation or where there was a legitimate interest, of course, the agency would have to disclose and furnish the data. But it is simply designed to prevent a disclosure of something that could serve no purpose except to hurt the party involved, in the case of a financial filing, for example.

I thank the committee for the opportunity of being able to appear here today and testify in behalf of this organization.

Senator LONG. Thank you very much.

Any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I have just one question, Mr. Chairman. Mr. Schlefer, after the reorganization of the Maritime Board, has there been any change in their general policy of either disclosure or withholding?

Mr. SCHLEFER. It is my experience that the policy has been just about the same. Ever since the *Associated-Banning* case, minutes have been made available upon request, but they don't contain anything, and with respect to all of the other documents that I have mentioned, it is our experience that they are kept confidential and it is impossible to obtain them from the agency. The only time that we have been able to extract this kind of information is when there is an adversary proceeding in which the agency is involved in court.

Then, under the normal Federal Rules of Civil Procedure, the courts have compelled the furnishing of documents or the taking of depositions to establish facts. But I don't believe that on this point, there has been any appreciable change since the reorganization.

It may be that other people have had a different experience from mine, but this is our experience.

Mr. FENSTERWALD. You say secrecy continued both before and after the reorganization?

Mr. SCHLEFER. I would say so; yes.

Mr. FENSTERWALD. No other questions.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, I think it might be helpful to have in the record a brief description of the kind of proceedings that these two maritime agencies consider. Are they licensing or regulatory proceedings, grants, loans, or what?

Mr. SCHLEFER. The Federal Maritime Commission, after the reorganization plan, is an independent agency similar to the Interstate Commerce Commission. It regulates common carriers and terminals and freight forwarders engaged in the foreign trade of the United States or engaged in our trade with Puerto Rico, Hawaii, Alaska, Guam, and the Virgin Islands, our offshore States and island territorial possessions.

This regulation relates to steamship conferences and in the offshore domestic trades to the reasonableness of rates and practices of the carriers. It involves the filing of tariffs and the filing and approval of agreements.

The Maritime Administration is an agency within the Department of Commerce, and it generally administers the promotional aspects of our maritime laws, the subsidy program, new construction, transfers to foreign flag, mortgage title XI, and that sort of thing. Both agencies hold hearings.

Mr. KENNEDY. Are these open hearings?

Mr. SCHLEFER. Yes. Where required by statute, they hold open hearings, and in some instances, they hold open hearings as a matter of discretion in certain areas where they are not required by statute to hold open hearings.

Mr. KENNEDY. In the case of each agency, does the agency staff participate in the hearings by taking a position so that its position is disclosed to the parties during the hearing or not?

Mr. SCHLEFER. There is, in both agencies, an office; in the case of the Federal Maritime Commission, an office of hearing counsel, and in the case of the Maritime Administration, the office of public counsel. These offices are separate from the Office of the General Counsel, and the gentlemen from those offices that participate in public hearings ultimately do take a position, file briefs, produce evidence, and examine witnesses, and argue before the Commission or the Subsidy Board, which is within the Maritime Administration, as the case may be.

Mr. KENNEDY. Then who makes the staff memorandum that you were referring to?

Mr. SCHLEFER. A large area of both agencies is nonhearing—decisions which are nonhearing decisions. For example, the approval of construction differential subsidy awards and the approval of a transfer to foreign registry or flag. In the case of the Maritime Commission recommendations to suspend or not to suspend rates, or to order investigation. These are all what you might call purely administrative decisions.

With respect to the Maritime Administration, I would say that the great bulk of its work is not the subject of public hearings.

In connection with public hearings, there are staff recommendations that are made to the agency and frequently do not come from hearing counsel; they may come from the hearing examiner's office, they may come from the Secretary, they may come from the Office of the General Counsel, and so forth.

Mr. KENNEDY. Then these staff memorandums that you refer to are used in the type of proceeding where there isn't a hearing or are made after the hearing is closed, and they are not shown to the parties affected, is that right?

Mr. SCHLEFER. Yes; that is true, except in instances where the staff recommendations relate to whether to order a hearing or not.

For example, a question may come up as to a potential violation of the statute or possible existing violation, and the staff may make an investigation and may wish to recommend to the agency that an investigation or public hearing be held. That is a staff recommendation prior to the ordering of the hearing, and it is never made available either prior to or at the hearing to find out what the basis of the staff's order is.

Mr. KENNEDY. I have one other question, Mr. Chairman.

What is the purpose, Mr. Schlefer, of having the agency required by statute to make those findings that you referred to, if they are kept secret? At the beginning of your statement, you referred to findings which were kept secret.

Mr. SCHLEFER. You mean, the Maritime Administrator's actions?

Mr. KENNEDY. Yes; you say he made findings which were kept secret.

Mr. SCHLEFER. Yes; he does.

Mr. KENNEDY. What is the purpose of making the findings, if they are not going to be made public?

Mr. SCHLEFER. To give you a specific example, where there is a financing of a vessel involving a mortgage guarantee by the U.S. Government, the Maritime Administrator has to make a number of findings, 11 in connection with the mortgage, 8 additional ones in connection with the loan, and so forth. The statute requires these findings, and doubtless, he normally makes them. As a matter of fact, I have no doubt that he probably tries to make them before he issues the mortgage insurance. But the attorneys for the bank and the attorneys for the shipowner are not permitted to see the action to determine whether the findings, in fact, have been made.

Mr. KENNEDY. In other words, they might want to object to them but they can't see them.

Mr. SCHLEFER. They might say, "Well, you haven't done this; you haven't made this finding. One has been left out," or "it hasn't been made in the terms of the statute."

There are any number of reasons why a careful lawyer would want to see whether the Administrator has made findings which the statute requires before he can enter into a kind of contract—a certain kind of contract. The way the agency operates now, a letter is received from the staff or from the General Counsel which states that the Administrator has made the findings.

But the action itself is never furnished. This is true with respect to everything that the Administrator does to my knowledge. I have never seen the actions of the Administrator disclosed to the private persons involved.

Mr. KENNEDY. Is there a statute which permits him to do this?

Mr. SCHLEFER. Because of the various agency reorganizations, it is a little remote. But originally, there was no Administrator. There was a U.S. Maritime Commission, and the statute required the Com-

mission to keep its minutes. When the functions of the Administrator were broken away from the Commission by reorganization plans, his actions really took the place of the Commission's minutes, there now being only one official involved. I think, in the light of the reorganization plans, the Administrator's action is comparable to the minutes of the Commission; it is required to be kept by statute, and, hence, is an official record which is required by law to be produced in my opinion, under the present Administrative Procedure Act, and under the common law rule, with respect to official records.

This raises the question which Mr. Fensterwald brought up earlier; namely, whether it would help to repeal the whole of section 3(c). I have no doubt that 3(c), in the present law, is intended to be a disclosure statute. We have done a good deal of research on this subject. There is no doubt that the Congress intended to require the agencies to produce more in the way of documents and records than existed at common law.

It hasn't necessarily functioned that way with respect to some agencies, I suppose, but if you now repeal it, the argument would be that the liberalization of the right of access to agency documents is now repealed, and I think you would have a hard time getting what you are entitled to. I would much prefer the approach in S. 1666 to tell the agencies what to do in a statute, and then provide a remedy for violation of the statute.

Mr. FENSTERWALD. The lack of remedy makes it frustrating, doesn't it?

Mr. SCHLEFER. That is right; the only time you can have a remedy is when you have a substantive basis for litigation. Obviously, every time you are denied access to information, that is not really a basis for starting a lawsuit.

Mr. KENNEDY. That is all.

Senator LONG. Thank you, Mr. Schlefer, for your statement.

Mr. SCHLEFER. Thank you.

Senator LONG. The committee appreciates your appearance here this morning. That concludes the hearings of the committee today.

The committee will now stand in recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:55 a.m. o'clock, the committee recessed until 10 o'clock a.m., Thursday, October 31, 1963.)

FREEDOM OF INFORMATION

THURSDAY, OCTOBER 31, 1963

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND
PROCEDURE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2228, New Senate Office Building, Senator Edward V. Long of Missouri presiding.

Present: Senators Long of Missouri and Burdick.

Also present: Bernard Fensterwald, Jr., chief counsel; Cornelius B. Kennedy, minority counsel; Kathryn Coulter, special assistant; Donald V. Nangle, assistant counsel; Charles Helein, assistant counsel; Carlos F. Lucero, staff assistant; Joan Miller, staff assistant, office of Senator Long.

Senator LONG. The committee will be in order.

Our first witness this morning is our very distinguished colleague from New York, Senator Keating, who is also a cosponsor of the bill. Senator, we appreciate your being a cosponsor and we are grateful to you for being here this morning. We will be pleased to have your statement.

STATEMENT OF SENATOR KENNETH B. KEATING, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KEATING. Thank you, Mr. Chairman.

This bill, which was introduced by the chairman and of which I am cosponsor, is designed to bring policy and action into line with principle and theory. Theoretically our Republic derives its power from the consent of the governed. But no electorate can be expected to render an informed judgment when the means by which it can inform itself are blocked, and knowledge of the common routine of Government business is made inaccessible.

There is no doubt that the American people are not getting adequate information about the affairs of Government. The administrative agencies, under sanction of ill-defined law, decide at their discretion what, in the public interest, should be public knowledge. In my judgment, we cannot afford the luxury of allowing a far-reaching bureaucracy to carry on its activities outside the glare of public scrutiny.

The administrative agencies have been described oftentimes as a fourth branch of Government. Their decisions affect the price of food on the family table, the success or failure of many businesses, the rights of consumers and labor, and, in the final analysis, the carrying out of many of the laws of the United States. Despite their tremendous

power, the heads of these agencies are not subject to voter approval and many of their activities are unfamiliar to the public. In this situation, it is especially important that there be the fullest disclosure and publication of information concerning their operations. Public scrutiny, which is difficult under any conditions, and will, I might say, be difficult even under this bill, is impossible if access to the records, rules, and decisions of these agencies is thwarted.

The need to keep the public informed of administrative operations was recognized in the Administrative Procedure Act of 1946. But in its attempt to anticipate all the circumstances under which it would be inconvenient or truly detrimental to the public interest to allow the unlimited dissemination of information, exceptions were written into the act and they have been relied upon to defeat much of the original purpose of the public information clause. As a result, the Freedom of Information Committee of the Sigma Delta Chi professional journalism society, reported just this week that Government officials are keeping the flow of information at "the lowest ebb in history."

The bill before this subcommittee, S. 1666, attempts to embody into the act a public information clause which would close some of these loopholes. It would tighten up on the situations in which secrecy can be imposed by agency officials. Even in the area of national defense, a distinction should be made between information which is simply embarrassing to a Government agency, and actual defense secrets. In some cases, Americans are denied information which the governments of other countries, including the Communists, already possess. The withholding of information in such instances is more for the protection of defense officials than of our Nation's security.

Apart from its specific provisions, hopefully enactment of S. 1666 would set a new tone for Government information policies, a tone much more in harmony with the President's oft-repeated pledge to make available to the press and the public the fullest information possible outside the narrowest limits of national security. I believe the President is sincere in this pledge, but, all too often, misguided lower echelon officials can vitiate the best of intentions. The adverse departmental reports on this bill are the best evidence of this conflict between the President's position and the views of some of these agencies.

I was rather shocked to read some of the adverse reports from some of the Government agencies on this bill, Mr. Chairman.

Personally, I hope that the subcommittee will repudiate the excessive claims of privilege and secrecy reflected in these reports and give full implementation to the President's own eloquent declarations on this subject.

There can be no sanction for covering up mistakes or dissent in the operations of Government in a free society. The people do not expect perfection from their Government, but they have every right to insist upon honesty and candor and enough of the facts to enable them to form their own opinions as to the wisdom of the Government's actions.

The words of James Madison have often been quoted in relation to this subject, but they lose none of their potency in repetition and

serve to point up the fundamental importance of this legislation. President Madison pointed out that—

> The right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right.

The greatest danger presented by our growing Federal system—and the necessity and direction of that growth must always be subject to constant vigilance—is the temptation to yield to the convenience of the bureaucratic decision; to let the administrator, the appointed administrator, use the power of his office in an arbitrary, unchecked manner away from the spotlight of public surveillance. When we permit this to happen we have sown the seeds of oppression and uprooted the very foundations of a free society in which Government is the servant rather than the custodian of the public interest.

This legislation is necessary to restore to the citizen his right of access to information concerning the operation of the least scrutinized areas of Government, the "shadowland" of Government operation, the administrative agency. But we must not assume that any one measure will remove all the unreasonable impediments to the right to know. Congress itself has been under attack for the excessive secrecy surrounding its own operations and the increasing resort to executive sessions in questionable circumstances by some committees.

The prospect for diligent application of the principles required by this measure would be enhanced by a demonstration that Congress is willing to practice what it preaches. The Sigma Delta Chi report, to which I have already referred, concluded that congressional freedom of information has suffered "its worst year of the last decade." Our cause certainly will not be aided if the legislative branch insists upon following a double standard.

While some of the problems involving congressional information policies are not within the jurisdiction of this subcommittee, one specific proposal which could appropriately be added as an amendment to the pending bill would be to require the inclusion in the public record of any communication by a Member of Congress with respect to any adjudicatory proceeding before an administrative agency. This would eliminate the ex parte nature of many such contacts and give full publicity to all possible influences on the agency's decision. I believe that the inclusion of such a provision in the pending bill would be a strong indication of our good faith in insisting upon a broader scope in the executive branch for the public's right to know.

In conclusion, I want to commend the subcommittee for the attention it has given to this subject and to state my full support for keeping the processes of Government firmly in the public view.

I particularly commend the distinguished chairman for the leadership which he has taken in bringing this legislation before us, and in insisting upon and conducting these hearings in the face of opposition from various Government departments.

Senator LONG. Thank you, Senator. We are certainly grateful to you for your statement and for your support. I am sure you agree with me that it is a nonpartisan problem that we do have.

Senator KEATING. Very definitely, yes.

Senator LONG. In one degree or the other, it has been true in every administration back through the years.

Senator KEATING. Every administration is subject to this, and has been as long as I have been here. I agree with Sigma Delta Chi, the journalistic fraternity, that it has reached a new high now, but it is just a matter of degree. My fear is that those agencies which are now howling to high heaven in opposition to this bill, if the Congress passes it and it becomes law, will then say that it doesn't change things very much and it just confirms what they have been doing right along.

That is frankly the danger that I see, except for one thing in the legislation, and that is the right to go into court, if an agency improperly withholds a document, the right to force it to produce the information.

Senator LONG. That is one of the parts of the bill that will keep them from covering up. Very obviously, some of the agencies use the present bill as you suggested, as a means to hide behind while actually, the intent of Congress was that it be used for entirely another purpose—to make information more available.

Senator KEATING. That is right.

Senator LONG. Thank you very much, Senator.

Do you have any questions?

Mr. FENSTERWALD. I have no questions.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. No, thank you, Mr. Chairman.

Senator KEATING. Thank you.

Senator LONG. Is Mr. Leslie H. Whitten, of the Hearst papers, present? Will you come forward, please?

(The biography of Mr. Whitten is as follows:)

BIOGRAPHY OF LESLIE H. WHITTEN

Born Jacksonville, Fla., February 21, 1928. Educated, Washington, D.C., and Boyle, Miss., public schools. Served U.S. Regular Army, 1946–47; honorable discharge as T–3 (staff sergeant). Graduated, Lehigh University, Magna cum laude, B.A. journalism-English, 1950; editor, college newspaper, Brown and White. Worked Radio Free Europe, Munich, 1951–55, as news editor; RFE, New York, 1955–57, newsroom chief; International News Service, 1957–58, desk man; United Press International, 1958, reporter; Washington Post, 1958–63, reporter; Hearst Headline Service, 1963, reporter. Membership in professional organizations: American Newspaper Guild, White House Correspondents Association, House-Senate press galleries.

STATEMENT OF LESLIE H. WHITTEN, HEARST PAPERS

Mr. WHITTEN. I don't have any prepared statement, Senator, but your people wanted me to come in and tell you about a story I had a hard time getting and I haven't gotten yet, so I am glad to do it.

My name is Leslie H. Whitten, and I am 35 and I have been with the Hearst Headline Service, that is the national bureau that serves our 10 newspapers, located here in Washington. I have been with them since July. I was a reporter for the Post for the previous 4½ years, and was with INS and UP before that.

On October 19, Navy Secretary Korth released, for whatever purposes he may have had, a large number of letters. Many of them were written on Navy stationery. Now, at least three of these letters pertained to invitations which he had extended to his banking friends for the U.S.S. *Sequoia*. One of these letters pertained to an invitation which was accepted by Mr. Phil Regan, who is some sort of public

relations man, and who subsequently put $50,000 into the bank of which Mr. Korth was formerly president, the Continental National of Fort Worth.

Now, the U.S.S. *Sequoia* is, according to a Navy press release, to be "used for official functions by the Secretary, the Under Secretary, and Assistant Secretaries," and it may also "be made available for the Secretaries of the Department of Defense for military department and officials of Cabinet rank."

So it doesn't have any military purpose. It is a pleasure yacht. It is a 104-feet long, and it carries a crew, a Navy crew, of 23, 8 of whom are stewards and it accommodates about 30 guests for buffet and about 38 maximum. It is paid for by the taxpayer and it is maintained by the taxpayer. It was bought originally by the taxpayer, and we pay the salaries of the Navy men who staff it.

So, on October 21, this was after the Korth letters were released, my boss said, "See if you can get a look at that log," that it should be interesting. We knew some people had been aboard and we wanted to look at the rest of it. It seemed we had all of the logic on our side, particularly since Korth himself had released these letters originally, thus bringing it into public interest.

I couldn't see any possible military consideration why it should not be released so I started calling up the Navy, and I started with the actual custodians. They told me that the logs were "for official use only." They said that historians could get permission to use these logs, and that they saw no problem as far as—in general—the log being released, unless the ship were classified for some reason.

I made a few more calls to the wrong offices over there and I finally got a captain, J. B. Smith, who is listed in the Bendix directory, which is a pretty reliable one, as the Media Relations Divisions Director. I told him what I thought about his ship and I said, "I can't see any reason why we should not be able to see this log, since it is not a military ship and since Mr. Korth himself has brought it up and since I am paying for the ship to be operated."

Captain Smith said to me that morning, "I am not against it. It is just not my baby."

So I said, "Well, whose baby is it?" And he said, "Well, I think you probably ought to talk to Cmdr. James Jenkins."

Now, Comdr. James Jenkins, I believe, James E. Jenkins, is the Secretary of the Navy's public relations aide. So I called him up. This was all still on October 21. And I said, "What about this log?" He said, "Well, the letters have all been released, you can come over and look at them."

I checked with him and made sure I had the three pertinent letters that I knew about pertaining to this ship. I said he has brought it into the public interest and it is not a military ship and the taxpayers' money is paying for it, how about a look at that log?

He said, "Well, I'll see Mr. Korth about it and see what we can do." I took some hope from that. Meanwhile, I called up the Under Secretary—let's see, the Under Secretary of the Navy, Paul B. Fay, who was Acting Secretary while Mr. Korth was in the hospital with an ear ailment.

I said, "What about this log? It has probably got a lot of names on it and I'd like to get a look at it. My boss wants me to. I think

it would make a good story. It is not a military ship," I went through this pitch with about everybody I talked to over there. He said—and this is a pretty good paraphrase of what he said according to my notes. He said, "Well, I don't know what the policy is on it. As far as I am concerned, if it is used in an official way, why there is nothing wrong with it." And he said, "When I have a party aboard, which is not too often, I don't like to have stereotyped people. I might have some people from the Congress and from the executive branch, and from the business community; attractive people."

He said he even had a newspaper editor aboard one time. And then he said, "I see no reason why you can't see it. It seems like an easy enough instruction." And I was going to use that but I wanted him to know that I was going to use that quote.

I said, "Well, now, are you saying to me that you see no reason why I can't see it and that it seems like an easy enough instruction?"—just reading back his words. And then, I guess, he caught on that I was going to use the quote so he said, "Well, I think maybe you had better call me back tomorrow and we will see what the policy is on that."

So I said, "OK, I'll call you back tomorrow." By the way, Commander Jenkins made it plain to me that he was just a spokesman for Korth and that he in no way was making the policy over there.

The next day, October 22, I called back Jenkins and I also called back the Under Secretary, and Mr. Fay said at that time something to the effect, "Why don't you huddle with the Secretary? It is his yacht." And he said, "Myself, I use it very seldom." And that he felt it was something that Mr. Korth should handle as far as releasing the log and the guest list were concerned.

So I then called up Commander Jenkins again and I said, "If you can't let me see the log, I'd like to see the guest list." And he said, "Well, the guest lists are a part of the log," so the whole thing was in a package.

I said, "What did Mr. Korth say?" He said, "I haven't reached him yet."

Later that day, apparently, he did reach him because he had a statement for me. He said that we could quote Secretary Korth's office as saying that, "Defense Department policy precludes the release of logs of operating forces."

I said, "Well, does that mean that the Navy Department won't let me see this log?" He said, "Well, all I can say to you is—"and then he repeated that statement.

I said, "Can't you amplify?" He said no. I said, "What about the guest list? They aren't a part of the log." He said, "Yes, they are." I said, "Don't you have anything separate?" He said "No, I'll have to go back to Mr. Korth."

So I wrote a story based on my experience. This is our file copy. It got picked up in a number of our papers. This is the story from the Seattle Post-Intelligencer.

Senator LONG. Do you want that in the record?

Mr. WHITTEN. If you want it in. I don't know. Whatever you say.

Senator LONG. That will be included in the record.

(The papers referred to follow:)

KORTH

(By Leslie H. Whitten, Hearst Headline Service, exclusive to (name of paper))

WASHINGTON, October 23.—Representative Bill Stinson, Republican, of Washington, asked the Justice Department today to investigate "immediately" the use by Navy Secretary Fred Korth of a 104-foot Government-owned yacht to entertain business friends.

Stinson said in a letter to Attorney General Robert F. Kennedy that correspondence released by Korth on one such display of shipboard hospitality "indicates it was not an isolated instance." He questioned whether conflict-of-interest laws were broken.

Korth was given full permission by the Defense Department today to open the log of the mahogany-paneled U.S.S. *Sequoia* to show just who his guests of honor and other guests were. Tuesday, he balked at opening the log to the press on the grounds that the Defense Department policy precluded it. But when his roadblock was removed, a spokesman for the Navy Secretary said the answer was still "No."

Korth, 54, resigned effective November 1, following a charge by Representative H. R. Gross, Republican, of Iowa, that he was in conflict of interest. The bank of which he was president—Continental National of Forth Worth—extended a $400,000 credit to a General Dynamics subsidiary. General Dynamics won the controversial $6 billion TFX contract decision, a decision in which Korth sided with General Dynamics.

The Navy Secretary, backed by the administration, vigorously denied the conflict charges. Today—faced with a mound of letters written by Korth about bank business on Navy stationery—the Defense Department was less solicitous of Korth.

At least three of the letters to banking friends dealt with invitations to the *Sequoia*, a 123-ton craft at the disposal of Navy Secretaries since 1936 for "official functions." When told that Korth was throwing the ball to the Defense Department, a spokesman there said:

"We don't object to Mr. Korth making his guest list available. He has all the right in the world to release it. It's up to Korth."

The Defense Department explained that the names of guests on the yacht—which is also for "official functions" of cabinet officers and top armed services executives—can be released at will by the official throwing the party.

The Navy spokesman then acknowledged that the log would show guests of honor and when Korth used the *Sequoia*. He said in addition some guest lists were available. But for the second straight day he balked at giving up the information.

Another Navy spokesman said if the Defense Department would release the entire log—showing use by all officials—then Korth would sanction the release of his data.

Stinson, in his letter to Attorney General Kennedy, said that "on February 1, 1963, Korth wrote to Phil Regan (singer and "human relations" man) of Palm Springs, Calif., thanking him for a $50,000 desposit in a new account in Continental National Bank. Regan had arranged the large deposit immediately after returning home from a cruise with Korth on the Navy yacht, *Sequoia*."

Stinson then quoted the correspondence released by Korth in which Korth said, "We were indeed fortunate that we were able to have you and Jo (Regan's wife) aboard the *Sequoia*. * * *"

Stinson continued: "In 1962 and 1963, there is correspondence showing that Korth was entertaining officials of the Continental National Bank on the *Sequoia*, and that he suggested that they bring along the 'extra good customers.'"

Stinson detailed areas where he said Continental had done business with General Dynamics. Commenting on the correspondence, he told Kennedy that "if your office has not examined this new evidence, I would hope that this project would immediately be undertaken."

Boeing Co., which fought General Dynamics for the TFX contract, is in Stinson's home State.

Stinson—outside the letter—said he thought the initial Justice Department probe of Korth, which Kennedy indicated had cleared Korth, was "skimpy." Korth has consistently denied any wrongdoing or that his use of official Navy stationery to do bank business was to the detriment of his work as Navy Secretary.

Korth resigned from the bank when he took the job as Navy Secretary in January 1962. On October 11, he announced he would quit the Navy post reportedly because of a dispute about carriers, but rumors began to spread that the Senate Investigations Subcommittee had material on him. Senator Carl T. Curtis, Republican, of Nebraska, has said Korth will be recalled before the subcommittee in connection with the TFX probe.

[From the News-Post, Baltimore, Oct. 24, 1963]

PROBE ASKED OF KORTH'S NAVY YACHT HOSPITALITY

(By Leslie H. Whitten, News-Post correspondent, Hearst Headline Service)

WASHINGTON, October 24.—Representative Bill Stinson (Republican of Washington) has asked the Justice Department to investigate "immediately" the use by Navy Secretary Fred Korth of a 104-foot Government-owned yacht to entertain business friends.

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The Navy Secretary, backed by the administration, vigorously denied the conflict charges. Today—faced with a mound of letters written by Korth about bank business on Navy stationery—the Defense Department was less solicitous of Korth.

At least three of the letters to banking friends dealt with invitations to the *Sequoia*, a 123-ton craft at the disposal of Navy Secretaries since 1936 for "official functions." When told that Korth was throwing the ball to the Defense Department, a spokesman there said:

"We don't object to Mr. Korth making his guest list available. He has all the right in the world to release it. It's up to Korth."

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[From the Los Angeles Herald-Examiner, Oct. 24, 1963]

DEMAND ALL DATA ON KORTH'S USE OF U.S. YACHT

(By Leslie H. Whitten, Herald-Examiner Washington correspondent with Hearst Headline Service)

WASHINGTON, October 24.—Representative Bill Stinson, Republican, of Washington, asked the Justice Department today to investigate "immediately" the use by Navy Secretary Fred Korth of a 104-foot Government-owned yacht to entertain business friends.

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[From the New York Journal-American, Oct. 24, 1963]

KORTH IGNORES OK TO OPEN LOG: DEMAND PARTY YACHT PROBE

(By Leslie H. Whitten, Hearst Headline Service, special to New York Journal-American)

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BALKS AT REQUEST

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"We don't object to Mr. Korth making his guest list available. He has all the right in the world to release it. It's up to him."

The Navy spokesman for the second straight day balked at giving up the information.

Representative Stinson—outside the letter—said he thought the initial Justice Department probe of Mr. Korth, which Mr. Kennedy indicated had cleared Mr. Korth, was "skimpy."

Mr. Korth has consistently denied any wrongdoing or that his use of official Navy stationery to do bank business was to the detriment of his work as Navy Secretary.

PROBES

(By Leslie H. Whitten, Hearst Headline Service, special to (name of paper))

WASHINGTON, October 22.—Navy Secretary Fred Korth, who has admitted using a Government yacht to entertain business associates, sharply shut the ship's log to the press today.

"Defense Department policy precludes the release of logs of operating forces," a spokesman in Korth's office said carefully. He was responding to a request for additional details on how the 104-foot pleasure craft, the U.S.S. *Sequoia*, was used.

The action came amid developments on another major case in which the conflict-of-interest issue has been raised. The Senate Rules Committee will meet tomorrow to decide how to look into the financial affairs of former Senate Majority Secretary Robert G. "Bobby" Baker, owner of large vending machine and other interests.

Korth was accused of a "clear conflict of interest" by Representative H. R. Gross (Republican, Iowa) in the $6 billion TFX airplane contract award. Korth was president of the Continental National Bank before he took his Navy job in January 1962. The bank had given a $400,000 credit to a subsidiary of General Dynamics, the eventual winner of the TFX contract.

The Navy Secretary, who took part in the TFX decision, denied the charge and was backed by the White House. He will be called again before the Senate Investigations Subcommittee making the TFX probe, according to a member, Senator Carl T. Curtis (Republican, Nebraska).

On October 11, Korth quit his Navy job, effective November 1 reportedly over a dispute about aircraft carriers. But rumors began to spread that the subcommittee had more material.

The Navy Secretary, now recuperating from an ear ailment in Bethesda Naval Hospital, released texts of letters on Navy stationery, many of them relating to the bank, and some mentioning the *Sequoia*.

A Korth aid, questioned by a reporter about the 123-ton yacht, said he would ask Korth whether the ship's log could be opened to show who were guests aboard the yacht. This morning the aid brought back a flat "No."

The wood-hulled craft is Government-owned and Navy-manned, but is at the disposal of the Navy Secretary. Its teak decks and mahogany-paneled salon can handle about 30 guests for buffets and cruises on the Potomac River.

The 37-year-old pleasure craft has been at the Navy Secretary's call since 1936 for "official functions of the Secretary, Under Secretary, and Assistant Secretaries." It is "also made available for Secretaries of the Department of Defense, military departments, and officials of Cabinet rank," said a Navy spokesman.

Korth, in his letters, made this mention of the yacht:

He told Phil Regan, a singer and "human relations" man for a union, distillery, and brewer, that the bank in a deal aided by Korth would be very happy to get Regan's promised deposit—business totaling $50,000. "We were indeed fortunate that we were able to have you and Jo (Regan's wife) aboard the *Sequoia* while you were in Washington," Korth wrote Regan on January 28, 1963.

After negotiating a loan from the bank, Korth wrote George Thompson, Jr., of Continental, that "nothing would please Vera and me more than to have you and Bea drop by Washington and let us have a dinner for you aboard the *Sequoia*.

On August 13, 1962, he wrote G. E. Homstrom, vice president of Continental National, about plans for "a little party aboard the *Sequoia* primarily for my Texas friends who will be attending the bankers' convention in Atlantic City."

In all, Korth released about 200 letters to and from him, as well as bank records. The Senate Investigating Committee already had many of them. They show Korth did a considerable amount of bank business on official stationery, but Korth specifically denied it was to the detriment of his duties as Secretary.

In the Baker affair, Rules Committee Chairman Senator B. Everett Jordan, Democrat, of North Carolina, has a mandate from the Senate to study the entire field of possible Senate staff conflicts of interest.

Baker, 36, held an influential $19,612-a-year job in the Senate until he resigned October 7. He quit after initiation of a suit in Federal district court here charging he "conspired maliciously" to interfere with another vending machine company in maintaining machines in a defense contractor location. The suit said he was a stockholder in Serv-U-Corp., which reportedly does $3.5 million a year and has locations in many defense plants.

Baker, who will be asked to testify, according to Senator Jordan, has denied that he peddled his influence. A one-time Senate page, Baker was regarded as a protege of former Senate majority leader, and now Vice President, Lyndon B. Johnson.

KORTH, FACING PROBE, BARS YACHT'S LOG TO NEWSMEN

(By Leslie H. Whitten, Post-Intelligencer Washington correspondent with Hearst Headline Service)

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The wood-hulled craft is Government owned and Navy manned, but is at the disposal of the Navy Secretary. Its teak decks and mahogany-paneled salon can handle about 30 guests for buffets and cruises on the Potomac River.

Mr. WHITTEN. The next day, I called up and they had seen this story in another one of our papers, the New York Journal-American, and they said they didn't think it was all fair.

I said:

Well, it seems to me that the Navy had shut the door on the log and that is the way I stand by the story.

Commander Jenkins then said:

Why don't you call up the Department of Defense, if you don't believe that this is Department of Defense policy?

So I called up the Department of Defense and talked to a Mr. Harvey over there, who, I believe, is Mr. Robert Harvey, the Deputy Director of the Directorate for News Services.

I said:

The Department of Navy says that Defense Department policy precludes your release of this log to me and how do you feel about it?

This was on October 23. He said to me that this was indeed not Defense Department policy. He said:

The military are merely the custodians of the records. It is up to the individual concerned to make the ship's logs public. It would be up to Mr. Korth to make the ship's log public pertaining to his party or parties available.

I pressed him a little more for something a little more quotable than that and he said:

It is up to Korth.
We don't object to Mr. Korth making his guest lists available. He has all the right in the world to release it.

So, armed with that, I went back to Commander Jenkins, and I said, "The Defense Department says that you can release that log if you want to." He said, "Well, we will discuss it and decide what we are going to do."

I got hold of him later that day—excuse me, back to Mr. Harvey for a minute. He said that this log was just like an airplane which a Congressman might use for his own purposes, and that if the Congressman wanted this material released, then it would be released and if he didn't want it released, it wouldn't be released.

He said the *Sequoia* was the same way. If the Attorney General used it, or the Secretary of State used it, it would be up to them to release it. And so the next day, October 23, I reached Commander Jenkins again and he said, "Well, in view of that policy, we'll release the whole log, but we aren't going to release just our part of it."

And I said, "You are changing your mind a little bit." He said, "No, that has been our policy all along."

So I read him the quote from the Defense Department. And then he said that Secretary Korth was going to exercise his prerogative under this Defense Department policy as it had been enunciated, and was not going to let us get a look at either the log or the guest lists.

I said, "Now, I am asking you directly." I said to Commander Jenkins, "Are you going to let us see that log or those guest lists?" And he said "No."

I thought, well, that is probably the end of it, I called up Congressman Moss out in California to get his advice on how to pry this thing out, and I plan to talk to him about it some more to see if I could get hold of that log. My reason, as I say, Senator, is that there is no statutory reason in the world why that material could not be released to us, and why we wouldn't find out who his guests were aboard that yacht, that pleasure yacht, and I frankly left the whole thing feeling like Franz Kafka, rather than Mr. Forrestal, had created the Department of Defense over there.

It was a very unnerving experience. That is about the end of the story.

Senator LONG. Thank you, Mr. Whitten. Let me say that I don't know the importance of the information that is in the log, but I certainly do admire your persistence. Let me ask you—in your investigation of this log or this particular matter, do you know what has been the policy of the Secretaries in the years gone by, not only this administration, but in other administrations, in regard to it?

Mr. WHITTEN. On October 23, I was told by Commander Jenkins that hundreds of logs have been made available, but that these requests have had to be to the Department of Defense.

Senator LONG. Do you have any information that the log of the *Sequoia* has every been made available?

Mr. WHITTEN. I do not, sir, no. I think it was to Commander Jenkins that I said:

> Well, if I were writing a "patsy" piece about some destroyer of the Navy that had done a marvelous job in rescuing people, I'll bet you I wouldn't have any trouble getting that log.

I don't think that he answered that.

Senator LONG. Do you have any questions, Mr. Fensterwald?

Mr. FENSTERWALD. I have no questions, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. I have no questions.

Senator LONG. Thank you, Mr. Whitten.

Mr. WHITTEN. Thank you, Senator.

Senator LONG. Mr. Robert Benjamin. Mr. Benjamin is one of the distinguished lawyers of the Nation. We have a biographical sketch here we would like to have included in the record at this time.

(The sketch referred to follows:)

ROBERT M. BENJAMIN

Born: New York City, 1896.

Education: A.B., Harvard University, 1917; LL.B., Harvard University, 1922.

Experience: Law secretary to Mr. Justice Holmes, 1922–23; practice of law in New York City, 1923 to present; partner Parker, Duryee, Benjamin, Zunino & Malone, 1923 to present.

Chm. Regents' committee on discipline, New York education department, 1949–55; alien enemy hearing board, Southern District of New York, special alien enemy hearing board, Department of Justice, 1941–44; consultant on administrative law to Indian Law Institute, New Delhi, 1958; served as captain, U.S. Army, 1917–19.

Member: New York State Bar Association, Bar Association of City of New York, New York County Lawyers Association, Public Education Association of New York, Harvard Club of New York. Democrat.

Author: "Administrative Adjudication in the State of New York," official report to the Governor (1942). Contributor of articles to legal periodicals. Board of overseers, Harvard Law Review.

STATEMENT OF ROBERT M. BENJAMIN, CHAIRMAN, AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON CODE OF ADMINISTRATIVE PROCEDURE; ACCOMPANIED BY FRANKLIN M. SCHULTZ, AMERICAN BAR ASSOCIATION; AND JOHN W. CRAGUN, AMERICAN BAR ASSOCIATION

Mr. BENJAMIN. There are sitting here with we two of the members of the committee of which I am chairman, of the Committee of the American Bar Association on Code of Administrative Procedure, Mr. John W. Cragun and Mr. Franklin M. Schultz, both of the District of Columbia bar. They have been working on this question.

Senator LONG. Pardon me for just a moment. The Chair would like to note the presence of Senator Burdick, who is a most valued member of this committee.

Senator, I overlooked a moment ago to ask you whether you had questions of the witness.

Senator BURDICK. That is perfectly all right.

Senator LONG. Thank you, Senator. We are happy to have you with us.

Mr. Benjamin, will you proceed?

Mr. BENJAMIN. Mr. Chairman, I have a written statement which has been submitted and I think it would save time if I did not read it completely but paraphrased part of what is said and submitted it for the record, and then I would be prepared to answer any questions that the committee may have to ask.

Senator LONG. I will be glad for you to do that. Your entire statement will be submitted for the record.

(The statement referred to follows:)

STATEMENT OF ROBERT M. BENJAMIN, CHAIRMAN, AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON CODE OF ADMINISTRATIVE PROCEDURE

Mr. Chairman and members of the subcommittee, I greatly appreciate this opportunity of appearing before the subcommittee in its present hearings on S. 1666, a bill to amend section 3 of the Administrative Procedure Act of 1946, the section dealing with the vital subject of "public information."

I am particularly glad to note that S. 1666 is also one section of S. 1663, a more inclusive bill which would effect a comprehensive revision of the Administrative Procedure Act of 1946.

I appear here as chairman of the American Bar Association's Special Committee on Code of Administrative Procedure, which is one of the constituent committees of the association's special committee on legal services and procedure, of which I am also a member. My committee on the code is charged by the American Bar Association with representing before the Congress its views regarding its proposals for a general revision of the Administrative Procedure Act of 1946 and other related proposals. It is most encouraging to find the subcommittee sharing the viewpoint that general revision is desirable; and we look forward to the opportunity of testifying in the hearings which we understand the subcommittee will in due course hold on the other provisions of S. 1663.

I have taken the liberty of making available to the subcommittee and its staff reprints of an article of mine which appeared 2 years ago as part of a symposium on administrative regulation in "Law and Contemporary Problems," published by the Duke University School of Law. In that article I outlined the American Bar Association's activity in the field of administrative law over the years, and discussed in considerable detail the legislative program on which the association embarked in 1956, including its proposed code of administrative procedure (which was S. 1070 in the 86th Congress and S. 1887 in the 87th Congress). While the article is obviously too bulky for any hearing record, I hope

that I may properly suggest it as a convenient source of reference for the members of the subcommittee and its staff, especially with respect to the desirability of a general revision of the Administrative Procedure Act of 1946 and some of the details of such a revision that we would consider important.

The association is very glad also that the first of these hearings is being held on S. 1666, the bill dealing directly with the vital subject of public information. It is, I think, entirely consistent with the belief we share in the importance of general revision of the 1946 act that a separate first step should be taken on this subject, which so urgently needs corrective attention.

Section 3 of the 1946 act, which S. 1666 would amend, was intended to provide adequate public information; but in operation, as the subcommittee is well aware, agencies have on occasion justified restrictive information practices by reference to this very section and to 5 U.S.C. 22. The latter statute, the "housekeeping statute," was amended in 1958 to add: "This section does not authorize withholding information from the public or limiting the availability of records to the public." But the language of section 3 of the 1946 act remains unchanged, and the basic purpose of S. 1666 is to change it so as to make impossible the kind of misapprehension of congressional intention that has existed too long.

The proposals initially made by the American Bar Association with respect to the subject of "public information" were contained in section 1002 of our proposed code. In 1957 and again in 1959 Senator Hennings introduced a bill to amend section 3 of the 1946 act (S. 2148, 85th Cong., 1st sess.; S. 186, 86th Cong., 1st sess.), his bill resembling generally section 1002 of the ABA proposed code, but with changes. The ABA Committee on the Code, of which I was then and still am chairman, considered carefully the differences between the Hennings bill and ours, and determined that we should welcome some of the changes. A memorandum of our conclusions in this regard was furnished in May 1959 to this subcommittee.

On April 12, 1961, Senator Carroll, then chairman of this subcommittee, introduced for himself and others, namely, you, Mr. Chairman, Senator Hart and Senator Proxmire, a bill on the same subject, S. 1567, 87th Congress, 1st sesssion. S. 1567 resembled in many respects (though in a few respects it differed from) the provisions of the American Bar Association's proposed section 1002, as modified to conform to various provisions of the Hennings bill.

Gratified as we are by the introduction at this session of S. 1666, we have some difficulty with various of its specific provisions, and we believe that the objectives which all of us seek would be achieved better by substituting a bill substantially in the form of S. 1567, 87th Congress, 1st session.

I shall, if I may, comment briefly on some aspects of S. 1666 which concern us.

We are concerned, generally, with the fact that each of the major subsections into which section 3 (S. 1666) is divided contains its own set of exceptions, which differ from those applicable to other subsections. Thus subsection (a), which deals with publication in the Federal Register of descriptions of agency organization, procedure, rules, etc., begins with the excepting language of the 1946 act, applicable there to all of section 3; "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency"; subsection (b), which deals with public availability of opinions, orders and rules (by making them available for public inspection and copying or the offering of copies for sale) and requires the maintenance of a current index thereof, excepts matter that "(1) is specifically exempted from disclosure by statute, or (2) involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order or (3) relates solely to the internal employment rules and practices of any agency"; subsection (c), which deals with the availability of "agency records," excepts "those particular records or parts thereof which are (1) specifically exempt from disclosure by statute; (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters"; and subsection (d), which requires the recording of the individual votes of each member in every agency proceeding, contains an exception only "to the extent required to protect the national defense" from the requirement that the voting record shall be available for public inspection. Apart from the difficulty in practice of having to refer in different contexts to differing sets of exceptions, we see no justification for the differences, and we respectfully sug-

gest that the form of S. 1567, 87th Congress, which contains a separate subsection setting forth exceptions applicable to all the others, is preferable. We suggest also the desirability of provisions like those in S. 1567 protecting matters submitted in confidence and matters the disclosure of which would be a clearly unwarranted invasion of privacy.

I mention a few other provisions of S. 1666. Subsection (a), dealing as I have said with publication in the Federal Register, requires such publication of "statements of general policy or interpretations" only when "formulated and adopted by the agency for the guidance of the public." This last clause is language of the 1946 act, and is one of the bits of language that it seems to us most important to get away from. The quoted language adds statutory blessing to a practice of keeping secret from those affected agency manuals which have, in effect, predetermined agency adjudication by detailed instructions to subordinate personnel how to deal with matters subject to adjudication.

We have, further, difficulty in reconciling the language of subsection (a) just discussed with the language of subsection (b) requiring every agency to make available for public inspection and copying (or to publish and offer for sale copies of), among other things, "statements of policy, and interpretations adopted by the agency and affecting the public * * *." On its face, the phrase "affecting the public" is obviously much broader than "formulated and adopted * * * for the guidance of the public." Just how broad "affecting the public" is intended to be we are not informed; it appears to be an entirely new concept in administrative procedural legislation, and we know of no legislative history tending to define it. In any case the intention should be made clear.

Subsection (b) contains also a provision requiring the agency to maintain and make publicly available "a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation." The purpose of the provision is obviously commendable, but we are concerned lest it impose on agencies an impossible burden of determining what is "adequate information for the public" as to each of the categories covered; for example, how far the agency must go in explaining the context, subject matter, and effect of every final order in litigated matters, or the substance of the various branches of a long opinion in a complicated case, or the elements involved in a complex "statement of policy." It is doubtful, moreover, how soon after the event the index must be made public in order to meet the statutory requirement that it be "current."

Subsection (c), dealing with "agency records," gives no indication of what is included. We have doubt also as to the provision for a new form of proceeding in the U.S. district court to require upon complaint the production of any "agency records or information improperly withheld from the complainant by the agency." While the provision would put the burden on the agency "to sustain its action by a preponderance of the evidence," it is not clear to us that the section as a whole defines the agency's duty in this regard clearly enough to enable the court to decide such a proceeding.

I have one final comment which is applicable both to S. 1666 and to S. 1567, 87th Congress. Both bills would amend section 3 of the 1946 act without amending the definitions section—section 2. Thus both, in requiring the publication of "rules," would include in that term, under section 2(c) of the 1946 act, among other things rate orders of particular applicability. If a bill in either form is presently adopted, therefore, it would be desirable at the same time to amend section 2 of the 1946 act as S. 1663 now proposes.

In conclusion, may I repeat that the American Bar Association supports with enthusiasm the purpose of S. 1666, and that our suggestions and comments are made in the hope of accomplishing this purpose most effectively.

Mr. BENJAMIN. I would like to say, as the statement says, that we are particularly glad of two things. First, that S. 1666 is part of a larger bill, S. 1663, which contemplates a comprehensive revision of the Administrative Procedure Act of 1946.

While the American Bar Association had a great deal to do with the drafting and enactment of that 1946 act, it has never been our position that it was the final answer to the problems that it dealt with, and we have always felt that it should be reconsidered as time goes on in the light of experience.

Since 1956, we have been actively engaged in that ourselves, and with this subcommittee for the last few years. There have been, at times, indications that the Congress was not sure that there should be a general revision. There was one report of this subcommittee several years ago that expressed doubt as to revision, and we are delighted to find that, presently, the subcommittee is of the opinion that a general revision is called for.

We are also very glad that you have picked as an initial step in this regard, section 3 of the Administrative Procedure Act, which deals with the vital question of public information and we find no inconsistency between putting this bill forward as a first step and the program of general revision of the act.

My statement gives a little of the history of the American bar's activity in this and the draft of a code that we, ourselves, have prepared which include in section 1002 a revision of section 3 of the Administrative Procedure Act.

Then, as a matter of history, Senator Hennings made a study of that subject and introduced bills in successive sessions which started in a way with our section 1002 and made a number of changes in our 1002. The Hennings bills, as I mentioned in my statement, were S. 2148 of the 85th Congress and S. 186 of the 86th Congress.

My committee of the American Bar Association studied those bills carefully and were persuaded by a lot of the changes that Senator Hennings had made in our draft, and we got up a memorandum, copies of which were submitted to this subcommittee and are in the possession of the staff. I left a few more with Mr. Kennedy this morning before the rest of you arrived, in case anybody wants to see them.

The next step, and one that I consider particularly relevant, was the introduction 2 years ago of a bill in the 87th Congress, April 12, 1961, introduced by Senator Carroll, who was then chairman of the subcommittee, and you, Mr. Chairman, Senator Hart, and Senator Proxmire. That was S. 1567 of the 87th Congress.

Senator LONG. Mr. Benjamin, pardon me a moment. I have a copy of S. 1567 here, which was introduced by Senator Carroll and of which I was one of the cosponsors. Without objection, that will be placed in the record at this time.

(The S. 1567 referred to follows:)

[S. 1567, 87th Cong., 1st sess.]

A BILL To amend section 3 of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

"SEC. 3. In order to provide adequate and effective information for the public—

"(a) ORGANIZATION, RULES AND FORMS.—Every agency shall separately state and promptly file for publication in the Federal Register and for codification in the Code of Federal Regulations: (1) Descriptions of its central and field organization, including statements of the general course and method by which its functions are channeled and determined, delegations by the agency of final authority, and the established places at which, and the methods whereby, the public may obtain information or make submittals or requests; (2) all procedural rules; (3) all other rules; (4) descriptions of all forms available for public use and instructions relating

thereto, including a statement of where and how such forms and instructions may be obtained; and (5) every amendment, revision, and revocation of the foregoing.

"(b) ALTERNATIVE METHODS.—An agency may, pursuant to a published rule, use an alternative method of publishing the information specified in subsection (a) or of communicating it to all interested persons (which shall include any person inquiring with respect thereto), when to do so will achieve economy and expedite dissemination of information to the public. No information published by such alternative method shall be relied upon or cited against any person who has not received prior, reasonable, and actual notice thereof.

"(c) ORDERS AND OPINIONS.—Every agency shall promptly publish its orders and opinions (which need not include determinations on agency personnel matters) or make them available to the public in accordance with published rule stating where and how they may be obtained, examined or copied.

"(d) PUBLIC RECORDS.—Every agency shall promptly make available to the public, in accordance with a published rule stating where and how they may be obtained, examined, or copied, all records, files, papers and documents submitted to and received by the agency, including but not limited to applications, petitions, pleadings, requests, claims, communications, reports or other papers, and all recorded actions by the agency thereon, except as the agency by published rule finds that withholding is permitted by subsection (f) hereof. Every individual vote and official act of an agency shall be entered of record and made available to the public.

"(e) EFFECT OF FAILURE TO PUBLISH.—No rule, order, opinion or public record, shall be relied upon or cited by any agency against any person unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be bound by or required to resort to any organization or procedure not so published.

"(f) EXCEPTIONS.—The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national defense, (3) submitted in confidence pursuant to statute or published rule, (4) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy, or (5) submitted by another agency in whose hands the subject matter fell within one of the foregoing exceptions and where nondisclosure was specifically requested by such other agency; however, nothing in this section authorizes withholding of information or limiting availability of records to the public except as specifically stated in this subsection, nor shall this subsection be authority to withhold information formally requested by any committee of the Congress."

Mr. BENJAMIN. That bill is directed to the same purposes as S. 1666, and it is not a matter of pride of partial authorship or anything of the sort that leads my committee to suggest, after consideration, that it probably offers a better framework for revision of section 3 than does the current bill.

My statement gives some reasons for thinking that. As I say, it started with a combination of Senator Hennings' bill and the ABA section 1002 of our general proposed code, and it went through the sort of correlation of that that my committee had worked out in 1959, and when it was drafted in 1961 and introduced by Senator Carroll and the present chairman, and others, it struck us as a good solution, and it still does.

Now, one of the features of that bill which my committee finds is preferable to the present bill is that 1567 combines in one subsection (f), all the exceptions to the various provisions of the bill, whereas 1666, the present bill, has separate exceptions dealing with each of the major subdivisions of the bill. Those separate exceptions seem to us confusing as a matter of dealing with the bill, interpretation of the bill, and seem to us unnecessary.

I had the advantage of talking briefly with Mr. Kennedy this morning before the session started, and he suggested that one of the reasons that subdivision 3(a) of the present bill incorporates the introductory language of the 1946 act, so far as subdivision (a) is concerned, which deals with the Federal Register, is that it is intended to avoid opposition to any changes dealing with that publication. It does not seem to me that there could be any legitimate objection to redefinition of what the agencies are required to submit to the Federal Register for publication.

It has nothing to do with what the Federal Register does with them after they are submitted, but a definition of what is required to be submitted can't arouse any legitimate opposition.

Now, what concerns us about 3(a), in 1666, is that it continues some of the language of the Administrative Procedure Act of 1946 that has caused the troubles that other witnesses have recounted to the subcommittee during these hearings. The fact is, as has been illustrated over and over by witnesses whose testimony I have been able to read, that section 3 of the Administrative Procedure Act, far from operating as an injunction to the agencies to make information available, has been relied on by many agencies as an excuse for not making information available. One of the phrases in that regard is the phrase that appears now at page 2, of 1666, lines 14 to 16:

* * * statements of general policy or interpretations formulated and adopted by the agency *for the guidance of the public* * * *.

Those are the words I emphasize. What we are very anxious to do is to get into the requirements of the act, as to disclosure of information, matters that are not adopted simply for the guidance of the public but matters that the public has reason to know and a right to know.

Similarly, the very introductory clause "requiring secrecy in the public interest" is so broad that it has been relied on to cover a great many things that I am sure the Congress never intended to cover. The exceptions that 1567 incorporates are much more precise and narrow. The provision as to the requirement of secrecy is "in the protection of the national defense."

It could conceivably be broader than that, "national security," but a phrase like "the protection of the national defense" or "national security" is obviously more precise and more limited than the broad kind of phrase "in the public interest," which an agency can always find application for.

I suppose even Secretary Korth, in this last account we have had, would find a way of formulating all this as being in the protection of the public interest.

Mr. FENSTERWALD. Mr. Benjamin, might I interrupt at that point to say that primarily, it applies to subsection (a).

Mr. BENJAMIN. I know it.

Mr. FENSTERWALD. In other words, it applies to publication in the Federal Register, as I have explained on previous days. The only objections we have had as to what goes in the Federal Register have been on the side of inclusion of too much, not too little. We have done little to try to change section (a), so this is a conscious thing on our part and not——

Mr. BENJAMIN. I know it applies only to publication in the Federal Register, but as a practicing lawyer and also as somebody speaking

in behalf of the public whom practicing lawyers represent, this idea of a distinction between what is in the Federal Register and available by reference in the Federal Register, and what is available otherwise, is a distinction that is very difficult to accept in practice.

For example, I understand that the problem of agency manuals that are intended to foreclose the result of adjudication, although the people subject to adjudication are not told about them, are supposed to be covered by subdivision (b), but if the only way you can get the agency manual is by coming to Washington or even to a regional office of an agency to look at them, that is not a very practical solution for the person far away from Washington.

While in a sense, I suppose the American Bar Association represents the bar, practicing among other things in the field of administrative law and in Washington, we don't think it is a good idea to have things set up so that you have to have an elaborate investigation to find what is available that is not in the Federal Register.

The whole purpose of the Federal Register is to allow you to know what things exist that affect your rights. If you have to go beyond this, have one standard for what goes in the Federal Register and an entirely different one for what is to be made available otherwise, it is going to be a matter of inconvenience and of confusion and of loss of contact, I am sure.

There are also differences in the exceptions for the other sections, that is (b), which deals with——

Senator LONG. Mr. Kennedy has a question.

Mr. KENNEDY. Mr. Benjamin, while you are on the point, before you move on, do I understand correctly, then, that you suggest that the same rules apply to the Federal Register that apply generally and that therefore, opinions and orders should also be published in the Federal Register?

Mr. BENJAMIN. No.

Mr. KENNEDY. At what point do you draw the line between the type of material which should go into the Federal Register and the type of material which should be available for public inspection or otherwise published than in the Federal Register?

Mr. BENJAMIN. I draw the line between matters generally in the nature of rules, if they are not precisely rules, the generally applicable standards and interpretation. What bothers me is particularly interpretation, interpretative rules, procedural rules and substantive rules of general application.

It seems to me that one ought to be able to find all of those in the Federal Register, and if there is a problem of the volume of some of these agencies manuals, I think they can be cut down for that purpose. They may be very bulky, but it is only a limited part of them that are in effect interpretations binding on an adjudication.

Mr. KENNEDY. To take the two exceptions in second 3(a)—section 3 of the present act, and it has been incorporated in section 3(a) "matters relating solely to internal management of an agency," would you suggest that all of that matter be published in the Federal Register?

Mr. BENJAMIN. No.

Mr. KENNEDY. So that, as I understand it, it is not your position that matters relating solely to internal management should be published in the Federal Register and you would favor that exception?

Mr. BENJAMIN. I would think that matters relating solely to internal management properly defined should be exempted all the way through.

Mr. KENNEDY. Narrowing the question to the Federal Register, you feel that should not be published. The other present exception is "functions of the United States requiring secrecy in the public interest." Do you think that that exception should be removed? And what should be substituted in its place?

Mr. BENJAMIN. Well, some general criterion, something like what appears in (f) of 1567; namely, "matters required to be kept secret in the protection of the national defense" or "of the national security," plus the other items in (f) of 1567, which I think also should be applicable to the Federal Register as well as elsewhere. I mention this in my statement. I don't want to get ahead of where we are, unless you want to. But among other things that I think should be excepted from publication in the Federal Register and elsewhere is matters submitted in confidence pursuant to statute or published rule, and matters, the disclosure of which would be a clearly unwarranted invasion of personal privacy.

It may very well be that those exceptions would almost never apply to matters that would be required to be published in the Federal Register, but they might, in some instances, apply.

Mr. KENNEDY. I don't have a copy of 1567 before me. Would the exceptions in clause (f) of that bill include opinions in particular cases?

Mr. BENJAMIN. Yes.

Mr. KENNEDY. Would you read what those exceptions are? It would be helpful to have that.

Mr. BENJAMIN. It reads:

> The provisions of this section shall not require disclosure of subject matter which is (1) specifically exempt from disclosure by statute, (2) required to be kept secret in the protection of the national defense, (3) submitted in confidence pursuant to statute or published rule, (4) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy, or (5) submitted by another agency in whose hands the subject matter fell within one of the foregoing exceptions and where nondisclosure was specifically requested by such other agency.

Mr. KENNEDY. Then, Mr. Benjamin, as I understand it, none of those exceptions include opinions and orders in particular cases, so it is your position that all opinions and orders should be published in the Federal Register?

Mr. BENJAMIN. No; this applies to the whole statute which includes the Federal Register, opinions and orders, and public records.

Mr. KENNEDY. The point I want to get clear is whether you suggest that those should be the appropriate exceptions.

Mr. BENJAMIN. That is right.

Mr. KENNEDY. For publication in the Federal Register.

Now, if I understand your position correctly, then, everything which is not excepted by clause (f) in that bill would then be required to be published in the Federal Register, and I was mentioning merely one of a number of categories.

Mr. BENJAMIN. Oh, no. There is a section of the bill that says what should be published in the Federal Register.

Mr. KENNEDY. In other words, you do not want us to take your statement, then, that clause (f) should be the only set of exceptions from publication in the Federal Register?

Mr. BENJAMIN. It is the set of exceptions—I mean, I don't consider if you say that there shall be published in the Federal Register a, b and c, that everything that isn't "a," "b," and "c" is an exception. It is just not within the requirements of publication in the Federal Register. The exceptions are that "a," "b," and "c" shan't be published if they violate the exceptions.

Now, to be complete, I would like to add one thing on 1567. In our own draft of the Administrative Procedure Act bill, we decided to put in (f) whatever exception there is for matters of internal management, and I think that ought to be in this (f) of 1567 also.

Mr. KENNEDY. Then, am I correct that you think matters stated in (f) should be exempt from publication in the Federal Register and, in addition, the only things which should be published in the Federal Register are those which are affirmatively stated elsewhere?

Mr. BENJAMIN. That is right. There is a section which says what shall be published in the Register, what shall be done with orders and opinions, and when they may be relied on against others and when they may not be, and another which says what shall be done with records, and so on.

But the exceptions are applicable across the board to whatever is otherwise required to be made available. I would like to point out in 1666, for example, that when you get to agency records, the only exceptions are—

> specifically exempt from disclosure by statute; specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters.

Now, I don't see the justification for the differences between that and the exceptions in (b) at all. I just don't understand why there should be a difference between them.

Mr. KENNEDY. Between (a) and (b)?

Mr. BENJAMIN. Between (b) and (c).

Mr. KENNEDY. I was directing my inquiry only as to whether there should be a difference between (a) and the others.

Mr. BENJAMIN. No; I was going on to the general subject of exceptions. If I may complete that, (d) of 1666 requires the recording of every vote of each member in every agency proceeding, which I agree with, as a matter of substance. But the only exception there is—

> except to the extent required to protect the national defense—

So that whether the vote is on a matter that is even specifically exempt from disclosure by Executive order or by statute, (d) reads as if the vote had to be made public, and I think that is the difficulty you get into inevitably if you try to repeat exceptions in each of these sections.

I mentioned, also, in my statement, and contrast the language in (b) of 1666, "all rules, statements of policy, and interpretations adopted by the agency and affecting the public," and the language in (a) about "for the guidance of the public."

Now, I understand that something drastically more is meant to be required by "affecting the public" than by "for the guidance of the public," but I think it is essential to be precise about what more is required. I gather, also, after conversations, since my statement was written, that it is this provision that is supposed to make these manuals, which conclude agency adjudication "made available to the public," because they affect the public. But I think that if that is intended, the statute has to be more precise, or there ought to be a very precise legislative history about it.

I will not add to what I said in the written statement about the provision for an index which I think is an affirmatively important one, and obviously commendable in purpose, but it creates, it seems to me, very great difficulty for the agency in knowing how to conform to it, since the requirement is—

> a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation.

Now, it is very hard to know, for an agency to know, what will be considered "adequate information," and also what will be considered "current" publication. I will refer to my statement for more detail on that.

I have made some comment in the statement on the provisions of subdivision (c) for a district court proceeding, in which a complainant can go into court and require the production of any agency records or information improperly withheld, with a provision that the agency may be assessed the cost and reasonable attorney's fees of the complainant, and that the burden of proof shall be upon the agency to sustain its actions by a preponderance of the evidence.

I did not mean—I have discussed this, also, since my statement was written—I did not mean to express a view of the American Bar Association against such a court proceeding. I did mean to say, and I think that is what I said, that I thought that if there is to be such a proceeding, it would have to be much more carefully spelled out than is done in this draft, because I don't think the obligations of the agencies are clearly enough defined to make it possible for a district court to determine whether the complainant has prevailed on the proof.

I also think that there should be serious consideration, since this is part of an entire revision of the act, whether or not, if there is such a proceeding in the nature of mandamus, there should not be a unified proceeding in which various preliminary things may be taken up, such as the right to counsel and other rights that other parts of the statute will afford.

I recognize that this, more likely than the others, would be availed of by, say, the press or others who are not concerned with quasi-judicial proceedings otherwise, but it still seems to me that if you are imposing on the courts an elaborate new jurisdiction of this kind—though it is an extension of what was recently adopted regarding proceedings in the nature of mandamus—that the whole procedure has to be more carefully spelled out than is done here.

Finally, I have noted in my statement, and I think Senator Long mentioned it in his introductory statement, that the scope of this bill, like 1567, would depend on the definition of "rule" in the definitions section of the act, and as the Administrative Procedure Act now stands, the requirement for publication of all rules would require the

publication of all rate orders of particular application, so that if this bill were to be adopted or any other on this subject were to be adopted before a general revision of the Administrative Procedure Act, at least it ought to be accompanied by amendment of the definitions section, so far as it defines rules, generally as S. 1666 proposes.

I think that is all for my statement, Mr. Chairman. If anybody has any questions, my colleagues and I will be available.

Senator LONG. Thank you, Mr. Benjamin.

Senator Burdick?

Senator BURDICK. No questions.

Senator LONG. Mr. Fensterwald?

Mr. FENSTERWALD. No questions.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, Mr. Benjamin was very active in the administrative conference last year. There was a proposal by the committee on information and education that it would be most desirable for the public if the various agency rules on availability of information on agency records were gathered together and published periodically in an official digest.

Would that be helpful for the public, Mr. Benjamin?

Mr. BENJAMIN. I think that would be very helpful, and I think if any such publication is made, it should include, as any such publication should, the statutory source of authority, because it might be that some agencies would adopt restrictive availability rules, and one ought to be able to judge right away whether the restrictions are within the statutory authority of the agency. Then one might want to consider modifying the authority, if they are.

Mr. KENNEDY. Thank you, Mr. Benjamin.

Senator LONG. Thank you, Mr. Benjamin.

Do either of the gentlemen with you have any comment?

Mr. CRAGUN. Nothing to add, sir. Thank you.

Mr. SCHULTZ. No, thank you.

Senator LONG. We appreciate all three of you gentlemen being here, and we are particularly grateful to you, Mr. Benjamin for presenting this statement.

Our next witness is Paul Rand Dixon, Chairman of the Federal Trade Commission.

Chairman Dixon, will you come around? We will be happy for you to introduce your assistants whom you have with you.

Mr. DIXON. I have with me to my right, my assistant, Mr. J. V. Buffington; to my left, Mr. Fletcher Cohn, who is the Assistant General Counsel of the Commission in charge of legislation, and to his left, Mr. Frank C. Hale, our planning officer, who is presently Acting Executive Director of the Commission.

Senator LONG. Mr. Dixon, we have a biographical statement of you here. I see you are from the great State of Tennessee.

Mr. DIXON. Yes, sir.

Senator LONG. That will be included in the record at this time, your entire biographical statement.

(The document referred to follows:)

PAUL RANDALL DIXON

Age: 47. Born: September 29, 1913, at Nashville, Tenn.

Family and background: Father, James David Dixon (deceased); mother, Sarah Munn Dixon—both native-born Tennesseans. Three brothers and one

sister. Married Doris Busby, a college classmate, 1939. Two sons, David Leslie, 13, and Paul Randall, Jr., 10.

Education: Public schools, Davidson County, Tenn. A.B., Vanderbilt University, 1936. LL. B., University of Florida, 1938.

Early career: Assistant football coach, University of Florida, 1936–38. Member of bar of States of Tennessee and Florida. In July 1938 accepted appointment as trial attorney on staff of Federal Trade Commission. With exception of war years, continued on staff of Federal Trade Commission until accepting appointment in February 1957 from Senator Estes Kefauver, chairman of the Senate Antitrust and Monopoly Subcommittee, to serve as counsel and staff director of that subcommittee.

Military service: Active duty with Navy, 1942–45. Entered Navy as lieutenant (j.g.) on staff of Chief of Naval Operations. Served overseas as assistant to commanding officer, Naval Operating Base, Palermo, Sicily. Twenty-three months' duty outside limits of continental United States. Participated in occupation of Africa and in invasion and occupation of Sicily. Entitled to wear three battle stars. Presently lieutenant commander, U.S. Navy Reserves (retired).

Recent career: As counsel and staff director of the Senate Antitrust and Monopoly Subcommittee assisted the subcommittee in developing, and focusing the attention of Congress and the public on, a large number of important and difficult problems in the field of restraints of trade, such as the problem of administered prices in many major industries including steel, automobile, oil, bread, and drugs. Sworn in as Chairman, Federal Trade Commission, March 21, 1961.

Other activities: Methodist, Mason, member of ATO college social fraternity, and member of alumni board of directors of Vanderbilt University.

STATEMENT OF PAUL RAND DIXON, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY JOHN VICTOR BUFFINGTON, ADMINISTRATIVE ASSISTANT TO THE CHAIRMAN; FRANK C. HALE, ACTING EXECUTIVE DIRECTOR; AND FLETCHER G. COHN, ASSISTANT GENERAL COUNSEL FOR LEGISLATION

Mr. DIXON. I am happy to be here, Mr. Chairman.

I am appearing today because I requested your chairman that, in the event hearings are held by the committee on S. 1666, 88th Congress, 1st session, I be given an opportunity to be heard.

You have been considerate and have invited me, and on behalf of my fellow Commissioners and myself I wish to express our appreciation.

The reason for asking to be heard is that I consider this proposed legislation, which seeks to amend section 3 of the Administrative Procedure Act, most important. As I interpret the purpose of S. 1666, it is to serve the very commendable objective of removing, as far as practicable, any secrecy concerning actions taken by the governmental agencies which are subject to the provisions of the Administrative Procedure Act.

The Federal Trade Commission is primarily an enforcement agency, to which Congress has given the broad statutory duty of preventing unfair methods of competition and unfair or deceptive acts and practices in commerce. Certain of the statutes it administers require the Commission to issue rules and regulations and to obtain and maintain compliance with them. To a limited degree, therefore, the Commission also has specific statutory authority to gather and compile information concerning, and to investigate the organization, business, conduct, practices, and management of corporations, individuals, associations, and partnerships, and from time to time to make public such

portions of the information so obtained, except trade secrets and names of customers (disclosure of which is prohibited by statute), as it deems expedient in the public interest. The Commission is further empowered by statute to require corporations, partnerships, and individuals, whether or not they are under investigation by the Commission, to furnish information and documents concerning their business and operations.

The Commission each year receives thousands of complaints from individuals, business firms, Members of Congress, and others concerning alleged unfair business practices. Most of the Commission's investigations are initiated as a result of complaints of this nature.

In these investigations, most of which do not result in formal adjudicatory proceedings, the Commission obtains information from many sources, much of which relates to the intimate operation of business firms.

Thus, in the performance of its statutory duties and in its efforts to gain the expertise it is expected to have, the Commission obtains much information, the disclosure of which could do serious harm to those who furnish the information. The Congress itself, when it created the Commission in 1914, recognized the potential danger of undue disclosure of information coming into the Commission's possession. Under section 10 of the organic act, it is a misdemeanor subject to fine and imprisonment for any officer or employee of the Commission to make public any information obtained by the Commission without its authority. The Commission's existing policy with respect to the disclosure of information concerning its actions is described in detail in its published procedures. The Commission, I think it may be stated, makes public all of its actions and records except those containing information and material furnished the Commission by complainants or obtained by the Commission in investigations and internal memorandums relating thereto and records pertaining to its internal operations and management.

Thus, the Commission, as provided in its rules of practice, procedures, and organization, makes public, among other things, the pleadings, transcript of testimony, exhibits, and all documents received in evidence or made a part of the record in adjudicative proceedings (except evidence received in camera); decisions of the Commission in adjudicative proceedings and in proceedings disposed of by the entry of consent orders to cease and desist; rules issued under the various labeling acts which the Commission administers; quantity limit rules issued under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act; trade practice conference rules, trade regulation rules, industry guides, texts or digests of selected advisory opinions and other administrative interpretations; petitions for the issuance, amendment, or repeal of rules and regulations issued pursuant to specific statutory authority, including petitions for exemptions; records of hearings in all rulemaking proceedings; agreements containing orders to cease and desist after acceptance by the Commission; and reports of compliance. The Commission just recently announced that it will publish texts or digests of advisory opinions which have general interest, subject to statutory restrictions against disclosure of trade secrets or names of customers and to considerations

of the confidentiality of facts involved and meritorious objections made by the requesting party to such publication.

We would point out further that under the Commission's rules there is set forth a procedure whereby upon application of a member of the public "upon good cause shown," records, files, papers, or information which, under the Commission's rules, are classified as confidential information, will be made public or disclosed to the particular applicant where the Commission is of the opinion that this should be done, with the Commission having due regard to statutory restrictions, its rules, and the public interest.

Furthermore, the Commission's rules provide that in the event confidential material is desired for inspection, copying or use by an agency of the Federal or a State Government, a request therefor may be made by the administrative head of the agency in accordance with the procedure set forth in the Commission's rules of practice.

While I do not think it is the intent or desire of the sponsors of S. 1666 to require that information furnished the Commission by applicants or complaining parties and information obtained by it in investigations, or information relating solely to internal operations and management, be made public, the bill as now drafted might be subject to such interpretation.

The committee undoubtedly will appreciate that the disclosure of information of this kind could result in substantial harm to those upon whom the Commission must depend to furnish the information needed to perform its statutory functions.

Individuals and firms, especially small business concerns, cooperating with the Commission could be subject to reprisals by their more powerful competitors and the public would be harmed by the resulting reduced effectiveness of the Commission in enforcing laws.

Section 3(a) of the Administrative Procedure Act requires each agency to state and currently publish in the Federal Register delegations of final authority. The proposed amendment eliminates the word "final" and would require the publication of all delegations of authority. This could create practical difficulties for the Commission in that almost every employee who deals with the public, including hundreds of attorneys, has authority to take certain limited actions. I question whether the publication of minor delegations would serve any useful purpose.

Section 3(d) of the proposed amendment would require the Commission to keep a record of the vote of each of its members in every agency proceeding and to make such record available for public inspection.

The Commission presently keeps a record of the vote of each of its members on all matters coming before the Commisison. Each Commissioner has the right to make public his vote with respect to any action by the Commisison. Because of the potential harm to the public interest from a requirement that each Commissioner's vote in every agency proceeding be made public, I believe it preferable to leave the question of whether or not to make public a particular vote up to the responsible discretion of each agency member.

May I reiterate that the Commission heartily supports the purpose and objective of the proposed legislation. I trust that the comments

which I have made will be of assistance to the committee in arriving at its conclusion concerning S. 1666.

Mr. Chairman, that completes my formal statement but I would like, I think, for the help of this committee itself in considering this problem to consider how the Federal Trade Commission from day to day operates.

Over the course of a year we will receive somewhere between five and seven thousand complaints. They will come from the business communities largely.

They will come by the route of the Congressmens' or Senators' offices, or from a relevant committee interested in the work of the Federal Trade Commission specifically. When this comes to the Commission, they are ferreted out from the standpoint as to whether or not basically we have any jurisdictional basis to proceed. We will then try to proceed within the limits of our personnel. We are presently today trying to use administrative approaches to try to straighten up a problem without the formal long, litigated formal case. Many of these are disposed of in that way. But it is the usual when we get a complaint, it is inquired into. Congress vested us with the power that the Congress has itself to inquire.

We have the right by personal request by oral interviews through one of our delegated attorneys to call upon parties, to ferret out and see if there is any substance to this complaint we have received.

We have also the power to resort to formal investigative hearings. Here we have the power of subpena. True, since Congress gave us this power of demand, we will immunize parties appearing at such hearings from criminal prosecution when we go into a matter at this depth. We have found it necessary to use all of these tools. Now this is done under a practical delegation down to the principal bureau heads, the enforcement bureau heads, at the beginning. A log is given every month to each one of the five Commissioners. This is for the practical purpose of trying to contain this monster within the limits of our personnel. So we even at that stage, we at the Commission have our own hand on it and are responsible for it.

Then this matter is finally investigated. Formal interview reports are obtained. Formal hearings, records of transcripts of hearings, together with a summarization comes to the table of the Federal Trade Commission. Very often on complex matters we call pertinent members of the staff to that table. We go into this thoroughly, and then we, that is, only the five members of this Commission can decide what we do next. If we have evidence of an indication of law violation, we usually issue a complaint. If we decide to issue a complaint, under our present rules we serve a copy of the proposed complaint upon the involved party with a notice, and say to him, "If you, within 10 days, will indicate to us that you would like to negotiate and sit down and see if this can be settled by the entry of a formal cease-and-desist order without the necessity for formal hearings, you can avail yourself of this privilege."

As a usual rule this is done, sir. In order to free ourselves and stay within the framework of this responsibility after the Administrative Procedure Act of 1946, we have transferred this into the General Counsel's Office where we, the Commission, can move in and out of there, and we make the final decision as to the settlement offered.

Now, if that settlement comes about, sir, only one issuance of a public statement is made, which includes both the complaint and the order. The order having been issued, we then have thereafter the responsibility to see that it is complied with. But if no settlement can be worked out, a formal complaint is then served, and when it is served, the Administrative Procedure Act of 1946 fully comes into play. Everything thereafter that takes place is on a formal record.

Now, in order to protect and do something about what the President described as the regulatory lag, and the Congress had their finger on it, too, we decided that we should be ready if we came to the point of issuing a formal complaint. We are doing pretrial now. Before trial takes place there is an exchange of information. That information the Commission counsel plan to rely upon in the trial is given to respondent's counsel. Nothing is withheld, sir. None of the internal memoranda nor anything resulting from a general search of what we found here, there, and the other place, is made available. We make available the evidence upon which we are going to rely together with the names of the witnesses, and then we go to trial for a continuous trial and thereafter an initial decision is rendered, and ultimately that comes to the Commission again for final decision upon appeal, is the usual course, and finally at that stage the final findings, orders, and usually an opinion of the Commission is rendered. I have given you this tedious background for the purpose of showing you mechanically how an agency such as the Federal Trade Commission operates from day to day.

Unless some safeguard is written into this proposed bill, I am afraid that the responsibility of law enforcement will come to a grinding halt.

I know of no reason why if I were a small businessman I would turn to my Government and I would say to him, the representative of the Government, "I am being driven out of business. I have every reason to believe a giant competitor of mine is taking advantage of me."

For instance, the complaint may be in the nature that "This man has come into my area, into my State, into the small place I live, and he is selling here the product which I sell, at considerably beneath my costs, and I believe beneath his."

Now under this bill, unless you put a proviso in here, from that very day that party who has been complained of will be aware of it, and every person we go to and every statement we get he will be entitled to see, and he can follow that from day to day even up to the point when we consider the total investigation, and we may as well hold the meeting on Pennsylvania Avenue under this bill, because he could be sitting at the table if it is public and listen to our discussion, because it says, "Make a log of it, record yourself, state your reason why." Now, if he has all of those advantages, I will say to you that a man would be rather foolish to come to his government and make a complaint, because his shirttail will be out in the wind, sir. He won't be there when we get through. He will be gone before we get through. Now, I am not going to take it upon myself to project myself into the other problems of other agencies, but I say to you that Congress saw fit to say, "We are going to put five Commissioners down there."

The President could appoint us with your approval. If you have faith in us, we are going to do the best we can. If we don't do good we don't stay long, sir, we don't stay long. If we do good I hope we will be allowed to stay long. But our sole purpose is not to withhold information, not to say to anybody, "We have got secrets." Or "We are ashamed of our inefficiencies."

But what we are withholding in my opinion presently at the Federal Trade Commission is that and only that that is absolutely necessary for us to do a competent job, because once we pass that point of formal adjudication, Congress has already taken care of those secrets, because they have said, "Everything shall be upon the record."

If you get an ex parte communication, if you get a letter, it must be made a part of the record served upon both sides. So we have no secrets after we pass that point. Now the broad other functions we have, obviously we have rulemaking functions and we try to issue many rules today. All of these matters are public anyway. It is the background paper, perhaps, that someone doesn't have access to or a staff evaluation; but today if I, as one of the Commissioners, should take it upon myself and call up anyone or talk to a member of the press or anyone and tell what was in one of the files of the Commission, I would violate the law as the Congress passed the law. I would violate the law. The Congress, when they created this agency, definitely made it the arm of the Congress to regulate interstate commerce. I say, in my opinion, at that time it was clear that it was necessary if we are going to enforce a law, as any prosecuting attorney must know, when he gets information from out of the public as to how he should handle that, he, the same as the Commission, doesn't call the newspaper up that day and say "I have got a complaint down here. You should know about it."

Great harm comes to the public if you get a bogus complaint. You must weigh this thing on two sides of the scale, those things that are germane and are necessary to proceed against, and those things that don't quite come up to what the complainant says they do. Somewhere in the middle is the answer. I only have said this to you because I think it is most important, wherever in Government there is law-enforcement responsibility from the day of the beginning through the end, a requirement that all shall be done from the standpoint that it be done in public, so that there will be no secrets. I am afraid great harm would come to the enforcement effort. Somehow or other I think adequate language could be arrived at to protect this responsible function, because sir, the Congress is fully aware of that responsibility and the need to protect that necessary information.

Thank you, sir.

Senator LONG. Thank you, Mr. Chairman, for a very helpful statement. The committee, I am sure, and the Congress, wouldn't want to do anything that would seriously hurt the law-enforcement provision of any agency, but at the same time it is suggested that other material that is not absolutely necessary for that enforcement should be available to the public. You have been very generous with the committee and I believe your statement indicates a favorable approach to that.

It is rather refreshing because many of the agencies have not been particularly favorable to it, and I think I am being rather charitable

at that. We are very happy to have one agency appear that can see the overall picture. Senator Burdick, do you have questions of Chairman Dixon?

Senator BURDICK. I would like to commend Mr. Dixon for a very fine statement, as a matter of fact, a very powerful one. You might be interested to know, Mr. Dixon, that yesterday I inquired into this very area and I could see the damage that might be done to small business, and maybe even large business, if too much public light was cast on your investigations and so forth. Based upon your testimony, the division between that which you make public and that which you do not is more or less a discretionary thing, is it not?

Mr. DIXON. It has to be, sir. It is. Presently, as the law recognizes and as our rule recognizes, it is entirely within the discretion of a majority vote of the Commission.

Senator BURDICK. And you are afraid that if this bill passes in its present form, that that discretionary line may no longer exist, and that it might go over into areas you think might be detrimental to some people?

Mr. DIXON. This is what I have tried to say, sir.

Senator BURDICK. In your statement it also contains two recommendations. One is that the deletion of the word "final"—do you recommend that we restore the word "final"?

Mr. DIXON. Yes, sir.

Senator BURDICK. And then you would recommend the deletion of section 3, subsection (d)?

Mr. DIXON. No, I don't think so, sir. Let me see. I think it should be left to the discretion of the agency.

That is what I think I have tried to say here; 3(d), isn't that?

Senator BURDICK. Yes.

Mr. DIXON. Well, I said that we presently keep the record of our vote, and I think that today our present rule is sound, sir. For instance, let me give you a practical example. We have five strong-willed people upon the Commission, as I think is good. There are five viewpoints very often. We can only live by a majority. We can only act by a majority.

Now, if two of the members held a very strong view against proceeding against someone at the stage of original evaluation of the evidence, even under our present rule today if either one of those two members or both of them desire, they could note upon the complaint, "I dissent against the issuance of this complaint." But let me show you what would happen to that gentleman. He might be the very man when the final came to him for final judgment, who would change his mind, that is, the man who voted against the issuance of a complaint, might very well see fit, once all of the evidence is in, to change his position. But more than that, I would be afraid of the breakdown of what I think is a very fine procedure. Today we offer the opportunity of settlement. Who would settle a case if he figured he had a 3 to 2 vote by the Commission on accepting, to start off the settlement with? Now we are worrying about lag. I am not ashamed of any vote I take. I would stand up anywhere and defend that anyplace to anyone that wants to look at it. I think we must operate this way. But today the Congress can call upon us, and there are about 12 committees of the Congress that have some degree of oversight upon us, and

they can ask to see this and I think we would very freely bring that in and let you examine it. But we are talking about the rights now, not only of secrecy, but when you mention this word "secrecy," sir, remember, you are talking about the right of a defendant, a man, a corporation, that may or may not have violated the law.

Are you going to give through the word "secrecy" some right to him that will slow down law enforcement? That is what I am talking about. Just as the newspaperman is protected under the Constitution of the United States, when very often he is asked by Members of Congress, "where did you get the source of this information?" And he says "No." Congress even when they wrote the Constitution, recognized that was desirable. Congress, when they passed the Federal Trade Commission Act, I think recognized the need: Somehow or another to have some scheme of things of protecting, making confidential the information that was absolutely necessary.

Now I am rather proud of the Commission today. I think we have less secrecy, if we ever had too much, than we ever had before. We are trying to get as far out in the light as possible. I even thought, sir, since I felt so firmly when I left working here with the Senate Judiciary Committee, that so much good came from public hearings and public investigation, that the time had come at the Commission to begin to hold more of these things. We held one in the State of Indiana, sir, and we had to abandon it because we were resisted. We were resisted vigorously, and we were taken into the district court and stayed, and we couldn't get the district judge to make his mind up.

And so in the pursuit of our job we went back to the executive hearing. We were forced there from a practical standpoint. I would be perfectly happy if every investigation we held was right in the public. But I would say we would never get through because the defense counsel who are available to the giant corporations will try to contest every question, and it would probably be 4 years later before it would be decided by the Supreme Court.

Senator BURDICK. Mr. Dixon, I have a considerable degree of sympathy with your position. What I am dealing with now is some suggestions or recommendations for this bill so we can protect the interests your refer to. What recommendations do you have other than these contained on pages 6 and 7 of your testimony?

Mr. DIXON. I would recommend, sir, some language, some additional language to the three exceptions you have noted, 3(c) I would say you recognize three points that should not be made, that type of information. I would recommend appropriate language, perhaps a No. 4, so far as my agency is concerned, recognizing either delegating to us or writing that plain in the law that this type of investigation information need not be made public.

Senator BURDICK. I wonder if you could have your staff submit some language to the committee that we could consider? [1]

Mr. DIXON. We would be very happy to attempt to, sir.

Senator BURDICK. Thank you very much.

Senator LONG. Mr. Fensterwald.

Mr. FENSTERWALD. Thank you, Mr. Chairman.

I think it is unnecessary for me to commend Mr. Dixon. I have been commending him for so long and learning from him for so long that

[1] Letter included in appendix at p. 242.

it is almost unnecessary to commend him again here today, although it was a very powerful statement, and we are grateful.

I was interested in Senator Burdick's questions. As you know, Mr. Dixon, the staff of the subcommitee has been meeting with a number of the regulatory agencies, not only on this particular provision but on other provisions of the APA, and we have received a number of very helpful suggestions. We have not yet had an opportunity to meet with you and your fellow commissioners but we would hope to do so. I might just comment very briefly on some of the things which have been suggested and which may obviate some of your difficulties.

In section 3(a), the question of final authority: it has been suggested that we go back to the original Senate version when the original bill was passed, which did not include the term "including delegations by the agency of final authority." It merely said that you published the field organization and the established places at which and methods whereby the public may secure information or make inquiry or request.

Mr. DIXON. That would be fine, sir.

Mr. FENSTERWALD. This will be suggested to the subcommittee, and I think it may solve the problem raised by S. 1666.

As to section 3(c), a number of agencies have suggested that, in addition to the three exceptions listed, we add two more. I mentioned one of these yesterday. It had to do with trade secrets.

Mr. DIXON. This is written in our law, so No. 1 would take care of trade secrets and name of customers.

Mr. FENSTERWALD. That is true, but for a number of other agencies it would not, because they do not have statutory exemption.

Mr. DIXON. I would suggest it, then.

Mr. FENSTERWALD. So we would certainly consider that very carefully. The other suggestion has been an exception for investigatory files. This suggestion has been made almost universally. We would certainly consider that. I think that would obviate some of the other difficulties which you find with the statute.

Mr. DIXON. Plus the 3(d) thing which I covered in my statement.

Mr. FENSTERWALD. As to section 3(d), I think that you are the only agency so far that has objected to 3(d). Some question has been raised, I think, so far as the Federal Trade Commission is concerned, as to the question of printing of dissenting opinions. I think that is one thing that has put some particular interest in this subsection 3(d).

I don't know if you have any comments on the printing of dissenting opinions or not.

Mr. DIXON. I think primarily, Mr. Fensterwald, I was thinking about maybe all agencies, even though broadly under the broad, generic term of regulatory they are not all just alike. They could not be all alike. The Federal Trade Commission is the nearest thing, in my opinion, to law enforcement family. We have so little true regulatory functions to perform. For instance, the easiest place to see the regulatory function that we perform is in the four consumer acts that Congress passed, the Wool Products Labeling Act; the Fur Products Labeling Act; the Flammable Fabrics Act; and now the last Textile Fiber Identification Act. Congress put into each of those laws an enabling section. The enabling section said to us that after due public hearings and whatnot, we should issue a set of rules, for instance, a

register of terms, and so forth, which after they had been published in the Federal Register would have the full effect of law. Now this is a true regulatory delegation by Congress.

Only Congress can do that unless they tell somebody else to do that. Now, in our broad, generic statute under section 6(g), Congress said we could make our own rules and regulations. Well, no one has ever been foolish enough at the Commission yet to try to write law under that kind of a statute, under that broad thing. We have only adopted rules of practice which I have talked about.

But because fundamentally we wear three hats, which sometimes is rather strange for the American public to understand, and I don't think the bar has quite bought it yet although it has been in effect for 49 years, the three hats, investigate, evaluate, charge, and then sit back finally and be the final judge. This is a little strange to the old Anglo-Saxon approach of common law. But Congress turned to this, in my opinion, from a very deep need. It wasn't done as an act of folly. It was done as an act of need, to have a body of experts to try to eliminate these things before you got in law, and then keep these experts here to make the final finding of fact and opinion, but they would not have the force of law until reviewed in the courts.

Now we are not a court. We are not a judge. We are a commission. Our actions only become final by fiat of statute or else upon approval by the court, but technically speaking, we have three hats. It is that middle hat that bothers me, sir, the first two hats; not the final one. The final hat, we today record our vote when we decide the case, and each man is listed thereon, and I will say to you it is very rare that an opinion is not written, and even with dissents. And so today, after 1946, there is a complete division between the trial judge function and the final function at the Commission.

The hearing examiner is the trial judge.

Mr. FENSTERWALD. Mr. Dixon, would it help if we added the word "final" before "agency proceeding," to record the votes of each member in every final agency proceeding?

Mr. DIXON. It sure would help, sir. I think it would do a great deal for the problem I have been addressing myself to, sir. If the Congress wants our votes recorded and says finding of fact and an order was issued today and these three Commissioners voted for it and these two against it, fine; I would like for them to be counted more often myself. "Final" would be fine, sir.

Mr. FENSTERWALD. Those are all the questions I have, Mr. Chairman.

Senator LONG. Mr. Kennedy?

Mr. KENNEDY. Mr. Chairman, I just have one question to clarify in my mind, the type of information which is made available to respondents in the Federal Trade Commission Act. Let's assume that you receive a complaint from the public and you send out your own investigating staff to determine whether or not the complaint would justify the Commission in proceeding, your investigators bring back the information—that they talked to, let's say 10 people, who would be knowledgeable, and that the people were divided 5 and 5, 5 people gave information to the investigators that would lead you to issue your complaint, and 5 gave information of the kind that would not lead you to issue the complaint.

Would the Commission release to the respondents in case it went ahead with the proceeding, information that there were five interviews which would have not led the Commission to go ahead?

Mr. DIXON. We would not, sir, and I will tell you why. I am glad you asked the question.

In the first place, the respondent would not have to worry about it unless he was charged with a law violation. If he was charged with a law violation, before he was put to the burden of going into the trial room, he would find out what the Commission was going to depend upon. He would find that out, the names of the witnesses that the Commission was going to call to the stand, which would give him enough notice to go and talk to them if he wanted to do it, and the documents we had obtained that we were going to rely upon as written documents. But we would not give him the five interviews, if that is what you are talking about, that we did not think were worthy of consideration. Now you pictured these interviews as being entirely favorable to the defendant. I would say to you they are not usually in that category. For one reason or another the five may not be as good witnesses as the other five. Then you very often elect how many witnesses you have to call to prove a point. You might have 25. We might have 50. We may say 10 is enough or 5 is enough. Should the other 40 be made available for good or bad? I think not, sir.

Mr. KENNEDY. But the main point of my question and of your answer is if these Government agents go out and find some material which is favorable to the respondents and some which is unfavorable, that the Commission will inform him as to that information they decide to use which is unfavorable, but they will not inform him as to that information which is favorable to him, and which they of course will not use; is that correct?

Mr. DIXON. If you could say that, if your statement exactly duplicated a set of facts, it could result in that. In other words, what you are talking about, are you going to sit here and adopt a procedure that is entirely in the defense standpoint. Are you going to perform an act that says that it is going to be a little bit harder to ever prove one of these law violations. I don't think so, sir.

I am for fairness. In 1946 after many years, the American Bar Association kept coming to this Congress with the contention that administrative law was not fair. They were all one. There was no division. And so the Congress in 1946 passed a law to make it a little fairer. They took the adjudicative function of the staff and everything and removed them, those people that advise us in an advisory capacity in the final analysis cannot have any access or any relationship to the proof of trial. This separates the two sides. That was what 1946 did. I hope that under the name of secrecy this time we are not trying to open it up and making it a little harder because I assure this Congress that it is very difficult today to enforce the so-called antitrust laws and the trade restraint laws of this land.

Respondents have good lawyers and good counsel and have good access to the information you are worried about, sir. They have got a lot of it. You don't have any secrets from those fellows. They know it all, sir. I wish we knew as much as they did sometimes.

Mr. KENNEDY. Thank you.

Senator LONG. Thank you Mr. Dixon, for a very helpful statement and for your appearance. I am very much impressed with it and you have been very helpful to the committee.

Mr. DIXON. Thank you for the privilege, sir.

Senator LONG. There will be three more witnesses and we hope to conclude at this time. We will now take a 5-minute recess.

(Recess taken.)

Senator LONG. The committee will come to order. Our next witness is Mr. Belin, General Counsel of the Department of the Treasury, Mr. Belin, I have a biographical sketch of you which I would like to have put in the record at this time.

(The biographical sketch follows:)

Gaspard d'Andelot Belin was born May 30, 1918, at Scranton, Pa. He received his B.A. degree from Yale University in 1939. Following 5 years as a military intelligence officer for OSS and the Army, he returned to Yale and graduated from Yale University Law School in 1946.

Mr. Belin was admitted to the bar of the State of Massachusetts in 1947 and he has been associated with the Boston law firm of Choate, Hall & Stewart since that time. He was made a partner of the firm in 1955. Mr. Belin is a director of Harvard Trust Co. and of the United Research Corp. He is also a councilman of the city of Cambridge, having been elected in 1961. He is presently General Counsel for the Department of the Treasury.

A Democrat, he is married and father of five children. The Belins reside at 4 Willard Street, Cambridge, Mass.

Senator LONG. We appreciate your being here this morning.

STATEMENT OF G. d'ANDELOT BELIN, GENERAL COUNSEL OF THE TREASURY DEPARTMENT; ACCOMPANIED BY BERTRAND M. HARDING, DEPUTY COMMISSIONER, IRS

Mr. BELIN. I have with me Mr. Bertrand M. Harding, Acting Commissioner of Internal Revenue, with reference to the telegram which you sent me yesterday about the *Herbert K. May* case, and we will come to that whenever you choose, but I will go ahead with my statement, if that is all right, sir.

Senator LONG. That will be agreeable.

Mr. BELIN. Mr. Chairman, I am very pleased that you have afforded me this opportunity to appear before your committee to present the views of the Treasury Department with respect to S. 1666. As you are aware, this bill is of great concern to the Treasury Department. You will recall that attached to our report of September 27, 1963, was a statement of objections which was almost 50 pages long. We believed that a proper appraisal of this bill required that we examine it in detail in terms of its actual effects on American citizens generally as well as one the administrative agencies. We did not believe that generalized statements in abstract terms would suffice.

I should like to begin my testimony by reiterating that the Treasury Department fully agrees with the objectives which motivate the introduction of a bill such as this. We assert, without reservation, that it is important for all citizens and, particularly for citizens directly affected by the action of administrative agencies, to be as fully informed as is reasonably possible with respect to all aspects of Government agency activities. We recognize, too, that administrative agencies, like other human institutions, err from time to time and have

done so in this area of information. We recognize that the practices and procedures of an agency can never, despite its best efforts, be such as to be beyond improvement.

Our objections, and they are numerous, go to what this bill would actually do, rather than to the bill's general objectives. Because we have already reported so fully and in such detail to your committee I do not wish to rehearse with you everything that is contained in our written report and its attachment, but I do request that those documents be made a part of the record of these proceedings—and I have brought additional copies of them with me for your ready reference.

Senator LONG. That will be done.[1]

Mr. BELIN. I should like to limit my testimony today to mentioning a number, but by no means all, of the matters which concern us in this bill. In our detailed written statement we have explained how the language of the bill would, as a technical matter, produce the results we object to and I shall not now repeat our explanations in this regard.

We believe that one of the worst aspects of the present bill is that it would invade the traditional rights of privacy of the private citizen and require the Government to disclose the citizen's affairs to any business competitor, neighbor, prying relative, or criminal who seeks, for whatever reason, to gain access to such information. This contrasts with the present practice of the Treasury Department under regulations which authorize the nondisclosure of information if it relates to a financial matter or to 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 without furthering the public interest. Further, although all of the official records of the Treasury Department other than those relating to its internal management or which are held confidential for good cause are made available on request, they are made available under present standards only to persons properly and directly concerned with them.

In the modern world, official Government records relate to almost every aspect of our private affairs. Savings bonds which we buy from the Treasury are registered, and the Treasury records show our names and the extent of our holdings. The national banks in which we deposit money are examined by the Government, and examination reports which are official records of the Government disclose what citizens have on deposit, what they have borrowed and when such borrowings are repayable. With respect to the bank accounts of business concerns, bank records are even more revealing.

Millions of Americans serve or have served in the Armed Forces, have been treated in Veterans' Administration hospitals and have undergone physical examinations as applicants for Government jobs, whether or not they were ever Government employees. As a result, Government medical records are a storehouse of information with respect to the physical and mental characteristics of millions of us, and they contain both confirmed diagnoses and unconfirmed diagnoses, psychiatric evaluations, and the like.

Many records of the Internal Revenue Service in addition to those which are presently specifically exempt from disclosure by statute,

[1] The documents referred to may be found in the appendix at p. 268.

disclose information about our incomes, our business activities, and our transactions with others. It should be remembered that although income tax returns may be specifically exempt from disclosure by statute, information about an individual's income derived from audits or other sources is not similarly specifically protected. Furthermore, existing statutes do not protect information derived from the administration of various other taxes including retailers' excise taxes, taxes on admissions and dues and regulatory taxes such as those on narcotics. Bureau of Customs records disclose what we import, from whom we buy, what we pay and even what we return to a foreign seller as not being up to specifications.

If S. 1666 were enacted, the Federal agencies would be directed to cooperate with any snooper, disgruntled employee or gossip who seeks to invade our traditional right of privacy as citizens and to disseminate such information to our disadvantage. We do not believe that the rights of privacy which the citizens now enjoys should be cast away.

We can see no reason, for example, to destroy the confidence with which a serviceman can today consult a service doctor, secure in the knowledge that, like other Americans, he enjoys the patient-physician privilege which precludes his doctor's revealing information derived from a medical or mental examination. Since the Coast Guard is within the Treasury Department, this is a matter of some particular concern to us.

We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.

Apart from the disservice which would be done to the citizen in his personal and business capacity by the enactment of S. 1666, passage of the bill would hurt him in another way. It would lessen the efficiency and effectiveness of the Government. In this connection, I need not stress the obvious fact that Government agencies do not exist to serve their own purposes. They exist to carry out the functions which have been imposed upon them by the Congress for the public good.

Let me give some examples of what I am talking about.

Senator LONG. Mr. Berlin, let me interrupt here to inquire. I notice you made a point a few paragraphs ago about confidential communications between lawyers and doctors and citizens, that this would destroy the right of that private communication. This is a little off the subject, but I judge you to be opposed to wiretapping on that same basis, because that would destroy that same confidential relationship.

Mr. BELIN. Wiretapping is a complicated subject, Mr. Chairman, as you know, and it has been partly dealt with by some statutes, but I think we would have to be concerned about the same problem there.

Senator LONG. It is just plain illegal today, but do we have the same basic right for individuals that you say this bill would violate that a wiretapping proposal it seems to me would do the same? As I say, it is not in your department, and perhaps it is an unfair question to ask you.

Mr. BELIN. I haven't studied the wiretapping problem with any particular care. I know in some States it is quite different from the Federal law to which you just referred.[1]

[1] Further comments by Mr. Belin on this subject may be found in the appendix at p. 232.

The savings bond system is, and is intended by Congress to be, an integral part of Government financing. It has been well thought out and it is successful. For example, more than 455 million savings bonds are now outstanding with a face value of more than $48 billion. It is clear beyond argument that registered savings bonds would be a much less attractive investment if Congress were, in effect, to rule that a person's holdings of such bonds would have to be disclosed to any person who asked the Treasury for such information. Obviously, if such a rule were adopted, the Government would have to turn elsewhere for much of the financing which is now carried out through the savings bond system—and this would be a serious blow to the orderly and noninflationary management of the public debt.

Law enforcement would be badly hindered. The Senate through another committee, has recently been giving serious and detailed attention to the organization and operations of the Mafia—the Cosa Nostra. It takes little imagination to guess whether the Cosa Nostra would be hurt or helped by the passage of a bill which would open up to their attorneys, or to anyone else acting on their behalf, the official records of investigations by the Bureau of Narcotics or the other investigatory arms of the Treasury or of other agencies of the Government.

Senator LONG. Mr. Belin, let me ask you this—I notice you now mention the Bureau of Narcotics which comes under your department.

Mr. BELIN. Yes, sir.

Senator LONG. You are again dealing with records there. Again my mind goes back to wiretapping, because one of the complaints we constantly hear is that the Bureau of Narcotics does extensive wiretapping and that one of the reasons that you are apprehensive that that information be given out is that the Department does do wiretapping?

Mr. BELIN. No, sir; that is not my fear at all. A great deal of information comes to the Bureau of Narcotics, I think I am free to say, from informants, and Congress, for example, has specifically taken cognizance of that, of informers in various Government departments.

We just feel that informants would absolutely clam up the first time something went wrong, and you would just get one dead informant on a narcotics offense, and we wouldn't hear anything from there on. That is our basic fear here.

There are other elements in the investigative process that would be troublesome, too, but that is the outstanding one, sir.

Congress has long recognized the importance of the role of the informer to effective law enforcement, and Congress and the courts have recognized the need which often arises for keeping the informer's identity confidential. Yet this bill would preclude that possibility.

The effective operation of the Government requires the continuation of the foreign affairs exemption which is now contained in the Administrative Procedure Act but which the present bill would eliminate. In our detailed statement we have pointed out, among other things, how the inability to preserve confidentiality in this area would prejudice the operations carried out under statute by the Treasury's exchange stabilization fund and the Federal Reserve System to maintain the stability of the dollar in world exchange markets. We have pointed out that, for example, we could not hope to get the useful information which we now get from foreign governments and foreign central banks,

if we had no recourse but to turn this information to speculators in foreign exchange.

As we read the bill, it would, indeed, seem to provide that economic and financial reports made by Treasury attachés abroad, as well as those made by other American officials abroad, would be made available on request to all who might ask. Two effects of such a provision are immediately apparent. One is that such reports would have to be less full and frank than at present, since otherwise their disclosure might prejudice the relationship of the United States with the foreign countries with which the reports deal. No longer could our representatives report frankly to our Government upon the effectiveness, the intelligence, or, indeed, the honesty with which various financial and economic measures were being pursued in foreign countries. Our Government, being deprived of such information, would be the loser thereby. On the other hand, such information as was reported, being freely available to all who asked, would be available to representatives of the Communist-bloc countries who, of course, would surely get it directly or indirectly.

The provisions of the bill with respect to the publication and indexing of material are at least as objectionable as those relating to disclosure of official records. One effect of the bill would be to require the publication and indexing of many millions of decisions, rulings, and interpretations which are neither needed nor wanted by the public. We have been unable to calculate the cost of such indexing and publication to the Treasury Department, but it clearly would be very great. In this connection, we wish to repeat that the Treasury Department is not opposed to publicity for its rulings and decisions. Indeed, a look at the record will disclose that the Federal Register and other Government publications, as well as many other publications dealing with Treasury matters, form a vast body of easily available information. The Internal Revenue Service publishes, among other things, Internal Revenue Bulletins, Cumulative Bulletins, Technical Information Bulletins, and a host of other publications which are intended to assist and inform taxpayers. As another example, the Bureau of Customs also publishes weekly Treasury Decisions which provide information with regard to customs rulings of precedential value. We have every reason to believe that every citizen having any concern with these matters can readily secure all needed information as to precedential rulings, orders, and interpretations either through the voluminous printed material now available or by direct correspondence with the appropriate bureau or office.

We reiterate therefore that our concern with the indexing and publication features of the present bill does not stem from any objection to keeping the public properly informed as to the rulings and adjudications of the Department, but we are deeply concerned by the provisions of the bill which would require the publication or indexing, or both, of all opinions, orders, rules, statements, and interpretations regardless of their importance to the public. As we have pointed out in our detailed statement, provisions such as those contained in the present bill would require the publication or indexing of literally millions of items every year for no useful purpose.

We have already provided the committee with illustrations of the kinds of matter which would needlessly be subject to the publication

and indexing provisions of the bill, and I shall not multiply such examples at this time. But I should like to elaborate one illustration:

Field offices of the Internal Revenue Service throughout the country, as well as the Internal Revenue Service's national office in Washington, annually receive many thousands of questions about the application of Internal Revenue rulings and regulations to individual taxpayers' particular situations. Some of these inquiries are made in person, some by telephone and others in writing. A taxpayer may ask, for example, how the excludable sick-pay provisions apply to his peculiar factual situation. Another may specify certain out-of-pocket expenses which he has incurred in performing voluntary work on behalf of a recognized charitable institution such as the Red Cross and ask whether they are deductible. The Internal Revenue Service as part of is taxpayer assistance program interprets the applicable laws and provides these people with answers.

These interpretations, of course, are not in any sense precedent making and are of a type which the taxpayer could determine for himself if he possessed the necessary expertness to consult the published rulings of the Internal Revenue Service. Nonetheless, they are interpretations of internal revenue law as it applies to particular individuals. Under section 3(b) of the bill, all of the interpretations of this type would have to be indexed and published or made publicly available; and since as I have stated they run into thousands, the cost of so doing would be enormous. We can see no reason to support such a requirement.

The cost to the taxpayers for the additional needless clerical work and for the procurement and maintenance of files for indexing and for preparing, printing, and publishing would be great and it would be pointless. As a representative of the Treasury Department, I cannot but be keenly aware of the need for curtailing unnecessary Government expenditures, and I would urge that the Congress not burden the taxpayer with this unnecessary expense.

We have also pointed out that the publication and indexing requirements of the present bill are seriously ambiguous. Although subsection 3(b) appears to allow an agency to make interpretations available and index them rather than publish them, subsection 3(a) may require publication of any interpretation given to a member of the public for his guidance. Moreover, each subsection appears to invalidate interpretations which are not handled in accordance with its own particular requirements.

Because of this ambiguity, every conscientious administrator would be constrained to publish material rather than merely to make it available whenever he was in doubt whether publication was required. He would be properly concerned that failure to publish might lead to the invalidity of his agency's action. And obviously this would increase the expense of agency operations.

Our objection to the bill, however, is not restricted merely to its technical shortcomings or to the particularly unfortunate consequences which we have detailed both here and in our written comments, and which would follow upon its enactment. We are troubled by a number of other fundamental matters as well.

We are opposed to any amendment of the Administrative Procedure Act which would have the effect of invalidating agency action merely

because of technical agency omissions which are not prejudicial to an affected party. Since this point has already been presented to you in fuller form, I shall not elaborate it now, except to say that such a requirement would needlessly vitiate agency action taken in the public interest.

We believe, also, that the bill is premised on a fundamentally unsound concept in that it appears to assume that Congress has considered in a comprehensive way, on the basis of a full review of the needs of the public and the varied operations of all administrative agencies, the problems relating to the disclosure of information. It also seems to assume that existing Federal statutes now provide a comprehensive statutory scheme for protection against unwarranted disclosure in all cases where such protection is needed. Quite the opposite is the case.

The statutory enactments prohibiting Government disclosure of the citizen's affairs have merely reinforced some of the more important existing rights of the citizen which have existed independently of Federal statutes. The present statutory prohibitions accordingly relate only to certain particular classes of disclosure which Congress has singled out for action and considered to be so important that unlawful disclosure should result in imposition of penalties. But these statutory enactments by no means relate to all of the areas traditionally protected against disclosures. Title 5, United States Code, section 139b, for example, points this up very clearly. That statute, which is quoted in our written statement, shows that Congress expects that where an agency has obtained information in confidence, its pledge of confidentiality will be respected not only by the agency itself but also by any other agency to which such information is transmitted. Yet, there is no statute which specifically prohibits the first agency from revealing such information.

A further example which Congress and the courts have long approved, although no statute specifically applies, is the policy of refusing to make known the identity of informers.

Other examples could easily be supplied.

Not only is there no statutory scheme which in and of itself determines precisely what Government records may and may not be disclosed, but we doubt that such a scheme would be either feasible or desirable. We do not suggest that it is inappropriate that there be additional guidelines with respect to disclosure of information but we are convinced that a bill, such as this, which seeks to deprive the administrator of virtually all discretion in determining whether the disclosure of Government records is in the public interest, cannot provide a satisfactory solution to what is admittedly a difficult problem. We have little doubt that the bill's approach in this regard is based on the fact that illustrations can be given of instances in which administrators have been too restrictive in their policies relating to disclosures of information and have made unwise judgments to refrain from disclosure in certain cases. Certainly no one can testify that such instances have not arisen in the past, and it would be foolish to suggest that such instances may not arise in the future.

Nonetheless, we are of the view that a Government administrator's occasional error of judgment should not lead to legislation which would deprive administrators of all power to exercise judgment. Exercise of discretion is inherent in the administrator's role, not only

with respect to disclosure of information but also with respect to the substantive and procedural aspects of administrative action generally. To remove the administrator's discretion and judgment in the information field would be inconsistent with proper administration of the law in this or any other area.

In short, no matter how well a bill dealing with disclosure of information is drafted, I do not believe that it can properly omit the present provisions of the Administrative Procedure Act which allow nondisclosure, in the discretion of the agency's administrator "for good cause found." Having said this, I perhaps should also note that, at least in varying degrees, the mistakes of judgment of administrators are not necessarily final—review by their superiors in the executive branch and by the courts plays a large role in tending to insure that the necessary discretion will be exercised properly.

Although we believe that an approach to the disclosure problem along the lines of S. 1666 is not the proper way to deal with the matter, we do not wish to assert that the administrative agencies have grounds for complacency or that no further action is warranted.

It is our belief that if the Congress should establish a permanent Administrative Conference of the United States, the problem of disclosure could well be a subject for its early attention. If such a Conference should undertake a study of this nature, it would do well to give separate consideration to disclosure problems as they relate to agencies, the roles of which are primarily regulatory, and as they relate to agencies whose functions are primarily other than regulatory. We believe that attention must also be given to the extreme diversity of Federal governmental functions in relation to these problems.

Finally, in any comprehensive study which is made of this subject, it is important to have in mind that access to information in Government files, although a highly desirable objective, is not an objective to be pursued without consideration of the other needs of good government. The right of the citizen to privacy and the need of the citizen to have his Government work efficiently and without extravagant expenditures for unnecessary paperwork are also important. Consideration of the difficult subject of access to information held by the Government must recognize that the general public good in these and other regards should not be lost sight of in our efforts to pursue as full a disclosure policy as is possible.

Senator LONG. Thank you, Mr. Belin, for your statement. I didn't recall the name of your associate.

Mr. BELIN. Mr. Harding, the Acting Commissioner of Internal Revenue.

Senator LONG. Do you have a statement, Mr. Harding?

Mr. HARDING. No, sir; I do not.

Senator LONG. Mr. Belin, you mentioned in opening your statement that you were in receipt of my telegram to you yesterday asking that you bring the complete file of Herbert K. May with you today and be prepared to discuss the withholding of information in this case. I would like to place in the record at this time a copy of the telegram which was sent to you.

(The telegram follows:)

SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
October 30, 1963.

HON. G. D'ANDELOT BELIN,
General Counsel,
Department of the Treasury,
Washington, D.C.:

At your appearance before Subcommittee on Administrative Practice and Procedure tomorrow, please bring complete file on Herbert K. May and be prepared to discuss withholding of information in this case.

EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure.

Senator LONG. I would like to inquire Mr. Harding, if you brought the complete file with you?

Mr. HARDING. I brought our complete Washington file; yes, Mr. Chairman.

Senator LONG. Mr. Harding, has request been made to you for the opening of that file by the press and the news media and have you complied with it or have you not?

Mr. HARDING. No request has been made to my knowledge, Mr. Chairman.

We issued a statement, as you may know, on October 29 which I would like to submit for the record.

Senator LONG. Without objection.

(The statement follows:)

[News release, U.S. Treasury Department, Internal Revenue Service, Public Information Division, Oct. 29, 1963]

Internal Revenue Service today acknowledged that it had supplied Senator John J. Williams, in response to his request, with the information regarding the income tax filing record of Mr. Herbert K. May. The Service pointed out that the failure to file income tax returns is a matter of public record under the Internal Revenue Code.

The Service confirmed that Mr. May had failed to file returns for a number of years and in 1963 voluntarily filed delinquent returns for 1953 through 1961. The 1962 return was timely filed.

All assessed taxes penalties, and interest for all past years were paid by Mr. May. There are no outstanding unpaid amounts.

As Mr. May has now publicly stated, the filing of these delinquent returns was completely voluntary on his part and was accomplished before the Service undertook an investigation of his tax affairs.

All the facts and circumstances surrounding the filing of these delinquent returns were considered to determine the possibility of prosecutive action. In line with the longstanding practice of the Service to give considerable weight to the element of "voluntary disclosure" in cases of this nature, it was the decision of the Service that the prosecutive potential of the case did not warrant referral to the Department of Justice.

The Service directly denied the statement by Senator Williams that the case was handled differently than that of any ordinary taxpayer.

Senator LONG. No newspaperman, no news media have interviewed you or anyone in your Department and asked for permission to see this file?

Mr. HARDING. Not to the best of my knowledge. We have had a number of calls from the press, to which we have tried to be as responsive as we could.

I have not personally talked to the press, but our public information officer has over the last 2 or 3 days.

When you refer to the file, Mr. Chairman, you are referring to the tax returns of Mr. May or merely the administrative files?

Senator LONG. The administrative files which you have on your investigation of this case and correspondence with the State Department, your disposition of the case and even his file in regard to the time he made application for employment in the Department, the investigation that was made.

Mr. HARDING. I do not have his personnel file, Mr. Chairman, and as far as any request on the part of the press for access to the administrative file in connection with the handling of the case, to the best of my knowledge no such request has been received.

Senator LONG. If such request was made would the file be made available to the press?

Mr. HARDING. I think we could make portions of the file available. Other portions of the file, however, Mr. Chairman, contain information regarding Mr. May's tax affairs which are specifically prohibited from disclosure under the statute.

Senator LONG. One thing that, of course, interested me in this case, in addition to the withholding, the alleged withholding of information, some of the news stories seem to indicate that perhaps there had been some withholding of access to them, and if it is a part of the statute I can understand that that should be, what also interests me is the fact that this man from 1942 to 1961 was an employee of the Treasury Department.

Mr. Belin, you remember that some weeks ago we had a hearing, I believe, in this room on June 4 and 5 where you appeared, and Mr. Hauser was here with you as your assistant at that time.

That particular bill dealt with the right of lawyers to appear before or practice before the Treasury Department.

Mr. BELIN. Yes, sir.

Senator LONG. And Mr. Hauser in speaking for the Treasury Department, in a reply to a question by Mr. Fensterwald, a member of our staff here, Mr. Fensterwald asked this question:

Mr. FENSTERWALD. It is general procedure in the Federal courts, where a case may be on appeal from the Internal Revenue Service, to recognize, without investigation, the moral quality of a practitioner but the Treasury feels it needs higher standards than the district courts, and the State courts, and the Supreme Court?

Mr. Hauser said:

Yes, I think we do. You have a situation where there are administrative proceedings sometimes at fairly low levels, about 3 million possible controversies each year; there are 3 million audits each year.

You have representatives from the Government who are not lawyers, which is contrary to the situation in the Federal courts, where the Department of Justice represents the Government. There are all sorts of opportunities for abuses. I feel we need some special showing of a person's good character for tax purposes.

Mr. FENSTERWALD. What do you mean by "good character for tax purposes" as opposed to good character in general?

Mr. HAUSER. That he files his tax returns.

Mr. FENSTERWALD. So this is basically a system to force lawyers to file tax returns, that you think are adequate, rather than to show a client that he has knowledge of the tax laws themselves?

Mr. HAUSER. Well, we have already bowed to the authority of the various bar associations by recognizing the professional qualifications of lawyers. We do not require that the attorney who wants to practice before us file returns which are adequate. It is just necessary that he file returns to show that he is a responsible taxpayer himself.

Now the thing that, of course, concerns this committee is that your Department has testified here that before a lawyer can practice before you, he is required to file his income tax return and that is one of the basic requirements of his moral character that you require.

And he can be blacklisted, of course, if he doesn't do that. Now I am concerned and the committee is concerned as to how you would permit a man to be employed as one of the responsible officials in your Department for nearly 19 years, and for 8 years we see, according to the press, that he did not file a tax return.

Doesn't the same rule of morality apply?

Mr. BELIN. Yes, sir; and I think it is understandably hard for you or anyone else to understand that. It certainly is a bad situation. Maybe it would help if I explained what our situation is for screening.

For some 10 or 11 years each employee of the Internal Revenue Department has received an annual check as to whether he has filed his return and paid the taxes shown to be due.

Senator LONG. How did this man then miss that?

Mr. BELIN. He was never in the Internal Revenue Service, sir. He was in the Treasury in the Office of International Affairs, Mr. Chairman. It is part of the Treasury.

Senator LONG. That is an important position though.

Mr. BELIN. Oh, yes.

Senator LONG. And it is under your jurisdiction.

Mr. BELIN. That is right. It is part of the Treasury, no question about it.

Now when this administration came in, there was inaugurated in the Treasury, and subsequently Government wide, a policy of having a tax check of all Presidential appointees to make sure that they had filed their tax returns and paid the taxes due, and I guess in the case of Presidential appointees at least there was an audit [After conferring with Mr. Harding]. No, I understand just a check to see whether they had filed their returns and paid their taxes and as to whether there was any criminal investigation underway.

Subsequently, since that time there has been put into effect in the Treasury a system extending down to those of grade 12 or above a tax check to make sure they have filed their taxes, filed their returns, and paid the taxes shown due, and it also applies to those being promoted up to grade 12, so that at least at that level there will be a check to make sure.

But there has never been a Treasury-wide policy to make sure that every employee of the Treasury has filed his tax return every year.

Senator LONG. Wouldn't you think it is as important a moral question that an employee of the Treasury Department file his return——

Mr. BELIN. Yes, sir.

Senator LONG. As it is to see that a lawyer who practices before you files one?

Mr. BELIN. Indeed I do, and I think our present system will do that for all responsible employees.

Senator LONG. As I understand you, you said that this system had been in effect for a number of years. It didn't apply to this branch of the Treasury Department that Mr. May was in?

Mr. BELIN. I believe it is only in the Internal Revenue Service that there was an annual check.

Mr. HARDING. That is correct.

Mr. BELIN. Up until recently the Treasury did not have a check on whether a person filed his return.

Senator LONG. But you do feel though the same basis of moral judgment should be the same on a lawyer who practices before you representing a client as it does someone who is employed in your Department.

Mr. BELIN. Indeed I do.

Senator LONG. In dealing with taxes?

Mr. BELIN. Yes, sir.

Senator LONG. Mr. Fensterwald and Mr. Kennedy may have some further questions.

Mr. BELIN. I wonder if just before that, sir, if it would be perhaps worthwhile—I think I would like to submit for the record one brief letter which Commissioner Caplin wrote to Senator Williams stating the facts about Mr. May's filing of his tax returns, this is a letter dated October 3, 1963, in which the Commissioner writes to the Senator and gives the list of the years from 1948 through 1962, and as to whether the returns were filed or delinquent or what not.

Senator LONG. Without objection, it will be admitted in the record.

(The letter referred to follows:)

U.S. TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Washington, D.C., October 3, 1963.

Hon. JOHN J. WILLIAMS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR WILLIAMS: In response to your letter of August 21, 1963, there is shown below a summary of the income tax filing record of Mr. Herbert K. May for the years 1948 through 1962.

Year	*Filing record*
1948	Timely filed.
1949	Delinquently filed in 1951.
1950	Delinquently filed in 1952.
1951	Delinquently filed in 1953.
1952	Do.
1953 through 1961	Delinquently file in 1963.
1962	Timely filed.

The district director in Baltimore, in whose office all of these returns were filed, reports that there are no outstanding unpaid assessments for any of these years.

I hope that this information satisfactorily answers your questions in the matter.

With kind regards

Sincerely,

MORTIMER CAPLIN, *Commissioner.*

Senator LONG. Is this the same letter that Senator Williams wrote you about in August?

Mr. HARDING. This is the reply to Senator Williams' August letter; yes, sir.

Senator LONG. And he didn't get a reply until October, did he?

Mr. HARDING. He got a reply on the 3d of October; yes, sir. You see, these records are not maintained in Washington, Senator. We had to get the information from our field office. Some of the records actually were in the Records Center, and had to be researched.

Senator LONG. That is about 2 months.

Mr. HARDING. No, it was about a month and a half, sir.

Senator LONG. It seems to me perhaps to be an unusual delay. I am not familiar with your system.

Mr. HARDING. He asked for records going back for 15 years and it was necessary for us to go to the Federal Records Center in order to get that information.

Senator LONG. Mr. Fensterwald, do you have some questions?

Mr. FENSTERWALD. I do, Senator.

Mr. Harding, can you tell me when this check on Presidential appointees went into effect?

Mr. HARDING. Very shortly after this administration took office, Mr. Fensterwald.

Mr. FENSTERWALD. And when did Mr. May transfer from Treasury to the State Department?

Mr. HARDING. As I recall, in mid-1961, but I don't recall his exact date.

Mr. FENSTERWALD. And it took between then and May 7, 1963, for the check to go through?

Mr. HARDING. No, sir. We did not discover Mr. May on this check. Mr. May was not a Presidential appointee, and was not subject to this procedure.

Mr. FENSTERWALD. Wasn't he a Deputy Assistant Secretary of State?

Mr. HARDING. Yes, sir.

Mr. FENSTERWALD. That is not a Presidential appointee?

Mr. HARDING. That is correct, sir.

Mr. FENSTERWALD. So he slipped through without anybody catching him?

Mr. HARDING. That is correct.

Mr. FENSTERWALD. Did he come in and volunteer to pay these taxes before you did catch him?

Mr. HARDING. Yes, sir.

Mr. FENSTERWALD. Did he give any reason for volunteering at that time?

Mr. HARDING. Yes, sir. He wrote a rather long letter to the district director explaining his failure. He has since made a public statement on this subject which, as I recall, relates the financial difficulties which he incurred for one reason or another. According to his statement, he was unable to pay about $150 worth of tax due the first year of his delinquency, and having failed to file a return that year, he then, as he expressed it, found himself on the hook and didn't feel he could get off, and therefore, continued to fail to file over the 9-year period.

Mr. FENSTERWALD. Would you make that letter from Mr. May to the district director available to the press?

Mr. BELIN. I think I would have to advise Mr. Harding that we could perhaps see if Mr. May will release it, because he has given a statement which embodies some of the substance of it.

But I think unless he did, we probably would find a statutory difficulty with releasing that. We could ask him.

Mr. FENSTERWALD. Mr. Belin, I am not interested in what Mr. May may or may not want to make available but what the Treasury Department and the Internal Revenue Service will.

Would you cite the statutory authority which would prevent your giving that letter out?

Mr. BELIN. I would cite two statutes, Mr. Fensterwald. One would be the code, the Internal Revenue Code, section 6103, which I have here, which provides that:

It shall be unlawful for any officer or employee of the United States—

excuse me, 7213A1:

It shall be unlawful for any officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof set forth or disclosed in any income return or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law, and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income, return, or any part thereof or source of income, profits or losses or expenditures appearing in any income return—

and then it goes on to provide the penalties for that.

Mr. FENSTERWALD. I thought you said this was a letter from Mr. May, not a return?

Mr. BELIN. It is a letter which included the returns and which letter discloses a considerable amount of information about the taxes shown to be due in the returns, so that it has a number of particulars of the returns as I recall it in the letter itself.

Mr. FENSTERWALD. And this is more or less a confession of wrongdoing on Mr. May's part?

Mr. BELIN. Yes.

Mr. FENSTERWALD. And you think that he is covered under this section of the code which says specifically "returns."

Mr. BELIN. Returns or particulars thereof. You see, it refers to copy thereof or any book containing abstract or particulars thereof. I don't think it is confined to returns, sir.

Mr. FENSTERWALD. It is not a return and it is not a book. What else is it?

Mr. BELIN. It is a particular out of the return.

Mr. FENSTERWALD. Had he filed his returns at that time?

Mr. BELIN. Yes, he filed them with that letter as I recall.

Mr. HARDING. Either with the letter or very shortly thereafter.

Mr. FENSTERWALD. It makes a difference which, because, if he filed them thereafter, it certainly couldn't be construed as a part of a return which had not yet been filed.

Mr. HARDING. The letter contains information which is also contained in the returns which he did file for years on which he was delinquent at the time that he filed the letter and the returns.

Mr. FENSTERWALD. Let me just move briefly to another subject. Did you have correspondence with the State Department with respect to this problem?

Mr. HARDING. No correspondence to the best of my recollection.

Mr. FENSTERWALD. You informed them by phone?

Mr. HARDING. Yes, sir. We sent our security officer to the State Department to inform them as soon as the information became available to us.

Mr. FENSTERWALD. And could you just tell us briefly what the security officer told the people at the State Department?

Mr. HARDING. He told them that we had received the information from the district office, that an employee of the Department had filed

9 years' delinquent returns with that office, and that we were conducting an investigation.

Mr. FENSTERWALD. Was he discharged for that reason?

Mr. HARDING. I do not know the circumstances of his leaving. The public statement, as I understand it, was that he resigned for mutually acceptable reasons.

Mr. FENSTERWALD. Let me ask you, you said that you had an administrative file on Mr. May, and that you might make parts of it available to the press.

Could you be a little more specific and tell us which parts of that file could be made available to the press?

Mr. HARDING. We could certainly make Senator Williams' request for this information available to the press. Actually, there is not much of a file except the report from the district office to us which, as I say, contains this tax information and our reply to Senator Williams.

Mr. FENSTERWALD. Mr. Chairman, I would suggest that this subcommittee request that that file be turned over to us at this time.

Mr. BELIN. May I make a suggestion here, sir.

As you know, Mr. Chairman, section 6103 of the code provides which congressional committees can see everything in the tax files and which can't.

Apart from the revenue committees, the standing committees, and the Joint Revenue Committee, this relates to committees which have a resolution of the Congress authorizing them to do this, and I believe it is correct that your own subcommittee had such a resolution last year, and if you should get one now, I think we could make the disclosures without embarrassment.

Otherwise, we would be glad to review it and see what we can disclose.

Mr. FENSTERWALD. I am not quite sure I understand, Mr. Belin, what resolution this is.

Mr. BELIN. A resolution of the Congress authorizing you to investigate the tax return in certain categories.

You are familiar, I am sure, with section 6103. Once you do that, then you request an Executive order which we prepare and send over to the President with our recommendation, that he open those returns to your committee, and this is done frequently by Congress after Congress, for various committees who have these resolutions.

We have no objection at all, of course, under those circumstances. It just clarifies the problem.

Mr. FENSTERWALD. Mr. Belin, I have no interest at all in seeing the statute concerned and I don't think the subcommittee does. I don't think we would be within our jurisdiction to ask for it.

I thought this was an administrative file which did not contain the returns but other correspondence and memorandums and other things connected with the case.

I don't want to get into the problem of jurisdiction with other committees, but this information which I thought under the law should be made public is not, and I merely would suggest to the chairman that we look and see what is in the file.

Mr. HARDING. I have just quickly gone through the file. The only two pieces that I see that do not contain information which we feel

to be nondisclosable are the request from Senator Williams and our reply to Senator Williams.

The balance of the information which as I said represent reports from the district director to us do contain information obtained from the returns filed by Mr. May, and would therefore, under our interpretation of the statute, involve disclosure.

Mr. FENSTERWALD. Under Executive privilege you would not show them to this subcommittee?

Mr. BELIN. I don't think that is a question of Executive privilege. It is a question of complying with the statute in our view.

Mr. FENSTERWALD. Would you read the section of the statute again that you think would prohibit us from seeing this file?

Mr. BELIN. Section 7213 of the Internal Revenue Code, subsection A–1:

> It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law or to any person the amount or source of income, profits, losses, expenditures, or any particular thereof—

and so forth, the same one that I read before.

Mr. FENSTERWALD. And you think that any person includes a committee of Congress?

Mr. BELIN. Yes, sir. I think section 6103 makes it clear that except with respect to the committees named in 6103d and the committees which get resolutions thereunder, we are obliged to treat the other committees the same as other people.

Mr. FENSTERWALD. Mr. Chairman, I am not prepared at this time to push this question any further.

I am rather intrigued as to what is so fascinating in this particular case that it is being treated in such a formal and official manner.

I would suggest we take this under advisement and study it and if necessary we can get a resolution.

Senator LONG. Any further questions?

Mr. FENSTERWALD. I just want to make one comment, Mr. Belin, on the legislation itself.

I think you were here when we discussed the matter with Mr. Dixon. I just wondered if the exceptions which have been suggested with respect to investigatory files and also to trade secrets would obviate some of the difficulties which you found with the statute as——

Mr. BELIN. They would certainly obviate some of our difficulties, unquestionably.

For example, medical records we think is really a serious and genuine problem. I don't think that is covered in those two exceptions.

Our international information about exchange stabilization and this sort of thing, reports of attachés abroad, there are a lot of areas where we think exceptions are needed and we think the way to handle it is by discretionary method rather than spelling each one of them out in detail.

Mr. FENSTERWALD. Might I suggest that on the possibility that the bill will be passed without that discretionary provision in it, that you supply us whatever language you think would be necessary to protect the categories which you have mentioned.

We have had such suggestions from a number of other agencies and we would appreciate getting one from the Treasury Department.

Mr. BELIN. We will certainly be happy to cooperate with you, of course. I think it is a hard bill to work from in our view, but we will do our best.[1]

Mr. FENSTERWALD. Thank you.

Senator LONG. Mr. Belin, on this discretionary problem, that is where we have been running into great difficulties.

Mr. BELIN. I realize that, Mr. Chairman, as I have sat here and listened. I am sure that it has been a source of mistakes in the past and it will be in the future.

But I don't really see how you have any information policy that doesn't provide some area of it.

If you haven't the trust of your administrators—it is nice to call them bureaucrats but they are the people you have to administer these affairs as well as others.

Senator LONG. It is not a partisan matter. The situation has existed in other administrations in the past.

Mr. BELIN. That is right, sir, of course.

Senator LONG. Mr. Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman.

I think it might be helpful here, in view of the fact that the bulk of the reasons Mr. Belin has given on behalf of the Treasury Department is that the bill would make an unfortunate amount of material in the Treasury's files available for public inspection, to recall not only what has been testified to today, but also the comment of the Chief Counsel of the Internal Revenue Service at the hearings to which you have already referred in June of this year on S. 1466. When Mr. Hauser was discussing the information in the files of the Internal Revenue Service, he said:

> The information is in the files of the Internal Revenue Service and we are forbidden by law to disclose it unless it is otherwise a matter of public record.

I have some difficulty in reconciling this existing statutory prohibition about disclosure with Mr. Belin's statement that—

> We believe that one of the worst aspects of the bill is that it would invade the traditional rights of privacy of the private citizen and require the Government to disclose the citizen's affairs.

I think it might be helpful if the Department of the Treasury would submit a rather detailed analysis of the statutory provisions that apply to withholding.

Senator LONG. Would you furnish us that information, Mr. Belin?

Mr. BELIN. Certainly we will.

I would like to get a little more exactly what Mr. Kennedy has in mind. An analysis of the statutory prohibitions which now exist relating to our not being allowed to furnish information; is that what you want?

Mr. KENNEDY. That is correct.

Mr. BELIN. We can furnish that.[2]

Mr. KENNEDY. I think the matter should be clear because at one point it seems Mr. Hauser was saying, for example, with respect to the Internal Revenue Service, and he was speaking fairly generally when he said it, that—

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[1] The material referred to may be found in the appendix at p. 226.
[2] The material referred to may be found in the appendix at p. 227.

The information that is in the file of the Service it is forbidden by law to disclose.

Mr. BELIN. I think he was referring to the tax files of an individual applicant for admission to the Treasury practice but, of course, I haven't reread that transcript at that page and I don't know.

Mr. KENNEDY. That brings up the next point which I would like to raise, because it goes to exactly what he was referring to.

At that point I believe I put the question to him as to what was in these files. I asked:

Do you maintain a clipping service in the local district director's office?

Mr. Hauser said that he thought that the derogatory information which was maintained usually referred to taxes.

Then I asked him:

In other words, as members of the public we have no idea of what kind of information the Revenue Service is sticking into a file on about 180 million of us; is that correct?

Mr. Hauser said:

I think that is correct.

And then I asked Mr. Reilly:

What kind of information is "derogatory"?

Mr. Reilly answered:

Well, "derogatory" information could be anything that you would consider derogatory or I may consider derogatory. Sometimes I think they may feel some things are derogatory that are not derogatory, but, generally, they are substantially derogatory. There are a lot of things—failure to file a return. I think in this field that is particularly derogatory.

Mr. KENNEDY. I asked Mr. Hauser this morning if that "derogatory" is limited for the purpose for which you are issuing Treasury cards, to "derogatory" in the tax sense; is it or is it not limited to tax matters?

Mr. REILLY. It is not limited. It is the broad word "derogatory."

Mr. KENNEDY. Then you are correcting Mr. Hauser's testimony?

Mr. REILLY. That is correct.

Mr. KENNEDY. Suppose that a man runs off and leaves his wife and children and it makes the newspaper headlines; is that something you would clip out and put in the file in the district director's office?

Mr. REILLY. Are you asking me?

Mr. KENNEDY. Yes.

Mr. REILLY. I would think that would come to my office.

Mr. KENNEDY. Then you would consider that derogatory?

Mr. REILLY. It would—it all comes under these things that have to be evaluated, and the information, if it does come in, is evaluated.

Now as I understand it then, both Mr. Hauser and Mr. Reilly are talking about a file, a system of files in the district director's office which goes far beyond tax returns but takes in newspaper clippings or anything else that might come to the attention of Treasury, or any of its subdepartments or bureaus, and I think that we should go into that further because of your own statement this morning that—

official Government records relate to almost every aspect of our private affairs.

That is on page 3 of your statement.

There are official records of the Government disclosing what citizens have on deposit, what they borrow, when such borrowings are repayable.

I wonder if you would tell us whether these records the Treasury apparently maintains cover the specific information with respect to

each citizen, by name, of what he has on deposit, what he has borrowed, and when such borrowings are repayable.

On the next page of your statement you say—

The Bureau of Customs—

Which is a part of Treasury—

records disclose what we import, from whom we buy, what we pay.

Are you using the word "we" there in the sense of a class or in the sense of individuals, and do the Bureau of Customs records disclose what each individual imports, from whom he buys and what he pays for what he imports?

Mr. BELIN. Which question do you want me to answer, Mr. Kennedy? There are an awful lot. I will give it a try.

Mr. KENNEDY. I think we ought to know what types of files Treasury and its various bureaus keep about the people of the country, how detailed they are, in order that we can evaluate your comment that it would be terrible if there was a broader right to public inspection.[1]

Mr. BELIN. We can do that. It would be quite a job but it could be done.

But just referring specifically to the bank records, for instance, I don't imagine you have ever had access to an examination report made by a national bank examiner, but he goes into that bank as you know, or several of them do, and they stay for quite a long time and they investigate all the loan credit files to see whether a loan is good, whether the bank has been provident and wise in extending the thing in the first place, and in keeping up-to-date credit information, and a bank can ask just about anything they want from a person to evaluate a loan.

Then if it gets underwater they can ask even more.

The criticism part of that report, for example, contains specific detailed criticisms of the X–Y–Z loan and the A–B–C loan for all these reasons.

Now that is a very specific detailed document which I don't think any of you or any of us would want to have made public.

Mr. KENNEDY. Then I think you may be starting to answer the problem that I have.

It doesn't mean, as your statement reads, that these Government records would disclose what citizens, as individuals, have on deposit, or what citizens borrow.

You are just talking now about particular loans that the bank examiner is questioning, is that right? You don't come out with a listing in your Treasury file as to what my bank account is in my bank and what everyone's bank account is, for example.

Mr. BELIN. No, no, but there might be some occasion in the specific part of an examination to refer to particular aspects of the bank administration, and that is what I had reference to there.

Mr. KENNEDY. And to what degree is that material, just as one of a number of examples, protected from disclosure by statute?

Mr. BELIN. My impression is not at all except to the extent that it is covered by 18 U.S.C. 1905 which as you know is our general governmental criminal statute about disclosure of confidential information generally, and that one says:

[1] The material requested may be found in the appendix at p. 224.

Whoever being an officer or employee of the United States or any department or agency thereof publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by or return, report or record made to or filed with such department or agency or officer or employee thereof—

And then it goes on—

which information concerns or relates to the trade secrets, processes, operations, style of work or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided—

Now this is important—

except as provided by law—

Shall be fined not more than $1,000 or 1 year in prison.

Section 1906 actually also deals specifically with disclosure of information by a bank examiner.

One of our troubles is, we don't know the effect of S. 1666 on 18 U.S.C. 1905., because that has that important exception in it that you are not supposed to do this except as provided by law.

It is at least arguable that specifically what S. 1666 does is to provide by law that we have to disclose these things.

Mr. FENSTERWALD. Mr. Belin, under what statutory authority did you tell the State Department of Mr. May's tax delinquency?

Mr. BELIN. Actually there is no statute—well, I will put it a different way. There is a specific statute, Internal Revenue Code 6103 (f), which says that it is a matter of public record whether a person has filed his return in each year, and we have interpreted that to mean that upon inquiry or suitable occasion it is not forbidden to disclose whether or not a fellow has filed.

So that that specific thing, you see, is not covered by statute.

Mr. FENSTERWALD. That gives you permission to disclose it. Under what statutory authority or regulation did you take it upon yourself to inform the State Department of it?

Mr. BELIN (to Mr. Harding). Do you have any particular answer?

I think that was for the good order of the Government, perhaps. I don't know any specific statutory provision. Maybe Mr. Harding does.

Mr. HARDING. It is the relationship between the agencies in which we felt that they were entitled to this information.

It was not restricted by the statute. We gave it to them on that basis.

Mr. FENSTERWALD. And did you give them anything other than just the bare bones information that he was delinquent?

Mr. HARDING. That is all we gave them, sir, exactly the same information we gave Senator Williams and under the same authority.

Mr. FENSTERWALD. And may I ask if he had worked for the State of Virginia rather than the State Department would you have gratuitously made this information available?

Mr. HARDING. I can't answer that question specifically, sir. We do have under the statute authority to make agreements with States for the exchange of tax information, and it might very well be that

under agreement of that sort with the State of Virginia that we would have been in a position to make it available to them.

Mr. FENSTERWALD. Suppose he had worked for a private employer, say, United States Steel?

Mr. HARDING. I doubt very seriously that we would have gone to United States Steel to discuss this with them.

Mr. FENSTERWALD. Do you know how Senator Williams ran into this information in the first place?

Mr. HARDING. I do not, sir.

Mr. FENSTERWALD. Do you know, Mr. Belin?

Mr. BELIN. No, sir, I do not.

Mr. FENSTERWALD. If you found out who gave this information to him would you prosecute him under section 1905 of title 18, or would you ask the Justice Department to?

Mr. BELIN. It would depend on what information he furnished to Senator Williams, but if it was essentially the same information that Commissioner Caplin subsequently wrote to him on October 3, I don't suppose it was an unauthorized disclosure.

We might not like it, but I don't think it would be a violation of law.

Mr. FENSTERWALD. No further questions.

Senator LONG. Mr. Kennedy.

Mr. KENNEDY. I might return for a moment to this file of derogatory information that Mr. Hauser described which the Internal Revenue Service keeps and his statement:

> The information in the files of the Internal Revenue Service we are forbidden by law to disclose.

I gather that this is a construction at least of a specific statutory authority to the Treasury.

Mr. BELIN. Let me comment on that, Mr. Kennedy.

It is dangerous to comment on another man's testimony in any event, but my own belief is that certainly a lot of the kind of thing that they describe in there, such as newspaper clippings and other derogatory information, would not be the subject of any specific statutory prohibition.

I have never seen one of those particular files, and I don't know what they look like.

But I suspect that the statutory prohibition to which he was referring was the kind of thing to which we have been referring this morning, and not to cover all of this other variety of business.

Mr. KENNEDY. That is something that perhaps you can clear up in the information which you furnish to the subcommittee.

I have one other question regarding the information collected by Treasury.

You stated:

> The courts have recognized the need for keeping the informer's identity confidential.

Does that go to the situation of the Treasury relying upon this informer's information and taking action against the person?

Mr. BELIN. I think there are two different things here. We, of course, recognize that when an election is made and we recommend prosecution and Justice Department accepts the recommendation and then prosecution takes place, that there are various statutes including

the *Jencks* statute that require that when we decide to make—you know—when we decide to use a witness we have to make him and his statements available.

Before that, however, there is an earlier stage in the game at which we simply have information in the file from informers that may, let's say, give us a lead, and I suppose X might telephone in and say to Narcotics, "If you go down to the corner of Ninth and Main you may see something that will interest you," and if they did and they went down there and watched and they found somebody pushing dope over to somebody else, they might than have the grounds of a prosecution and I hope a snatch.

But the informer would be out of that picture as a question of proving the case, of course.

Mr. KENNEDY. Thank you, Mr. Chairman.

Senator LONG. Any other questions?

Thank you, Mr. Harding and Mr. Belin.

We appreciate your being here. You have been very helpful to the committee.

Mr. BELIN. Thank you, sir.

Senator LONG. Now we have another man, Mr. Norbert A. Schlei, Assistant Attorney General. Mr. Schlei, will you come around. I do appreciate your coming. The hour is growing late. I wonder if it is possible for you to summarize your statement, and the entire statement will be put in the record.

(Biographical sketches follow:)

NORBERT A. SCHLEI, ASSISTANT ATTORNEY GENERAL (LEGAL COUNSEL), U.S. DEPARTMENT OF JUSTICE

Born: Dayton, Ohio, June 14, 1929.

Education: Ohio State University, B.A., 1950; Yale, LL. B., magna cum laude, 1956.

Military service: Midshipman, U.S.N.R. 1946–50; ensign, U.S.N. 1950–52, on board U.S.S. *Albany* (CA–123) in Atlantic and Mediterranean Fleets; lieutenant (junior grade), U.S. Navy, 1952–53, aide to Rear Adm. E. H. von Heimburg, U.S. Navy, commander, Training Command, U.S. Atlantic Fleet. Released to inactive duty June 5, 1953; now lieutenant, U.S. Naval Reserve.

Experience: 1954, law clerk with Dinsmore, Shohl, Sawyer & Dinsmore, Cincinnati, Ohio; 1955, special duty with International Law Branch, Office of the Judge Advocate General of the Navy, Washington, D.C.; 1956–57, law clerk to Associate Justice John M. Harlan, Supreme Court of the United States; 1957–59, attorney-associate with O'Melveny & Myers, Los Angeles, Calif.; 1959–62, member of the firm of Greenberg, Shafton & Schlei, Los Angeles; 1961, George S. Leatherbee, lecturer, Harvard Graduate School of Business, Cambridge, Mass.; 1961–62, lecturer in law, University of Southern California, Los Angeles. In present position since August 6. 1962.

Memberships: Ohio bar, District of Columbia bar, State bar of California, American Bar Association, Los Angeles Bar Association, San Fernando Valley Bar Association, American Judicature Society, Urban League, Town Hall.

Publications: Associate author of McDougal & Associates, "Studies in World Public Order," Yale University Press, 1961; author of "State Regulation of Corporate Financial Practices: The California Experience," Harvard University, 1962, and articles in legal periodicals. Served as editor in chief, Yale Law Journal, 1955–56.

WEBSTER P. MAXSON

Born September 24, 1916, Rockford, Ill., the second of four sons of Harold S. and Bertha (Kapple) Maxson.

Attended the public schools in Longmeadow, Mass.

Graduated from Amherst College (1939) and the University of Cincinnati Law School (1949) and studied accounting at George Washington University (1950).
Served 5 years in the U.S. Army Air Forces (1940–45).
Admitted to the bar of the State of Ohio, 1949.
Trial attorney and presiding officer, Department of Agriculture, 1949–56, 1957.
Trial attorney, Federal Communications Commission, 1956.
Attorney Adviser, Office of Administrative Procedure, Office of Legal Counsel, Department of Justice, 1957–59.
Acting Director, Office of Administrative Procedure, 1959–60.
Staff, President's Committee on Ethics in Government, 1961.
Director, Office of Administrative Procedure, 1961– —.
Executive Secretary, Administrative Conference of the United States, 1961–62.

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. What I would like to do, Senator, is to submit my statement that I have this morning, and I will perhaps talk for a few minutes and do the best that I can to summarize.

Senator LONG. Your entire statement will be placed in the record, and you may summarize it as you care to.

Mr. SCHLEI. Very good indeed, sir.

I would like to make the point very strongly, Mr. Chairman, that the Attorney General and the Department of Justice and the administration have followed a consistent policy favoring maximum accessibility of records and information to the public and to the press. I want to appear here today in the posture of a partisan of freedom of information, and not in opposition to that concept, that idea as an approach to governmental affairs.

But I do think that the bill that is before the subcommittee now fails to consider and deal with some very serious problems that relate to the privacy of individual citizens and to the efficiency of carrying on the public business that I think will have to be resolved before it will be possible to have a workable bill in this field.

I think that the testimony that has been heard during the previous days of the hearings has tended to emphasize broad principles and generalities, and that to some extent the bill suffers from that defect.

What we need I believe is not a declaration in favor of the principle of public information, but a formulation that would put in more specific terms the areas where the principle of freedom of information really does not apply, and I think the areas I have in mind are areas where the principle does not apply in anyone's view.

I think that all the members of the subcommittee and probably every witness that has appeared would agree that there are large quantities of Government documents and records and files that should not be made currently available to the press and to the public.

As examples, I would give FBI files, investigative files, the medical and psychiatric records of inmates of the Federal prisons, and correspondence between the Department of Justice and other agencies of Government relating to pending or prospective litigation.

These are matters that should not be currently available to the public, and yet I think that under this bill as it now reads they would

be. I think that the categories of documents I have mentioned are required to be disclosed by the bill. It indicates that there are problems which are not adequately considered, and that should be considered if we are going to have useful legislation.

(The witness then briefly summarized the points made in his statement, the full text of which follows:)

The Attorney General, in part as a result of his experience as committee counsel here on Capitol Hill, has an intense and abiding interest in the matter of public access to official information. He is keenly aware of the necessity of an informed public under our democratic system. Moreover, he knows from personal experience what a key role the press plays in insuring good government. As he said in an address last year to the annual meeting of the Associated Press:

> An alert press can make a major difference not only in eliminating wasteful or corrupt practices in government, but in insuring that justice prevails.

The consistent policy of the Department of Justice and of the administration has been and will continue to be one of maximum accessibility of records and information to the public and the press. I therefore appear before you this morning, Mr. Chairman, as a partisan on behalf of greater freedom of information, and not as an opponent of that fundamental right. I greatly appreciate this opportunity to present the Department's views with respect to that part of the subject which is now under consideration by this subcommittee, that is, the matter of public information as it relates to administrative practice and procedure.

Especially during the past quarter century, the administrative process has become a remarkable phenomenon in Government. As you have noted on several occasions, Mr. Chairman, it is only in recent years that there has been anything approaching a full appreciation of the magnitude of this area of governmental activity. Because of the steady flow of Federal agency determinations affecting our natural resources, transportation, power, finance, communications, commerce, securities, taxation, labor, credit, advertising, housing, veterans' benefits, the supply, quality, and price of food and fibers, public health, immigration, social welfare programs, drug control, and countless other areas of activity, the administrative process, in one way or another, continuously exerts its influence upon every citizen in his personal and business affairs. As the magnitude and complexity of every area of economic and business activity increases, the impact of the regulatory process upon the national economy increases as well.

Of particular importance to the Department of Justice is the fact that this phenomenon has substantially changed the business of the Federal courts, and correspondingly of the Department, over the past 20 years. The volume of litigation involving judicial review of administrative action is now considerable. Thus, to the Attorney General and to the Department, as to us all, the matter of public information relating to the Federal administrative process is of major importance.

Section 3 of the Administrative Procedure Act, the section here sought to be revised, is a direct outgrowth of the work done 23 years ago by the Attorney General's Committee on Administrative Procedure. The 1939–40 Walter-Logan bill did not include a public in-

formation section. This subject, therefore, was not directly a part of the considerations which attended the passage and the veto of that bill. In its 1941 final report, the Attorney General's Committee unanimously concluded that an "important and far-reaching defect in the field of administrative law has been a simple lack of information concerning its substance and procedure." The Committee saw a primary need for legislation which would, first, define the kinds of official information which should be made available and, second, give the agencies the authority and duty to issue such information. The final report of the Committee listed for legislative consideration some seven forms of what the Committee characterized as "vital administrative information." The matter of the availability of such information has figured prominently in discussions and deliberations concerning administrative practice and procedure since that time.

In 1946, after 10 years of study of proposed legislation in the field of administrative procedure, the bill which was to become the Administrative Procedure Act was undergoing its final development in the 79th Congress. The discussions concerning section 3 at that time only slightly resemble this subcommittee's present consideration of section 3. Although both the Senate and House Judiciary Committees assembled and carefully evaluated the views of all affected agencies, as well as those of representatives of a large number of business, labor, agricultural, professional, and other organizations, apparently the comments received voiced little or no dissent from the public information provisions which were then proposed and are now contained in section 3.

According to the Senate committee report, section 3 was drawn on 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." Congressman Walter described the advantages of the section in terms of overcoming "the difficulty of finding one's way about in the maze of Federal agencies." The Senate committee report explained that subsection (a) "protects the public from being required to pursue remedies that are not generally known," and Congressman Walter noted that also it affords "access to the regulations and general interpretations in matters of substance which the agency has framed for the guidance of the public." The Senate committee report also explained that, in addition to the general publication requirements, section 3 gives to individuals access to particular records and information in the possession of agencies. As to this provision, it noted that "the interest of the person seeking access to the record will be determinative" in many cases. From the legislative history, it is evident that the present section 3, at the time of its enactment, was viewed principally as an essential aid to practitioners and other private individuals who might be involved in agency proceedings for rulemaking and adjudication or otherwise might have business with Federal administrative agencies.

In contrast, most of the testimony of the past 3 days before this subcommittee has treated S. 1666 in the broad context of "the people's right to know," and has concerned fundamental principles of freedom of information.

There can be no question that in a democracy, where ultimate power resides with the individual citizen, the need for an informed citizenry is imperative. Indeed, never in the history of this Nation

has there been a greater need for informed public judgments and the ready accessibility of information concerning public affairs to enable the American citizen to exercise his power wisely. Only if the concept of freedom of information remains unimpaired will our system continue to prosper.

Therefore, it seems to us not only appropriate but essential that the matter of the availability of information relating to administrative practice and procedure be considered, not merely as an aid to the individual in "finding his way about in the maze of Federal agencies," as it was considered 17 years ago, but rather in its rightful place as an important part of the basic problem of freedom of information. Any legislation which the subcommittee may develop in this area necessarily must accord with the principles asserted and recognized here during the past 3 days.

At the same time it must be abundantly clear to everyone who has participated in these hearings that the task which this subcommittee has undertaken is not merely one of giving congressional recognition to a fundamental principle. In its difficulty, as well as its importance, the present undertaking of this subcommittee is of the first magnitude.

The cold war and the steady expansion of the commitments of the United States in foreign affairs, the increasing scope and complexity of regulatory programs affecting commerce, industry, labor, transportation, communications, and finance, the fuller coverage and development of social welfare programs, and advances in science and technology—all have enhanced the citizen's need for information. At the same time, these developments of the postwar years have enormously broadened the range and volume of information in the possession of the Government which cannot be made freely available to the press and public without invading the privacy of individual members of the public or defeating the objectives for which the information was secured.

I am sure that all members of the subcommittee, and probably every witness that has appeared in these hearings, would agree that some documents and records maintained by the executive branch, whatever their availability to committees of the Congress, should not be made currently available to the press and public. Random examples of such documents are the investigative files of the Federal Bureau of Investigation, files relating to pending or prospective litigation, and medical and psychiatric information relating to inmates of the Federal prisons. The point I wish to make is that the task here involved is not merely the development of a resolution which will appropriately acknowledge the fundamental right of freedom of information. Rather, the present need is for the development of a specific legislative prescription which will implement that right in such a way as to make clear the areas where all would agree that it has no real application—where disclosure to the press and public of information or documents in the possession of the Government would be genuinely harmful to individual citizens or to the public interest.

Reviewed in this context, the present section 3 perhaps is not so sorely deficient in principle. Although it was not conceived in the broad framework in which it is here sought to be treated, it provides, simply, that official information shall be made available except as the public interest or other good cause compels withholding. There can

be little quarrel with this principle. Rather, the deficiencies noted are all instances of the misapplication of this principle. Thus, I respectfully submit, if the present section 3 is inadequate, the real need is for a workable formulation, not merely an elaboration of principle, to take its place.

It does seem to us unwise to attempt to resolve completely the whole problem of freedom of information, in the broad context of the testimony of the past 3 days, by amendment of the Administrative Procedure Act. As a practical matter, the situation in which an individual comes to an agency for particular information relating to a specific case of rulemaking or adjudication may be very different from the situation where Congress, in the performance of its constitutionally assigned functions, is investigating broad areas of governmental activity. To ask the subcommittee, in effect, to equate these two situations and to develop a single set of rules which will apply to both, and indeed to all other situations, seems to us to be asking the impossible. It is unlikely that there are any universal solutions in a matter as far reaching as the matter of freedom of information.

The real hope of achievement in the subcommittee's present undertaking, it seems to us, depends upon containing the effort within the framework of the Administrative Procedure Act and of seeking a formulation which will effectively resolve the difficulties of that part of the overall problem. To attempt to settle the entire matter of freedom of information by revision of section 3 of the act governing agency rulemaking and adjudication, in our opinion, is to accept defeat before we have started.

The job of devising a precise formula to supplant the general "public interest" provisions of section 3 is an extremely ambitious undertaking. Because of its importance and the almost infinite variety of situations, affected, this task will require comprehensive and painstaking study and highly perceptive judgments.

The Department of Justice has reexamined the subject within the immediate context of S. 1666. Our study points up at least 10 areas which must be fully explored before there can be any real confidence in whatever solutions may be developed.

First, coequal to the right of members of the public to information in the possession of their Government is their right to the protection of that information to the extent that its disclosure would unjustly injure them as individuals. In our society, the individual's right to privacy is as deserving of recognition as his "right to know."

Much of the information in agency files which is legitimately entitled to be held in confidence is purely personal in nature. For example, the considerable extension, over the years, of public health and welfare programs, including the social security program, has resulted in great volumes of private medical, family, and financial information and individual employment and salary records in agency files. The development of more advanced techniques of personnel administration, including thorough field investigations in connection with appointments, aptitude testing, medical examination, and efficiency rating, has increased the Government's information on employees, former employees, and job applicants. The U.S. Employment Service, since 1907, has acquired similar, although less extensive, information on a sizable number of applicants for private employment. Several of

the regulatory and licensing programs, by statute, require Federal agencies to make personal character and reliability evaluations, and thereby have resulted in extensive accumulation in agency files of character information on a great many individuals.

The fact that some 20-odd million Americans of our generation have served their country in the Armed Forces is no reason to make those years of the life of each one of them an open book by opening his or her individual "201" file to anyone, no matter how private or invidious his motives may be in seeking the information. In fact, no arguments have been offered in these hearings for the publication of any of this purely personal information in the hands of Federal agencies. Obviously, it should be made available to other agencies, to the public, and to the press, only in special circumstances and under carefully drawn safeguards which will assure against injustice to the individual involved.

S. 1666 would afford no protection to private personal information. The proposed section 3(b) would permit an agency, when it makes available opinions, orders, rules, statements, or interpretations, to "delete identifying details" to the extent necessary " to protect the public interest," providing justification for each deletion is stated in writing. With respect to this kind of information, of course, it is primarily private interests rather than the public interest which is involved. However, the protection sought to be afforded by this device is wholly illusory in any event since the next subsection of the bill would open to inspection, without such deletions, the agency files from which the document involved was drawn.

The range and volume of personal information in agency files, the countless channels by which it comes into the Government's possession, the extreme variety of needs for nondisclosure, and the infinite number of possibilities of injury to innocent individuals, indeed to any one of us, by its publication are beyond conjecture and certainly defy simple solution. Only a most thoroughgoing study of the extent of such information, its nature and location, and the legitimate needs for disclosure will provide satisfactory provisions to govern records containing private personal information.

A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions.

Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors. Again, S. 1666 would afford no protection. In fact, the proposals contained in the bill might have the unfortunate effect of diminishing the protection of such information already available

under other statutes. Since the proposed section 3(c) would require disclosure of all agency records except where they are "specifically exempt from disclosure by statute," that section might eliminate the protection now afforded by title 18 United States Code, section 1905 to confidential business data obtained by agencies in the course of their official duties, and the protection afforded to income tax returns by title 26, United States Code, section 7213. Those statutes prohibit disclosure "unless authorized by law" and "in any manner not provided by law." It might be argued that the duty to disclose under section 3(c) constitutes statutory authority permitting disclosure within the meaning of title 18, United States Code, section 1905 and title 26, United States Code, section 7213. At least, S. 1666 would create a statutory inconsistency in this respect which should be avoided.

Obviously, appropriate solutions in this area must take into account the views of persons whose business activities would suffer from the disclosure of their private business information. There can be little confidence in solutions founded solely upon the testimony of the agencies which collect such information and of representatives of the mass media. The persons legitimately entitled to protection are entitled to be heard. Again, a comprehensive survey of the extent of such information, the damage which may result from disclosure, and the matter of from whom it is entitled to protection is necessary before reliable solutions can be devised.

Third, the manner in which and the extent to which the disclosure of private information will impede or wholly obstruct the proper performance of necessary governmental functions must be carefully inventoried and evaluated. Government recruitment might suffer greatly once prospective employees, particularly young people just beginning their careers, realize that, in the case of this employer, the Government, there are to be none of the usual confidences between employer and employee and that the evaluation of the individual's early performance by his bureaucratic superiors, whether fair or unfair, accurate or inaccurate, shall always be a matter of official record, available for all to see.

Voluntary reporting programs in the Departments of Commerce, Agriculture, and Labor, wherein cooperating reporters furnish detailed private information to be submerged in statistics and published only with that protection, will suddenly terminate, to be resumed only after the statutes have been revised so that they "specifically exempt," in the words of the bill, the private information involved from disclosure. Where the reporting is mandatory, businessmen confronted with the risks of making this information available to their competitors might be tempted to find a moral justification for misrepresenting it. The value to the public of Government lending and loan insurance programs as well as licensing programs, which involve the submission of private credit information, may be diminished considerably and the governmental purposes achieved by such programs may suffer correspondingly.

This is not merely a matter of weighing the possibility of greater efficiency in the performance of necessary governmental functions against the possiblity of increased agency responsiveness to public sentiment. Here the fundamental right of privacy is involved. The

Government must have power to receive and hold private information in confidence. Because of the breadth of the problem, the task of devising appropriate limitations upon disclosure will require careful and comprehensive study.

Fourth, of particular concern to the Justice Department is the potential effect of the bill upon law enforcement activities. The citizen's right to effective law enforcement is no less fundamental than "the people's right to know." In order to enforce the laws effectively, agencies must be empowered to receive, freely, information which may lead to the detection of violations. They must have the means to investigate such information without publicity. I think that Mr. Belin made clear several areas, that would also be of interest to us, which are not protected from mandatory disclosure by the present bill. In the interests of fairness to innocent persons, orders to show cause should not be issued on mere suspicion. Once cause has appeared, agencies must have power to plan and execute whatever remedial action may be necessary. If their plans and intelligence, communications, and advice are to be available to anyone who seeks to escape enforcement, the agencies' responsibilities in this area could suffer greatly. Again, the bill is almost wholly deficient. In this area, only internal memorandums relating to cases of administrative adjudication appear to be protected. As to all other law enforcement information in the hands of Federal agencies, only that which is specifically exempt from disclosure by statute could be withheld.

Fifth, is the related problem of the integrity of investigative files. The necessity and responsibility for investigations is broadly distributed throughout the Federal establishment. Just as Congress must have the power to inform itself in the execution of its functions, so the agencies have a duty to avoid official action based on inadequate information. The citizen's right to intelligently informed governmental administration, as a practical matter, is no less important to him than his fundamental right of privacy or his right to effective law enforcement. If persons interviewed by investigators are to have no assurance that what they divulge in confidence will not be published, the free flow of necessary information to Federal agencies from complainants, informants, and witnesses surely will be seriously jeopardized. In the extreme case, the life of the informer or of members of his family may be at stake. FBI files are at present protected by an opinion of Attorney General Jackson, which appears at 40 Op. A.G. 45. Although it has been pointed out many times that investigative files contain much uncorroborated and unevaluated information, some of which is no more than malicious gossip, the bill would open all such files to the press and to the public. Not only would this cause needless injustice to innocent citizens, but also it would open the door to persecution by publicity, and surely would seriously impede the conduct of necessary investigations. This also was covered by Mr. Belin.

Sixth, investigative techniques with respect to many Federal programs must be kept secret if the programs are to continue. To make available to all violators an agency's instructions to its investigators as to the means to be employed to detect violations is to render the investigation function useless in such programs. The bill would permit withholding of internal agency instructions to its staff only to the ex-

tent that they relate "solely to the internal employment rules and practices of any agency."

Senator LONG. Those techniques that would include wiretapping, the question that I asked Mr. Belin a while ago? Is that one of the techniques used in investigation?

Mr. SCHLEI. I have no direct connection with any investigative activity of that kind, Mr. Chairman. I do know at various times in the past the Attorneys General have indicated and Mr. Hoover has indicated, that there has been use of wiretaps.

The statute as you may know, prohibits not just the interception but interception and disclosure of messages on telephone lines, and I assume that the interpretation is that law enforcement agencies, so long as they do not publicly disclose the information, are not violating the Federal Communications Act if they do that.

Senator LONG. The information that they get from those sources, whether legal or illegal, would that be in the files of your agency which would be open to the public?

Mr. SCHLEI. I am quite sure that all of the investigative files of the department are among the files which we think should not be open currently to the press and public, although perhaps it would do no harm many years later. Even so, it might disclose investigative techniques, how the agents operate, what procedures they followed.

I really had reference here in this paragraph to instructions to agency personnel as to how to operate, techniques to use, which as we understand it would be made open to the public and perhaps even publishable in the Federal Register under the requirements of this bill.

Seventh, all litigation files in all Federal agencies must be afforded an appropriate degree of protection, and the determination of that which is appropriate will require careful consideration. Under title 28, United States Code, section 507(b), the Attorney General has responsibility for all litigation to which the United States or any agency thereof is a party. The bill would provide no protection for communications between Federal agencies except as they might be specifically protected by statute, or required to be kept secret for the protection of the national defense. This deficiency, together with the limitation of protection of internal memorandums to those relating to rulemaking and administrative adjudication, might have the intolerable effect of opening to public scrutiny the Justice Department's and all other agencies' files on proposed and pending litigation. Here, again, a workable solution will require very careful study to distinguish that which the public is entitled to know from that which cannot be disclosed without making it impossible to conduct litigation efficiently on behalf of the public.

Eighth is the all-embracing problem of the confidentiality of internal opinions and advice. The third exception provided in section 3(c) of the bill would protect some internal staff memorandums from disclosure, but only those relating to rulemaking and adjudicatory proceedings. There appears to be no reason for this limitation. The rationale which requires internal advice within the executive branch to be kept confidential applies to every function and activity, and not merely those relating to cases of adjudication and rulemaking. Clearly, the internal working papers of an agency, whatever its func-

tion, must be free from disclosure. This is not because there is anything furtive about staff operations. Rather, it is because of the restraint upon efficient staff operation and the serious inhibition of agency members and staff which surely would result from making every internal memorandum on any matter publicly available. If an internal report, proposal, analysis, or recommendation is to be worth reading, it must be a free expression and not confined to matters "cleared for publication." This is as true in Government as it is in any other organization.

Here the balance between the legitimate needs for governmental secrecy and the basic principle of freedom of public information is most critical. Nowhere might an ill-considered solution do more widespread damage. Nothing could be of greater benefit to the administrative process than an appropriate solution. This matter merits most careful consideration.

Ninth, a number of different kinds of governmental actions depend entirely for their effectiveness upon the absence of advance notice. Principally, these are matters which substantially affect securities and commodity markets, lending restrictions, interest rates, support purchases, et cetera. The bill, by ignoring the need for secrecy in such matters, would preclude the planning and preparation of these necessary governmental actions.

Tenth, our ever-increasing commitments in world affairs have greatly enhanced the legitimate need for executive secrecy in diplomatic affairs. S. 1666 contains no provision which would afford any degree of protection in this area.

I would like to reemphasize that I am not here to oppose the objectives of this bill. The Department of Justice yields to none in its dedication to the ideal of freedom of information and would like to see the affairs of Government open to public inspection to the maximum extent possible consistent with the public interest.

My comments have only suggested in random fashion the substantial damage which enactment of the proposals embodied in S. 1666 would cause to individual American citizens, as well as to the proper conduct of the public's business, unless the bill is substantially altered. In its present form the bill fails to recognize and deal with important problems which, I am confident, all would agree must be studied and resolved before legislation in this area is possible. In all of the matters which I have suggested as matters which will require careful study, the private citizen has a much more important and more fundamental right to reasoned and careful solutions than has been suggested by the testimony of the past 3 days.

I respectfully submit, Mr. Chairman, that the subcommittee can formulate, and report with confidence, appropriate solutions in this most important and most difficult area only upon the most intensive and thoroughgoing reexamination of the entire subject. Perhaps an administrative conference, such as that proposed to the Senate yesterday by the Committee on the Judiciary, might effectively consider the questions involved in this area. The matters which I have suggested represent only a part of the problem confronting the subcommittee's effort. The Department of Justice, of course, stands ready to participate in any way which the subcommittee may find helpful in its efforts.

26-023—64——14

Senator LONG. Thank you, General, very much. I think the statement on page 23 is ideal in this work, that all of us are interested in; that is, we would like to see the affairs of government open to public inspection to the maximum extent possible consistent with the public interest. I think that is the desire and ideal of all of us.

I don't believe you introduced your colleague to us a moment ago.

Mr. SCHLEI. I am sorry, Mr. Chairman. This is Mr. Webster Maxson, who is the head of the Office of Administrative Procedure, which is an office within the Office of Legal Counsel of which I am head.

Senator LONG. We are happy to have you here, too. Do you have comment that you would care to make?

Mr. MAXSON. There are two points I would like to make, not by way of offering an opinion, sir, but as a craftsman in this area.

First of all, and I think the point appears at the bottom of page 9, I think we are licked before we start if we try to formulate a prescription here which is going to cover the entire field involved in this fundamental right of freedom of information.

I think, in order to deal effectively with the problem, we have to contain it within the framework of the business before us, actually, the matter of public information as it relates to the administrative process. I think we have far greater hope of success if we try to achieve solutions in this area, and not try to solve the whole matter for all time.

Second, and a more technical point, the present form in which S. 1666 is proposed has one serious defect that ought to be kept in mind in considering the suggestions that have been made as to revised language.

Although protection is sought to be afforded in section 3(a) and section 3(b) with respect to some kinds of information, section 3(c), by not containing the same exceptions, opens to the public the record from which the documents referred to in 3(a) and 3(b) were drawn. We have to note that deficiency generally in trying to draft other language. Thank you, Senator.

Senator LONG. Thank you. Mr. Fensterwald, any questions?

Mr. FENSTERWALD. I will just ask one question, Mr. Chairman. I would like to thank Mr. Schlei for a very helpful statement. He has made a number of suggestions. Some suggestions we have heard from others, and some are new.

My question is whether you think that the present section 3(c) has, in practice, worked as an act of disclosure or as an act of withholding, and whether it needs any amending.

Mr. SCHLEI. I think that it has acted, the present section 3(c), as an act of disclosure. I think that it has been misused from time to time.

This committee has heard of a great many examples of misuse, of wrongdoing in the field of withholding of Government information. I think the section does contain reference to the important policies that should be served, and guides the Administrator to the things that he should be focusing his discretion upon.

Frankly, the mind reels at the infinite variety of situations with which this bill would deal, and it is terribly hard to imagine how language can be formulated that would cover all this vast amount of ground in the vastly differing situations that are going to come up, even such a thing as the distinction between a request for information from Congress and a request for information from the public.

I think that that is an important distinction that some thought has to be given to. For example, there are records with respect to Federal prisoners that we would never deny a committee of Congress that is interested in the subject matter, and on the other hand it would be catastrophic to the rehabilitation of these people if it were there to be picked over by gossip columnists or by people trying to get at them or their families or to do various other undesirable things.

There are just an infinite number of distinctions that have to be made throughout this area, and I am inclined to agree with Mr. Maxson's suggestion that one way to start licking the problem is to confine it to the administrative area, not try to knock off the whole problem at once of people's right to know in Government.

Mr. FENSTERWALD. If it were up to you, would you leave section 3(c) exactly as it is today, or would you provide any suggested amendments?

Mr. SCHLEI. As things stand, I do not know of any amendment that I could recommend, Mr. Fensterwald, that I could know would work properly throughout the areas in the Government it would affect.

Mr. FENSTERWALD. Are you for or against adding a judicial remedy such as we do in S. 1666?

Mr. SCHLEI. I am against the one that is proposed in the bill.

Mr. FENSTERWALD. Are you for any court remedy for someone who thinks that information has been wrongfully withheld?

Mr. SCHLEI. It presents a great many difficult problems. I have not been able to give it as thorough thought as I would like. Obviously there is a problem when the person seeking the information is totally dependent upon the discretion of the administrator.

Mr. FENSTERWALD. Isn't that the situation today?

Mr. SCHLEI. No, it isn't quite. There are curbs on the discretion of administrators, and one of them is provided, of course, by the Congress. Abuses of discretion by administrators get them a good deal of attention up here, and I think that that attention is usually quite effective in correcting policies, errors of that kind.

I think that this administration has accomplished a great deal in terms of aiming policy toward full disclosure. In the Department of Justice that is certainly true. Our entire effort has been toward opening more doors, making more information available than has been available in the past.

The efforts of this committee to bring these problems to the attention of everybody in the public and in the Government are helpful and produce pressures toward the making available of more information. I think that this committee has done a very constructive thing in that regard. But whether it should be possible for someone who has no interest personally in the information, in the matter, to be able to bring the agency into court and bring a third branch of the Government into the consideration of the matter, that is a difficult problem. It seems to me to raise a lot of difficulties.

Mr. FENSTERWALD. Thank you, Mr. Schlei. I would just like to comment it seems to me that the situation that you describe, where the only pressure that the newsman can bring is to go to the Moss committee or to the Long committee to force the disclosure of information, is certainly not a very useful system under our democratic scheme of government. I know there is a difference of opinion on this. Thank you, Mr. Chairman.

Senator LONG. Mr. Kennedy.

Mr. KENNEDY. No questions.

Senator LONG. Mr. Schlei, I thank you and your associate very much for appearing. We are sorry to have kept you so long.

Mr. SCHLEI. That is quite all right, sir.

Senator LONG. We do appreciate your coming, and your statement has been very helpful to us.

Mr. SCHLEI. Thank you, Mr. Chairman.

Senator LONG. We have one more witness, Mr. Edward Enos. Mr. Enos, will you give your name to the reporter.

STATEMENT OF EDWARD ENOS

Mr. ENOS. I have a short statement, Mr. Chairman.

Senator LONG. Would you please give your address?

Mr. ENOS. 2126 R Street NW.

Senator LONG. Mr. Enos, I would like to suggest, as I did to the Attorney General before you, that our time is very short. The Senate is in session and I am anxious to get to the floor.

Would you put your entire statement in the record if you could, and summarize it briefly for us, and it will be very helpful.

Mr. ENOS. Mr. Chairman, it is just a short statement. It will take about 5 minutes to read.

Senator LONG. It won't take over 5 minutes? We will be glad to hear you.

Mr. ENOS. Mr. Chairman, my name is Edward Enos, and I am appearing in my capacity as a citizen. I want to thank the committee for giving me the opportunity to testify in support of S. 1666 and to offer some information to aid the committee in its work.

The emphasis in the past 3 days of the hearings has been placed on the practice of administrative agencies of using section 3(c) of the Administrative Procedure Act as an excuse for withholding information from the public.

While this is important, I believe that what is much more important and fundamental is that a large number of agencies are violating the law by not currently publishing in the Federal Register the organizational, procedural, and substantive rules.

As far back as 1955 the Second Hoover Commission, in its task force report on legal services and procedure, made extensive comment on the agencies failure to comply with this section of the law, and I would like to place in the record his discussion which is contained in pages 144 through 150 of the report.

Senator LONG. Without objection that will be placed in the record.

(The document referred to follows:)

B. PUBLIC INFORMATION

The development of adequate procedures for keeping the public informed of agency rules, decisions, and other actions has been a problem of continuing importance in administrative law for many years. The enactment in 1935 of the Federal Register Act, 44 U.S.C. §§ 301–314 (1952), provided the means for publication of agency rules. Yet, in 1941, the Attorney General's Committee on Administrative Procedure stated, Senate Document 8, 77th Congress, 1st session 25 (1941):

"An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure * * *. Laymen and lawyers alike, accustomed to the traditional processes of legislation and adjudication, are baffled by a lack of published information to which they can turn when confronted with an administrative problem."

Congress attempted to meet this problem through the provisions of Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1952). The Senate Judiciary Committee said concerning this section, Senate Document 248, 79th Congress, 2d session 198 (1946) :

"The public information requirements * * * are in many ways among the most important, far-reaching, and useful provisions of the bill. For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it. [*Section 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 to have the ready means of knowing with definiteness and assurance.*" [Emphasis supplied.]

Except to the extent that there are involved functions of the United States requiring secrecy in the public interest, and matters relating solely to internal agency management, every agency is required to publish in the Federal Register a description of its organization, places of doing business with the public, methods of rulemaking and adjudication, including the rules of practice relating thereto, and substantive rules, statements of policy, and interpretations formulated for the guidance of the public. Opniions, orders, and matters of official record must be published or made available to public inspection, except where the agency determines that confidential treatment is required for good cause.

The task force has studied the operation of these provisions in the light of the policies Congress sought to achieve through enactment of section 3. The comparative study made by the task force is summarized in chart III–F, part VI. The following discussion of specific problems in the area of public information points out certain respects in which congressional policy may be better effectuated through statutory and administrative changes.

RECOMMENDATION NO. 27

Adequate, brief, and readable descriptions of organization, statements of the general course and method of operation, instructions, and descriptions of forms and other legal documents should be published in the Federal Register, except as to matters requiring secrecy in the public interest or relating solely to internal agency management.

The Problem

Section 3(a) of the Administrative Procedure Act, 5 U.S.C., § 1002(a) (1952) provides:

"Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; * * *."

Agency compliance with these requirements for publication in the Federal Register of the general course and method by which their functions are exercised has, in general, been good. In some other respects, however, publication of information could be considerably improved.

Prior to 1948, descriptions of agency organization were published in the Federal Register. Since that date, however, these descriptions have been published as "a special edition of the Federal Register designated 'United States Government Organization Manual'," 1 Code Fed. Regs. § 3.1 (1949). Use of this Manual, rather than publication in the Federal Register and the Code of Federal Regulations, was apparently prompted by budgetary considerations.

The Manual appears only once a year, and the information it contains is, therefore, not current. The July 1, 1954, edition, for example, contains only a skeletal description of the organization of the Foreign Claims Settlement Com-

mission of the United States. This new agency exercises certain functions of the former War Claims Commission, the former International Claims Commission of the United States, and the Department of State. A year will elapse before a complete statement of the organization of this agency will be available in the Manual.

Descriptions of organization in the Manual are sometimes inadequate. A digest form is used which is suitable only for general reference purposes and does not meet all needs for information regarding agency organization. For example, the eight-page section on the Interstate Commerce Commission in the present edition of the Manual (pp. 417–425) fails to detail explicitly the authority and powers of the agency and the exercise of such powers by named agency officials, with appropriate statutory citations. The discription also contains references to the annual report of the Commission which require the reader to resort to materials outside the Manual for full information.

The Administrative Procedure Act requires that agencies publish the "nature and requirements of * * * forms and instructions as to the scope and contents of all papers, reports, or examinations" required by the issuing agency. Publication of this kind usually consists of a general description of the form or report required, its title and number, and the place where it can be obtained. Some of these documents contain matters of considerable public interest warranting full publication.

The act does not contain a general clause to require publication of other regulatory documents of general applicability and legal effect. This, in effect, has been required by the Administrative Committee of the Federal Register in 1 Code Fed. Regs. § 1.10 (1949), which defines a "[d]ocument subject to codification" in the Code of Federal Regulations as

"* * * any regulatory document which has general applicability and legal effect and which is in force and effect and relied upon by the issuing agency as authority for, or invoked or used in the discharge of, any of its functions or activities."

The Federal Register and Code of Federal Regulations do not contain all the rules Congress has declared they should contain. Agency compliance with section 3 of the Administrative Procedure Act has not been uniform. Agencies generally publish all rules of practice and procedure, but many do not carry out their statutory duties with respect to current organizational statements and statements of general policy or interpretations formulated by the guidance of the public.

Conclusions

The failure of the Administrative Procedure Act to require publication of all rules in the daily issues of the Federal Register has resulted in inadequate public information with regard to descriptions of agency organization and delegations of agency authority. The daily Register and the Code, rather than the United States Government Organization Manual and agency publications which are not given general distribution, should be the principal public sources of such information, and the task force recommendations that publication in the daily issues of the Register be required by statute.

A complete description of organization should be included in the daily issues of the Federal Register and in the Code of Federal Regulations. Publication in the Code will place in one compilation most of the information required by persons to enable them to do business with each agency. The Manual should be continued only as a general reference work. One of the major functions of an Office of Legal Services and Procedure would be to supervise the form and content of these publications.

The Administrative Committee of the Federal Register has recognized the importance of agency forms, reports, and instructions by a special provision which amplifies the present statutory language of the Administrative Procedure Act, 1 Code Fed. Reg. § 1.82 (1949). This regulation should be enacted into law so as to require publication of all instructions, and a general description of all forms, applications, registrations, reports, contracts, examinations, or other required papers or statements used by the agency in the exercise of its functions.

The task force further recommends the inclusion of a special clause in section 3 to cover other regulatory documents of general applicability and legal effect relied upon by an agency as authority for, or invoked or used in the discharge of, any of its processes, functions, or activities. This would enact into law another rule of the Administrative Committee of the Federal Register, 1 Code Fed. Regs. § 1.10 (1949).

NOTE.—See pt. V, sec. 200(a), Administrative Code.

RECOMMENDATION NO. 28

All substantive rules, statements of policy, and interpretations of general applicability should be published in the Federal Register, except as to matters requiring secrecy in the public interest or relating solely to internal agency management.

The Problem

Section 3(a) of the Administrative Procedure Act, 5 U.S.C. section 1002(a) (1952), further requires agencies to publish in the Federal Register

"* * * substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public * * *."

The purpose of this provision was to forbid the formulation of rules unavailable to, but binding upon or applicable to, the public.

The task force finds that a large number of rules, statements of general policy, and interpretations have not been published or made publicly available. Most agencies have some unpublished rules, and many have rules that are not even available for public inspection.

Substantitive agency rules are often kept confidential by the agencies under two general theories. The first is that these rules relate only to matters of the internal management of the agency; the second, that they are intended for the guidance of agency personnel or State officials and not for "the guidance of the public." Agencies rarely keep rules confidential on the ground that secrecy is required in the public interest, see chart III–F, part VI.

The "Internal Management" Exemption

Inadequate statutory guides have been furnished for determining what constitutes a matter relating solely to "internal management of an agency." No clear definition of this expression is found in the legislative history of the Administrative Procedure Act. The task force considers as generally accurate the statement that, "[i]f a matter is solely the concern of the agency proper, and therefore does not affect the members of the public to any extent, there is no requirement for publication under section 3." Attorney General's Manual on the Administrative Procedure Act 18 (1947). The best agency practice confines the scope of this exception to such matters as budgetary rules, security regulations, approval of official travel, the advance of funds for travel, and the issuance and account of transportation requests, certification of the accuracy of long-distance telephone calls, verification of statements of account rendered by the Treasury Department, order and approval of overtime, and the administration of oaths.

The "Public Guidance" Exemption

The requirement that rules formulated and adopted for "the guidance of the public" must be published in the Federal Register was intended to except only those rules which do not affect the public; that is, rules relating solely to internal management. Under the public guidance exemption, some agencies have contended that rules, statements, and interpretations intended for the guidance of agency personnel and not for the guidance of the public are not subject to publication. When such rules are generally used by agency personnel in the determination of private rights, however, the task force believes that publication should be required.

Nonpublic Agency Rules

Nonpublic rules, interpretations, and statements of policy are generally available to agency personnel in one of three forms, (1) manuals and handbooks, (2) bulletins and field letters, and (3) legal opinions and interpretations.

(1) Manuals and Handbooks: The task force study has disclosed the existence of numerous manuals and handbooks containing rules which are withheld from general dissemination by the agencies concerned under the internal management and public guidance exemptions, see chart III–F, part VI.

The Claims Manual of the Bureau of Old-Age and Survivors Insurance, Department of Health, Education, and Welfare, contains hundreds of interpretative regulations not published in the Federal Register. As shown on table A at page 151, the Claims Manual defines and applies statutory language. The publication establishes a comprehensive set of interpretative regulations which govern the settlement of more than 2 million claims a year. It is available only to Bureau employees engaged in the adjudication of claims, and is not published or otherwise made available to the public.

The Operations Instructions of the Immigration and Naturalization Service are confidential communications from the Commissioner to all employees. The Instructions are kept in manual form. Like the Claims Manual of the Bureau of Old-Age and Survivors Insurance, the Operations Instructions contain many interpretative regulations of general applicability, defining and applying statutory language, and statements as to when the agency will seek the imposition of fines under certain criminal statutes within its jurisdiction, see table B at page 152.

The vast amount of detailed procedure that has been created to administer the various statutes within the jurisdiction of the Veterans' Administration has presented that agency with a problem probably not encountered elsewhere in the executive branch. One hundred and forty-five manuals setting forth its operations have been prepared. The great majority of regulations contained in these manuals relate to matters of no public interest. In general, the purpose of the manuals is to state the duties of administrative officials and employees and to describe organization and the flow of work. A small percentage of these rules, however, are interpretative guides to be followed by agency personnel in determining eligibility to benefits, which should be published under the Administrative Procedure Act.

(2) Bulletins and Field Letters: In recommending the enactment of the Administrative Procedure Act, the House Judiciary Committee stated, Senate Document 248, 79th Congress, 2d session 256 (1946):

"* * * Mimeographed releases of many kinds now common should no longer be necessary since, if they contain really informative matter, they must be published as rules, policies, or interpretations * * *."

This expectation has not been completely fulfilled. Several agencies have reported to the task force the use of various types of bulletins, field letters, interoffice directives, and circulars. While such publications may help to promote employees' knowledge of agency organization and procedure, they are costly and should be discontinued unless their worth is clearly established. Moreover, these bulletins and field letters often contain rules of general applicability and legal effect used by employees in the performance of their duties, without disclosure to the public.

(3) Legal Opinions and Interpretations: Some 22 agencies maintain compilations or files of legal opinions and interpretations which do not involve the adjudication of cases. In most cases opinions of this nature are not published. Several agencies, however, have taken measures to insure that opinions of general applicability which are not held confidential for good cause are at least made available for public inspection.

The Veterans' Administration, for example, has divided its General Counsel opinions into two classes, those of general applicability and those of particular applicability. The former group is made available to the public. In the Department of Agriculture nonconfidential opinions and memoranda of the Solicitor are available for inspection in the Department's library. In other agencies opinions or interpretations of this kind are not available to the public, see chart III–F, part VI.

Conclusions

Substantive rules, statements of policy, and interpretations are issued by agencies in many forms. Whether contained in manuals, handbooks, digests, indexes, legal opinions and interpretations, bulletins, field letters, circulars, or instructions, they should conform to the publicity requirements of section 3 of the Administrative Procedure Act if they are used by agency employees in the performance of duties which affect members of the public.

It has been said that confidential treatment of many rules is permitted by the interpretation of section 3 that they are intended for the guidance of agency officials and employees and are not for the guidance of the public. To correct this, the task force recommends that the section be amended to require the publication of substantive rules and statements of policy or interpretations formulated, adopted, or used by an agency, and that the phrase "formulated and adopted by the agency for the guidance of the public" be repealed.

The task force believes that many rules now kept confidential, on the theory that they relate solely to internal agency management, should be published in the Federal Register or be made publicly available in accordance with alternative procedures to be prescribed by the Office of Legal Services and Procedure. That Office could perform a valuable function by surveying the multitude of

NOTE.—See pt. V, secs. 200(a) and 301, Administrative Code.

manuals, handbooks, and other materials to establish detailed and uniform criteria governing the determination of what rules may be left unpublished under this exemption.

Mr. ENOS. This report reveals that agencies have not published their procedural and organizational rules in the Federal Register since 1948. Instead of using the Federal Register and the Code of Federal Regulations to publish descriptions of agency organizations, they have been using the Government Organizational Manual. Since this manual is published only once each year, it does not meet the requirement of law that information be currently published.

As a concrete example of how a citizen can be adversely affected by the agency failure to comply with the law, I would like to place in the record some information from my own personal experience. I was adversely affected by the failure of the Civil Service Commission to currently publish its organizational, procedural, and substantive rules in the Federal Register, and the Code of Federal Regulations.

The information contained on pages 39 through 42 of the brief I presented in the case, No. 17259 in the U.S. Court of Appeals for the District of Columbia Circuit, may I place that in the record?

Senator LONG. Without objection it is so ordered.

(The document referred to follows:)

VI. *Appellant's rights were prejudiced because the Civil Service Commission's legislative and judicial functions are not properly organized, to insure fair Administrative Procedure.*

1(a) The purpose of the Administrative Procedure Act of 1946 was to achieve uniformity in the administrative machinery of the federal government and to insure fairness in administrative procedure by requiring agencies to disclose their organizational setup and procedures. Section 3a of the Act (SRA 6) requires every agency to separately state and currently publish in the Federal Register (1) "Descriptions of its Central and Field Organization, including delegations of final authority."

The RIF notice appellant received stated that an appeal should be sent to the "Fourth Civil Service Regional Office." He tried to get a more specific address from the American Embassy in Paris, France. Two days later he received the address indicated in the letter of May 4th. (J.A. 9.) He was also told that there was no "Fourth Civil Service Region."

(b) Later appellant found that the last time the Commission published information on its organization, was November 5, 1947, 12 FR 7156. No reference is made there to an Appeals Examining Office.

(c) The Attorney General's Manual, on the Act commenting on Section 3a, states at page 21:

"Attention is called to the last sentence of the section, stating, 'No Person shall in any manner be required to resort to organization or procedure not so published' * * *. Should an agency fail to publish a listing of its field offices with their functions, persons who have not received actual notice of such agency organization may contend that they are not bound to resort to a field office prior to institution of their case in the central office."

See also, Pinkus vs. Rielly, 157 F. Sup. 543, and Low vs. Thomas, 163 F. Sup. 945.

2 (a) Section 3a requires also, that an Agency publish in the Federal Register "substantive rules adopted as authorized by law." The Commission publishes many substantive rules in the Federal Personnel Manual (which runs from A thru Z). Only the material in Chapter Z, however, is published in the Federal Register.

(b) Mr. Lawrence Meloy, the Commission's General Counsel, and Mr. Philip Young, then Chairman of the Civil Service Commission, testified before the House Subcommittee on Government Information on November 8, 1955. Their testimony appears on page 94, as follows:

Mr. FASCELL. Does an operating instruction have the full force and effect of a rule of the Commission?

"Mr. MELOY. Yes.

"Mr. FASCELL. Do you have a compilation of the operating instructions?

"Mr. MELOY. Oh, yes.

"Mr. YOUNG. That is what is in this book [indicating].

"Mr. MELOY. The Federal Personnel Manual.

(c) The Classification Act of 1949 under Section 501b gives an employee the right to file a classification appeal with the Commission. Although the Act has been in effect since 1949, the Commission published regulations to implement this section only on April 23, 1960, 25 FR 3543. Mr. Irons, the Executive Director in Transmittal Sheet No. 663, states:

"The new regulations largely represent established practices and procedures not set down in regulatory form (Sic)."

(d) In Hotch vs. U.S. 212 F. 2d 280, Judge Stevens in pointing out that the Federal Register Act and the Administrative Procedure Act are more than mere recording statutes, says at 283:

"The acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures have been complied with the agency or administrative rule has not been legally issued and consequently is ineffective."

(e) And in Borok vs. Biddle, 78 U.S. App. D.C. 141 F. 2d 278, this Court held that when the Civil Service Commission changed a rule (extending the Probationary Period from 6 months to one year) without notice to the employee of a change in his legal rights, and without publishing this change in the Federal Register (but simply recording it on the Commission's minutes), this action violated the Federal Register Act and therefore was a nullity.

3(a) President Truman presented Reorganization Plan No. 5, 1949 to Congress to implement a recommendation made by the Hoover Commission, to separate the Operating from the Rule Making, and Judicial functions of the Commission.

In his message the President said:

"The development and promulgation of civil-service regulations for the guidance of the departments and agencies under the civil service, and the conduct of hearings on matters appealed by individuals or departments are appropriate for a three-member bipartisan Commission. Here deliberation is important for the protection of the integrity of the civil-service system.

"On the other hand, the administrative direction of the day-to-day operations of the Commission's staff requires the unified leadership of one responsible individual. This is particularly so because of the operating relationships with the departments and agencies. Here decisive, prompt and vigorous action is essential.

"The operational functions require a type of leadership different from that useful for the deliberative functions. But under the present statutory organization, the same multiple leadership is provided for both.

"Accordingly, this reorganization plan separates day-to-day administration from the regulatory and appellate functions. It leaves vested in the full Commission final authority with respect to (1) the formulation of civil-service rules and regulations, (2) hearing and taking action on all types of appeals * * *."

Mr. ENOS. I believe that it is important for the committee to know that there is a conflict on this section between the court of appeals in the District of Columbia circuit and the court of appeals in the ninth circuit. At the present time I am preparing a petition for a writ of certiorari, and as one of my points I am requesting that the Supreme Court review the case in order to resolve this conflict.

Some discussion of this conflict is contained in Professor Davis' Administrative Law Treatise, volume 1, section 6.10, pages 395 through 400. The title of this section is "Case Law Interpreting Federal Publication Requirement." I believe that it would be helpful if this section of Professor Davis' treatise were placed in the record.

Senator LONG. Without objection it is so ordered.

(The document referred to follows:)

§ 6.10. CASE LAW INTERPRETING FEDERAL PUBLICATION REQUIREMENTS

An interesting question of interpretation of the Federal publication provisions is whether one who has actual notice of an unpublished regulation which is

required to be published can be found guilty of violation of the regulation. The Ninth Circuit has firmly answered this question no, holding that even though the defendant had actual notice, "Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective."[1] Neither the regulation nor the proposed regulation had been published in the Federal Register. The court seems clearly mistaken in citing section 7 of the Federal Register Act for the unqualified statement: "Any such document which is not duly published is invalid."[2] Section 7 provides for invalidity "as against any person who has not had actual knowledge thereof," and it is the only provision for invalidity on account of lack of publication or filing.[3] The court seems also clearly mistaken in its unqualified statement that "publication is a prerequisite to the *issuance* of a regulation,"[4] for this statement ignores the "unless" clause of § 4(a)—". * * * unles all persons subject thereto are named and either personally served or otherwise have actual notice * * *." A way to support the result of the case, not mentioned in the opinion, would be to say that the defendant was not "named" within the meaning of the "unless" clause.

But other federal courts have taken a different view. An ICC order permitting increases in certain charges was upheld even though no notice was given under section 4; the court was satisfied with the mere observation that the complaining party had actual knowledge.[5] In another case, an air traffic pattern—a map of an airport and vicinity, with lines showing patterns for taking off and landing—was published early in 1949 in the Airman's Guide but not published in the Federal Register until 1952. The accident occurred late in 1949. The trial court charged the jury that the traffic pattern was a binding regulation, deviation from which was negligence per se. The airline admittedly had knowledge of the pattern. The Court of Appeals specifically rejected the view of the Ninth Circuit, saying merely that the pattern had been officially prescribed and that the airline had actual knowledge of it.[6] The court did not mention the question whether § 4(a) of the APA had been violated.[7]

A district court has held that a regulation can be valid even though a specific requirement of § 3(a) of the APA had not been complied with.[8] An order of the ICC adopted new forms of logs required to be kept by drivers. The order was filed, with a copy of the form and instructions attached. Only the order was published. But both the order and the form had been received by the carrier whose driver was prosecuted for an alleged violation. Section 3(a) provides for publication of "forms and instructions as to the scope and contents of all papers, reports, or examinations * * *." The court thought the argument based on noncompliance "a quite too meticulous technicality * * *."[9]

A district court simultaneously rides two horses going in opposite directions on the question whether the court should recognize or consider an interpretative memorandum which had not been published in the Federal Register as required by § 3(a) of the APA. First it says: "Section 3 does not say what the sanction

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[1] Hotch v. United States, 212 F. 2d 280, 283 (9th Cir. 1954).

[2] 212 F. 2d at page 281.

[3] At a later point in the opinion, page 283, the court argues that "section 7 must be read in connection with section 2 which it modifies." Section 2 requires filing. But the only provision for invalidity is that of section 7, applying to both lack of filing and lack of publication, and containing the crucial words "as against any person who has not had actual knowledge * * *."

[4] 212 F. 2d at page 282.

[5] Florida Citrus Commission v. United States, 144 F. Supp. 517 (N.D. Fla. 1956), affirmed 352 U.S. 1021, 77 S. Ct. 589, 1 L. Ed. 2d 595 (1957).

In Air Line Pilots Ass'n v. CAB, 215 F. 2d 122 (2d Cir. 1954), the court responded to an argument that procedural requirements of section 4 were not followed by pointing out actual notice and opportunity to participate.

[6] Eastern Air Lines v. Union Trust Co., 95 U.S. App. D.C. 189, 221 F. 2d 62 (1955), reversed on other grounds, Union Trust Co. v. Eastern Air Lines, 350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 796, order of reversal modified and case remanded 350 U.S. 962, 76 S. Ct. 429, 100 L. Ed. 835 (1956).

[7] The regulation as later published in 17 F.R. 7178 (1952) recites that compliance with § 4 is unnecessary since the purpose is "to eliminate reference to the Airman's Guide and to publish the established traffic patterns in the Federal Register." The regulation provided for effectiveness "upon publication in the Federal Register."

In Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D. N.Y. 1955), affirmed on other grounds 238 F. 2d 812 (2d Cir. 1956), a traffic pattern for Idlewild Airport was upheld although it was adopted without notice to all interested parties: the regulation recited it was "adopted without delay in order to promote safety of the flying public" and that "compliance with Section 4 of the APA would be impracticable."

[8] United States *v.* Reid, 110 F. Supp. 253 (D. Md. 1953).

[9] 110 F. Supp. at page 257.

is if such interpretation * * * is not published * * * but since the mandate of section 3 is clear, direct and positive, the only way it can be enforced is to say that acts of administrative bodies not conforming to section 3 will not be recognized by courts as official acts * * *." [10] Then it recognizes the interpretation as an official act: "So that while the interpretation offered may thus lose much of its force, it is nevertheless entitled to consideration as the Expediter's construction of the regulation * * *." [11] The court then adopts the Expediter's interpretation.

An agency itself may follow a procedure for its own action, even though the procedure is not published pursuant to § 3(a). After dismissing a petition, partly on the ground of lack of a question affecting commerce, the NLRB issued a supplemental decision directing an election. The contention that the procedure for the supplemental decision had not been published in the Federal Register and was, therefore, invalid was rejected.[12] Similarly, an agency may fix its own policy for its own action without publication; the requirement of § 3(a) for publication of "statements of general policy * * * for the guidance of the public" means, said the court, "a governmental plan * * * which the public is required to obey or with which it is to avoid conflict." [13] When the FCC changed its internal procedure concerning consideration of noncontested applications, and it did not publish the change in the Federal Register, the court held: "The only penalty provided in that section [§ 3(a)] is that no person shall be required to resort to any agency procedure not duly published in the Federal Register. Appellant was not compelled to resort to procedure not published." [14]

Lack of publication means invalidity in many circumstances. Although the statute allowed recovery of treble the overcharge in excess of a mamixum price, failure to publish the price order until the day of the violation induced the court to allow recovery of only the overcharge, not treble.[15] Farmers succeeded in excluding from their farms the county committeemen who wanted to measure wheat acreage, where the regulation imposing duty on the farmers to allow the visits were not published in the Federal Register.[16] Notes issued by the Secretary of State concerning immigration visas were not interpreted to have general applicability and legal effect, but were interpreted as regulating only the internal administration of the consular offices, because of lack of publication in the Federal Register.[17]

Publication in the Federal Register means constructive notice to all who may be affected. The outstanding case so holding is Federal Crop Ins. Corp. v. Merrill,[18] holding that one who had entered into a contract with a government agent for insurance of reseeded wheat could not recover on the policy after the loss because a regulation published in the Federal Register, unknown either to the insured or to the agent, precluded insurance of reseeded wheat. Four Justices dissented. Mr. Justice Jackson said in dissent: "To my mind it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops." [19]

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[10] Woods *v.* Benson Hotel Corp., 75 F. Supp. 743, 748 (D. Minn.), affirmed on other grounds 168 F. 2d 694 (8th Cir. 1948).

[11] 75 F. Supp. at page 748.

[12] Foreman & Clark, Inc. *v.* NLRB, 215 F. 2d 396, 410 (9th Cir.), certiorari denied 348 U.S. 887, 75 S. Ct. 207, 99 L. Ed. 697 (1954).

[13] Brownell *v.* Schering Corp., 129 F. Supp. 879, 905 (D. N.J. 1955), affirmed 228 F. 2d 624 (3d Cir. 1956).

[14] Federal Broadcasting System *v.* FCC, 96 U.S. App. D.C. 260, 225 F. 2d 500, certiorari denied 350 U.S. 923, 76 S. Ct. 212, 100 L. Ed. 808 (1955).

[15] Hall v. Chaltis, 31 A. 2d 699 (Mun. App. D.C. 1943).

[16] United States v. Morelock, 124 F. Supp. 932 (D. Md. 1954).

[17] United States v. Birnbaum, 55 F. Supp. 356 (S.D.N.Y. 1944).

[18] 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947).

[19] 332 U.S. at page 387, 68 S. Ct. at page 5.

Cases generally in agreement with the holding of the majority include: United States v. Comstock Extension Mining Co., 214 F. 2d 400 (9th Cir., 1954); Lynsky v. United States, 130 Ct. Cl. 149, 126 F. Supp. 453 (1954); Benolken v. United States, 99 F. Supp. 723, 728 (D. Neb. 1951); Bohannon v. American Petroleum Transport Corp., 86 F. Supp. 1003 (S.D.N.Y. 1949).

Highly exceptional and probably mistaken is the court's statement in Flannagan v. United States, 145 F. 2d 740, 741 (9th Cir. 1944), that "Such publication [in the Federal Register] created a rebuttable presumption of notice to appellant." When publication is property made, the notice is effective and cannot be rebutted.

After the Secretary of the Interior has issued a regulation published in the Federal Register, it is "binding upon the Secretary, until repealed or modified by him." [20]

Constructive notice under the Federal Register Act results from filing, not from publishing, despite the fact that the courts generally speak of publication. Section 7 of that Act provides that "No document * * * shall be valid * * * until * * * filed with the Division and a copy made available for public inspection * * * and * * * such filing * * * shall * * * be sufficient to give notice * * *." [21] The Attorney General has ruled that it is not necessary that documents required or authorized to be published under section 5 be both filed and published in order that they may be valid or serve as constructive notice.[22]

Orders which are not of general applicability are not required to be published.[23]

The provision that the "contents of the Federal Register shall be judicially noticed" is so clear and unequivocal that one might expect courts to obey it, as they generally do.[24] But the Supreme Judicial Court of Massachusetts refuses to obey, without either interpreting the statute to mean something different from what it says or holding it unconstitutional. The action was brought by a landlord to evict a tenant for nonpayment of rent, and the landlord had prevailed in the lower court. The tenant on appeal called to the court's attention a regulation, duly published in the Federal Register, providing that a tenant may not be evicted without notice to the area rent office, which had not been given. The court held: "We think we should not take notice of the regulation. * * * It is well known that the Federal Register is not easily accessible in all parts of this Commonwealth. * * * With that we have nothing to do. But we can, and do, hold that if a party to litigation in the courts of this Commonwealth cares to rely upon such a regulation, he must bring it to the notice of the trial judge." [25] The court was badly confused. The regulation, whose validity was not questioned, was the supreme law of the land and under the federal system the state court had no more constitutional power to refuse to apply it than it had power to ignore a valid federal statute.

§ 6.10. CASE LAW INTERPRETING FEDERAL PUBLICATION REQUIREMENTS

The Second Circuit holds that failure to file or publish as required by the Federal Register Act and by § 3(a) of the Administrative Procedure Act is without consequence as against a person having actual knowledge of a regulation. United States v. Aarons, 310 F. 2d 3411 (2d Cir. 1962). The court cited § 6.10 of the Treatise.

Rules will not be held invalid for a defect in notice at the instance of a party who has actual notice. Owensboro on the Air v. United States, 104 U.S. App. D.C. 391, 262 F. 2d 702, certiorari denied 360 U.S. 911, 79 S. Ct. 1296, 3 L. Ed. 2d 1261 (1959).

The provision of § 4(c) of the APA requiring a thirty-day waiting period before the effective date of a rule "except as otherwise provided by the agency upon good cause found and published with the rule" allows immediate effectiveness of a rule if a finding of "good cause" is published with the rule. Dighton v. Coffman, 178 F. Supp. 114 (E.D. Ill. 1959), opinion supplemented 179 F. Supp. 682, affirmed 279 F. 2d 497 (7th Cir. 1960).

A fraud order is invalid because the Post Office Department failed to publish description of its central and field organization in accordance with § 3(a) of the APA. Low v. Thomas, 163 F. Supp. 945 (E.D. Pa. 1958).

A fraud order was set aside because it was issued under regulations which failed to spell out the relationship between the Assistant General Counsel and the General Counsel. G. J. Howard Co. v. Cassidy, 162 F. Supp. 568 (E.D. N.Y. 1958).

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[20] Sheridan-Wyoming Coal Co. v. Krug, 84 U.S. App. D.C. 288, 172 F. 2d 282 (1949), reversed on other grounds 338 U.S. 621, 70 S. Ct. 392, 94 L. Ed. 393 (1950).

[21] 49 Stat. 502 (1935), 44 U.S.C.A. § 307.

[22] Op. Att'y Gen. 359 (1935).

[23] Brownell v. Schering Corp., 129 F. Supp. 879 (D.N.J. 155), affirmed 228 F. 2d 624 (3d Cir. 1956); Reconstruction Finance Corp v. United Distillers Products Corp., 113 F. Supp. 468 (D. Conn. 1952), affirmed 204 F. 2d 511 (2d Cir. 1953).

[24] Golding v. United States, 219 F. 2d 109 (4th Cir. 1955); Green v. United States, 176 F. 2d 541 (1st Cir. 1949); Shaw v. United States, 151 F. 2d 967 (6th Cir. 1945); United States ex rel. Brown v. Lederer, 140 F. 2d 136 (7th Cir.), certiorari denied 322 U.S. 734, 64 S. Ct. 1047, 88 L. Ed. 1568 (1944).

[25] Mastrullo v. Ryan, 328 Mass. 621, 622, 105 N.E. 2d 469, 470 (1952).

Rules not published thirty days prior to effectiveness may be validly applied more than thirty days after publication. Borg-Johnson Electronics v. Christenberry, 169 F. Supp. 746 (S.D. N.Y. 1959).

A regulation or "minute" governing internal management of the agency (allowing Commissioners to vote by notation) need not be published, because it is not designed for guidance of the public. T. S. C. Motor Freight Lines v. United States, 186 F. Supp. 777 (S.D. Tex. 1960), affirmed 366 U.S. 419, 81 S. Ct. 1356, 6 L. Ed. 2d 387 (1961).

Procedural rules are not subject to the requirements of section 4 of the APA, even though procedural rules may affect substantive rights. Ranger v. FCC, 111 U.S. App. D.C. 44, 294 F. 2d 240 (1961).

Rules which failed to include a "concise general statement" of basis and purpose, as required by § 4 of the APA, are valid, if the basis and purpose are obvious. Hoving Corp. v. FTC, 290 F. 2d 803 (2d Cir. 1961).

Mr. ENOS. In view of the conflict in the courts that I referred to above, I believe that it would be very useful for future litigants if the committee would make clear in its report the congressional intent relative to the publication requirements concerning agency organizational, procedural, and substantive rules in the Federal Register and the Code of Federal Regulation.

Senator LONG. Thank you, Mr. Enos. Your statement will be given every consideration certainly by the committee. We always want to give citizens of this country the right to appear before committees, if they so desire.

This will conclude the hearings on Senate bill 1666. The record will be kept open for 2 weeks for other material that we may desire to place in the record during that time. I thank all of you gentlemen for your presence.

Mr. FENSTERWALD. Mr. Chairman, I would like to place some statements from Government agencies and some others in the record.

Senator LONG. Very well. The committee will be in recess.

(Whereupon, at 1:45 p.m., the hearing was concluded.)

APPENDIX

THE WALL STREET JOURNAL,
New York, N.Y., October 31, 1963.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: In the past few days, Senator Bayh of your Judiciary Subcommittee and Mr. Bernard Fensterwald of the subcommittee staff have been quoted as saying that the Wall Street Journal refused to cooperate with your subcommittee, although they claimed the matter had been taken to the highest level.

Both of these statements have not been founded on fact and the result has been an inadvertent injury to the Wall Street Journal.

I am the editor of the Wall Street Journal and I have received no request whatever from the Judiciary Subcommittee, from any of its members, or from anyone on the staff that we testify before the subcommittee about anything. After diligent inquiry, I have found no other top executive of the company that has received any such request.

I have learned that there were some conversations between Mr. Bernard Fensterwald and some of the people in our Washington bureau about the possibility of some sort of testimony. It is not our policy to go around volunteering to testify before Government agencies because our business is collecting and publishing the news, not in trying to make publicity for ourselves with public appearances. We particularly discourage such appearances by our people unless we know exactly what is wanted and feel that we are in a position to make some real contribution to the inquiry. For these reasons our Washington people quite properly discouraged the conversational feelers from Mr. Fensterwald.

However, it has never been the policy of the Wall Street Journal to refuse to cooperate with any congressional committee when we have been officially asked to do so and have felt that we had anything to offer. I have, myself, testified before congressional committees, as have other officers in the paper, and I have records of Wall Street Journal reporters testifying as far back as 1914 when our then Washington correspondent testified on the famous leak of the Lansing note during World War I.

In view of all this, I think you will agree that the statements referred to above are unfounded. I'm personally rather hurt by this because I am in favor of the objectives of your bill, S. 1666. I contributed to the statement prepared by the American Society of Newspaper Editors which was presented to the subcommittee by Mr. Creed C. Black, and if you will read his testimony you will see that I am personally cited by name in support of the bill. It seems ironic that I should, therefore, be kicked around in the public press for not cooperating with a request which I have never received.

I feel sure that you will want to take the necessary steps to correct the record as a matter of fairness and courtesy.

Yours very truly,

VERMONT ROYSTER.

NOVEMBER 1, 1963.

Mr. VERMONT ROYSTER,
Editor, the Wall Street Journal,
New York, N.Y.

DEAR MR. ROYSTER: I have received your letter of October 31, and regret any misunderstanding that might have resulted in injury to you or your very fine newspaper, especially an inadvertant injury.

After having discussed the matter thoroughly with Mr. Fensterwald, I have generally concluded that the misunderstanding arose principally because of the general practice in Washington of dealing almost entirely with the local bureaus and relying upon them to make the appropriate checks or clearances with their home offices. In the instant case, this obviously did not work out satisfactorily. In the future, Mr. Fensterwald and the other members of the staff will contact you personally if they believe there is any danger of such a "failure of communication." I will review the transcript of the present hearing to eliminate or minimize as much as possible any wrong impression or possible injury.

I wish to thank you most sincerely for your past, present and, I hope, future support in our efforts to make more Government information readily available.

Sincerely,

EDWARD V. LONG, *U.S. Senator.*

THE WALL STREET JOURNAL,
New York, N.Y., October 31, 1963.

Hon. BIRCH BAYH,
The U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: You were quoted in the press dispatches of yesterday as having said that the Wall Street Journal has failed to cooperate with the Senate Judiciary Subcommittee in offering testimony before the subcommittee although the matter was carried "to the top."

You have been seriously misinformed by your staff and thus inadvertently done us an injury.

I am the editor of the Wall Street Journal and I have received no request whatever from the Judiciary Subcommittee, from any of its members or from anyone on the staff that we testify before the subcommittee about anything. After diligent inquiry, I have found no other top executive of the company that has received any such request.

I have learned that there were some conversations between Mr. Bernard Fensterwald and some of the people in our Washington bureau about the possibility of some sort of testimony. It is not our policy to go around volunteering to testify before Government agencies because our business is collecting and publishing the news, not in trying to make publicity for ourselves with public appearances. We particularly discourage such appearances by our people unless we know exactly what is wanted and feel that we are in a position to make some real contribution to the inquiry. For these reasons our Washington people quite properly discouraged the conversational feelers from Mr. Fensterwald.

However, it has never been the policy of the Wall Street Journal to refuse to cooperate with any congressional committee when we have been officially asked

to do so and have felt that we had anything to offer. I have, myself, testified before congressional committees, as have other officers in the paper, and I have records of Wall Street Journal reporters testifying as far back as 1914 when our then Washington correspondent testified on the famous leak of the Lansing note during World War I.

In view of all this, I feel sure you will agree that your statement was based on a misunderstanding of the facts and that you will be anxious to correct the record as a matter of fairness and courtesy.

Yours very truly,

VERMONT ROYSTER.

NOVEMBER 14, 1963.

Mr. VERMONT ROYSTER,
The Wall Street Journal,
New York, N.Y.

DEAR MR. ROYSTER: I appreciate your frank and polite letter concerning the recent hearings of the Administrative Practices and Procedures Subcommittee of the Senate. I regret it very much if, because of a misunderstanding, material detrimental to you or the Wall Street Journal was incorporated in the record of the committee hearings. As I mentioned at the hearings, there can be no question of the caliber and reputation of the Journal. Truly, it is one of America's leading publications.

It was not my intention to distort the facts concerning the steps which the committee had taken to avail itself of the expertise of the Journal. We have all learned that the previously accepted practice here in Washington of requesting company policy through channels, starting on the Washington level, is not the proper course of action to pursue when seeking a policy decision of the Journal. I trust that future contacts with the Journal will be made directly to you.

I am anxious to clear up any misunderstanding in the record which might cause damage to the Journal. I plan to request the inclusion of your letter in the record of the hearings. If you have any other specific suggestions as to how this can best be accomplished, I would appreciate your informing me.

I would enjoy having the chance to meet you personally if the opportunity presents itself.

Thanks again for your thoughtful letter

Sincerely,

BIRCH BAYH, *U.S. Senator.*

THE 1963 REPORT OF THE SIGMA DELTA CHI ADVANCEMENT OF FREEDOM OF INFORMATION COMMITTEE

THE MAJOR PROBLEM

The Department of Defense unquestionably represented the major problem in the information field during the last year. Both the policies and the practices of the Defense Department should cause grave concern among those interested in the maximum freedom of information.

It should be made clear at the outset, that the objections are not with the proper use of measures to protect the national security of the United States within the law and properly drawn regulations. No responsible newspaper reporters or editors have suggested that the Defense Department, or any other governmental agency, abandon properly administered secrecy practices necessary for the national defense.

The objections are raised to policies and practices that have been devised and used for the purpose of stopping the normal flow of information from the Defense Department on matters that are not involved with the national security.

The pattern of the Pentagon in the last 3 years would appear to be designed to quash dissent, and to close up the avenues through which evidence of dissent normally finds its way to the press and to the public. This pattern would appear to be designed to keep a close supervision over press contacts with civilian and military personnel at the Pentagon to quiet those who might provide information contrary to the views and facts the politically appointed civilian secretaries wish to have presented.

The record shows that the Pentagon has in fact instituted policies to control press contacts at the Pentagon, and has released false and misleading information in connection with a variety of major controversies. This is the pattern:

1. In May 1961, testimony released by the Senate Armed Services Committee disclosed that Secretary McNamara made a statement indicating he favored less information for the public as well as misinformation on our military developments. The attitude expressed in that testimony might explain some later developments. McNamara testified:

"Why should we tell Russia that the Zeus development may not be satisfactory? What we ought to be saying is that we have the most perfect anti-ICBM system that the human mind will ever devise. Instead, the public domain is already full of statements that the Zeus may not be satisfactory, that it has deficiencies. I think it is absurd to release that kind of information."

Under criticism from Representative John Moss, Democrat, of California, Secretary McNamara issued a four-point statement on information policy that seemed to retreat from his position in his testimony. Moss had called the initial McNamara statement "a gross disservice" to the American people and declared it was "advocacy of a program of misinformation."

2. In February 1962, Defense Secretary McNamara used the arbitrary claim of "executive privilege" to prevent the Pentagon censors from testifying on the operations of the censorship program that had resulted in highly questionable pattern of deletions from the speeches of high-level military personnel. There was no claim that national security was involved in this withholding incident. The letter from President Kennedy to McNamara on February 8, 1962, appeared to be a further extension of the arbitrary claim of "executive privilege" that had been used by the Eisenhower administration to hide a broad range of scandalous conditions in the regulatory agencies, in the Defense Department, and in the foreign aid program.

"I do not intend to permit subordinate officials of our career services to bear the brunt of congressional inquiry into policies which are the responsibilities of their superiors," President Kennedy said.

The Eisenhower administration's use of "executive privilege" sought to bar testimony from high-level officials of Government. The Kennedy letter appeared to say that Congress could be barred from questioning low-level officials to go behind the broad general positions and self-serving declarations of heads of departments and their aids.

3. During the crisis over Cuba in the fall of 1962, there was a wide range of complaints that misinformation was distributed by the Pentagon press office. There has not been sufficient documentation on these complaints to make a broad charge, or to pinpoint the responsibility for this misinformation. The Nation was in the midst of a cirsis, and there is no doubt that mistakes were made by Government officials in the pressure of the crisis. It is also possible that there were some misunderstandings. However, there are some matters dealing with the Cuba crisis that are clear and premediated efforts to limit access to information.

4. On October 27, 1962, during the Cuba crisis, Assistant Defense Secretary Sylvester issued a directive to control all press contacts at the Pentagon. That directive stated: "The substance of each interview and telephone conversation with a media representative will be reported to the appropriate public information office before the close of business that day. A report need not be made if a representative of the public information office is present at the interview.

It would be naive to accept the assurances of Sylvester and Secretary McNamara that the directive is for the purpose of making more information available in "an expeditious and equitable manner." Veteran Pentagon reporters, such as Mark Watson of the Baltimore Sun and Jim Lucas of the Scripps-Howard newspapers, comment that the Sylvester directive is a Gestapo tactic. Their sharp criticism is echoed by almost every other military affairs reporter. Despite the criticism, McNamara and Sylvester refused to change the directive or withdraw it. (At the State Department, Assistant Secretary Robert Manning issued a memorandum that carried the same general view. However, he withdrew the memorandum after receiving complaints from a large number of State Department correspondents. He indicated he had only intended to use it during the emergency.)

President Kennedy has backed McNamara and Sylvester on the October 27 directive. The press complaints have subsided, and it would appear that this press policing device at the Pentagon will become permanent unless some new fury is raised on specific problems.

26-023—64——15

THE GOVERNMENTAL LIE

5. Shortly after the Cuba crisis, Assistant Secretary of Defense Sylvester boasted of the way the Kennedy administration had "managed the news" during the Cuba crisis. He followed this up with his infamous and controversial comment about the "inherent" right of the Government to lie when involved in a nuclear crisis. The full quotation from the transcript is as follows:

"If we can talk to the general point, it would seem to me basic, all through history, that a government's right—and by a government I mean a people, since in our country, in my judgment, the people express, have the right to express, and do express every 2 and every 4 years, what government they want—that it's inherent in the Government's right, if necessary to lie to save itself when it's going up into a nuclear war. This seems to me basic."

Considerable controversy arose over the news stories dealing with Sylvester's speech. Later Sylvester denied that he had ever said the Government had an "inherent" right to lie. When Sylvester was before the McClellan subcommittee in connection with the TFX warplane investigation, Senator Karl Mundt, Republican, of South Dakota, asked him:

"The question is that if you believe the Government has the right to lie to the people. You are speaking as a Government witness. I want to be sure that you don't carry that philosophy to the point of testifying before us under oath."

Sylvester answered:

"You are making a quotation to me which was attributed to nobody, some faceless accuser which you are using. You have not quoted anything I have said."

Mundt asked:

"If you said you did not make it, that is one thing. I have read it a dozen times in the paper, that you made that statement. I am not quarreling with you about that point of view at this time."

Sylvester replied:

"Obviously, no Government information program can be based on lies. It must always be based on truthful facts."

THE TFX PLANE CONTROVERSY

6. Sylvester had been called before the McClellan subcommittee for making what is now admitted to be a false, misleading, and erroneous statement in connection with the TFX warplane investigation. On March 8, 1963, Sylvester held a press briefing and in a critical commentary on the McClellan subcommittee members stated: "You will hardly get a judicial rendering by a committee in which there are various Senators with State self-interest where the contract goes. So far there is only one Senator I have seen on the committee, Senator Muskie, who hasn't got an interest in it."

When Sylvester stated that "there is only one Senator I have seen on the committee, Senator Muskie, who hasn't got an interest in it," Sylvester was charging that Chairman McClellan and other members of the subcommittee had a State self-interest.

Under questioning, Sylvester admitted that he had no information to support this charge against other members of the subcommittee. Only two of the members—Senator Henry Jackson, of Washington, and Senator Jacob Javits, of New York—had a State interest in the contract and there was nothing devious or hidden about this.

Committee members concluded that Sylvester had engaged in loose handling of the truth in an effort to discredit the McClellan subcommittee probe of the $6.5 billion TFX warplane contract.

7. Throughout the TFX investigations, the Pentagon released erroneous and misleading information. Also, high officials of the Defense Department refused to answer factual questions dealing with this multibillion-dollar contract. Information was released indicating that Deputy Defense Secretary Roswell Gilpatric had served as a lawyer for the Boeing Co., and that this in some way balanced his affiliation as lawyer for General Dynamics in such a way that it cancelled the possibility of any "conflict of interest."

When questioned by the McClellan subcommittee, Gilpatric admitted that he had not served as a lawyer for Boeing, but had only served as an unpaid witness on one occasion. The subcommittee developed testimony that Gilpatric's law firm of Cravath, Swaine & Moore had received $300,000 in fees from General Dynamics, and Gilpatric had been the lawyer assigned to General Dynamics prior

to becoming Deputy Defense Secretary in January 1961. Gilpatric refused to answer questions on the details of what he contended had been a total resignation from his law firm with complete severance when he joined the Defense Department. He refused to discuss the substantial sums of money he received from his law firm after becoming Deputy Defense Secretary. He said that these were private as between him and his law firm. Defense Secretary McNamara also refused to discuss these matters involving the important details on the arrangements for Gilpatric to receive money after becoming the No. 2 man in the Defense Department.

Navy Secretary Fred Korth refused to discuss the details of arrangements of loans his bank in Fort Worth, Tex., made to the General Dynamics Corp. in the fall of 1961. Korth, as president of the Continental National Bank of Fort Worth, Tex., approved the loans (identified only as being less than the $600,000 limit on the bank) to General Dynamics.

In January 1962, Korth resigned as president of the bank, but retained the bank stock with a value of more than $150,000. Then Korth took part in the discussions and decisions in the TFX warplane contract, and overruled the unanimous recommendations of his top naval officers and others and recommended that the contract go to General Dynamics.

Korth refused to tell reporters the amount of the loan to General Dynamics, or the circumstances surrounding the loan. He refused to tell reporters the value of his stock in the bank.

There was no national security question involved in the transactions between Gilpatric and his law firm, which still represented General Dynamics. There was no national security issue involved in the details of Korth's relations with the Continental National Bank of Fort Worth or in the details of the loan arrangement with General Dynamics.

Gilpatric and Defense Secretary McNamara refused to discuss whether these interests had been discussed, or what facts were made known to McNamara on Korth's and Gilpatric's interests.

SIGMA DELTA CHI TESTIMONY IN CONGRESS

On March 19, 1963, Representative Moss' House Subcommittee on Government Information held a public hearing on the matter of "management of the news" in Federal Government. Witnesses who testified were Robert J. Manning, Assistant Secretary of State for Public Affairs; Arthur Sylvester, Assistant Secretary of Defense for Public Affairs; and members of the press, including Clark Mollenhoff, Washington correspondent for the Des Moines Register and Tribune and a member of your committee.

This report already has dealt with most of the matters discussed in the hearing. But in his testimony, Mollenhoff gave definitions of the four types of "management of the news" now practiced in Federal Government and your committee feels that this should be inscribed in the record, as follows:

"Now, I think there is one thing that should be clarified here. There is an awful lot of talk in the press and in Congress on news management, without an effort to draw lines as between the different types of problems in this area. I want to very briefly just go over what I think are about the four types, because they have to be approached in different ways.

"The first would be the common news management, in which an administration puts out the information that is most favorable to it and then tries to make it a little difficult for you to get the other side of the story. This we fight to a degree all the time. I do not object to this too much, because that is part of the game—up to the point where you get the lies and the distortions, and at that point it is wrong.

"Also, such special directives as Sylvester's order of October 27 to control the press contacts at the Pentagon. This is an entirely different category. This is one that I think this committee and members of the press should fight in very respect until it is withdrawn, because, if this stays intact as it is, we will have other agencies that will follow it in the future.

"The mere fact that this directive is not enforced does not mean anything, either. Remember that it is a directive, and it can be used against personnel in the Pentagon at any point that they see fit to use it.

"That means that it is a club in their hands.

"Now, they may not use it for long periods of time, but I think that we have to continue to harp on this subject until it is corrected.

"The third area is the misuse of military security classifications to cover up mistakes of judgment, malfeasance, incompetence, and so forth.

"We have all run across many cases in this category.

"Then, fourth, and the one that I consider to be the most important, is the one of executive privilege.

"This committee has a great record relative to the abuses in this area, and there is no need to go into any more detail than to merely state that this is a claim of an inherent right by the executive branch to pull down the secrecy curtain at any point not only on the Congress, not only on the press, but on the Congress and the General Accounting Office.

"And when this administration took power, there were indications that it would not use executive privilege. There were a good many statements that it would not be used.

"Since then it has been used. It has been drawn down a little bit by a statement by the President that he would not allow it to be used as it was used under the Eisenhower administration, by every individual in the whole executive branch of the Government. However, I am going to have to watch that in operation for some period of time before I have any great confidence that it will not take place again."

CUBA AND VIETNAM

Your committee took note of:

1. The international agreement, through an exchange of secret letters between President Kennedy and Premier Khrushchev, that led to the removal of the Russian long-range missiles from Cuba.

2. The great obstacles faced by American newsmen in their attempts to report U.S. participation in the undeclared war against the Communists in Vietnam.

Details of the secret international agreement between Kennedy and Khrushchev over removal of the Soviet missiles from Cuba never have been made public.

Immediately after the crisis, French newspapers carried stories, based on information from their Government, that the United States had agreed to dismantle our missile bases in Turkey and Italy in return for the Soviet dismantling in Cuba.

This was denied by American Government spokesmen, yet within a few weeks the United States did dismantle its missile bases in Turkey and Italy, and it was announced that American defense in those areas against the communistic threat would be left to our nuclear submarines.

Meanwhile, o nJuly 3, it was disclosed that no less than 40 secret letters and messages had been exchanged in a running communication between Kennedy and Khrushchev. One newspaper reported these letters as "the Government's most carefully guarded secret," and quoted a U.S. Senator, who insisted that his name be withheld, as saying:

"I confess that I'm a little shocked to learn the great volume of these exchanges. What are they writing about at such great length if not plans for for serious negotiations on subjects affecting the entire Nation's security?"

Your committee realizes that it is almost impossible to conduct international negotiations in a fish bowl, but at the same time it sincerely feels that the secret agreement over removal of Soviet missiles from Cuba and the 40 secret letters and messages between the heads of the American and Soviet Governments are absolutely contrary to the principles of free government.

This is particularly true in the face of the fact that these secret communications undoubtedly dealt with subjects affecting the well-being of free American citizens and perhaps even their lives. Certainly the American people are entitled to a complete and accurate report on any international agreement relating to the encroachment of communism 90 miles from our shores, and likewise they also are entitled to a white paper or other official report from Washington on secret negotiations between their elected President and the chief of the communistic dictatorship.

What is taking place in our undeclared war against communism in Vietnam, which is costing both American lives and considerable tax dollars, is even more confusing.

On June 23, American newspapers reported that U.S. servicemen on duty in South Vietnam were being instructed to avoid "gratuitous criticism" and to give a more positive picture of the war to American reporters.

In its Log of July 4–11, the Associated Press gave details of how Vietnamese secret police pummeled, knocked down, and kicked American reporters and smashed their cameras.

On July 27, Editor & Publisher reported on the efforts of the South Vietnam Government to curtail the international press covering the feud between the Buddhists and the Diem government, and said that Vietnamese nationals employed by the foreign press had been threatened with prison.

Here again your committee sincerely feels that all of this is absolutely contrary to the principles of free government. The American people, called upon to fight an undeclared war in the jungles of the Far East, deserve complete and factual information from day to day and if the American Government officials in Vietnam are not supporting the American reporters, as has been reported, then our Government at Washington is obligated to step in and to give both cooperation and protection to representaives of the free American press.

A FEDERAL FREEDOM OF INFORMATION LAW

Senator Edward V. Long (Democrat, of Missouri) introduced in the U.S. Senate on June 4, 1963, a "freedom of information bill," which is designed to amend section 3 of the Administrative Procedure Act of 1946 and to open up the procedures, including records, of Federal Government.

It was cosponsored by 13 Senators—Senator E. L. Bartlett (Democrat, of Alaska), Senator Birch E. Bayh (Democrat, of Indiana) Senator Clifford P. Case (Republican, of New Jersey), Senator Everett M. Dirksen (Republican, of Illinois), Senator Ernest L. Gruening (Democrat, of Alaska), Senator Philip A. Hart (Democrat, of Michigan), Senator Kenneth B. Keating (Repulbican, of New York), the late Senator Estes Kefauver (Democrat, of Tennessee), Senator Lee Metcalf (Democrat, of Montana), Senator Wayne Morse (Democrat, of Oregon), Senator Maurine Neuberger (Democrat, of Oregon), Senator William Proxmire (Democrat, of Wisconsin), and Senator Stuart Symington (Democrat, of Missouri).

In brief, the legislation would require full publication of the Federal agencies' procedures, make nonexempt records of Government available for inspection, and disclose each agency member's vote on all issues.

In your committee's opinion, this is a better bill than the one introduced in the U.S. Senate in 1961 and 1962, but it is not so inclusive as the "freedom of information" legislation introduced by the late Senator Thomas C. Hennings, Jr., (Democrat, of Missouri), in 1958 and 1959 to amend the Procedure Act of 1946, which governs the release of information by our Federal Government.

The Long bill carries two exceptions which could enable the Federal bureaucrat to continue raising his umbrella of secrecy over the business of the American people. These exceptions are:

(1) (Except that which) "involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order * * *."

(2) (Except that which) "relates solely to the internal employment rules and practices of any agency * * *."

Your committee freely concedes that our Government should protect genuine security information, disclosure of which would aid possible enemies. But, at the same time, we remind that the investigations and subsequent reports of Representative Moss' House Subcommittee on Government Information and Senator Hennings' Senate Subcommittee on Constitutional Rights between 1955 and 1960 disclosed innumerable cases wherein the bureaucrats freely abused the claim of national security to hide legitimate information of government from the American people.

Likewise, your committee concedes that occasionally there are times when the public interest would be benefited by the withholding of confidential information pertaining to employment within the Federal Government. On the other hand, representatives of 19 major Federal agencies admitted in writing to the Moss Subcommittee on Government Information that they used President Eisenhower's "Executive Privilege" letter to the Department of Defense as the excuse to withhold legitimate information, on the "inner workings" of the agencies, from the people.

It will take possibly a year or two, perhaps longer, to get this bill before both Houses of Congress for a vote, and your committee urges that all representatives of the news profession, either by testimony in committee hearings or by letter

to Senator Long, urge that these two qualifications be rewritten, before passage, to define more sharply the limitations on the legitimate withholding of information.

The Moss and Hennings committees clearly showed, in the thousands of pages of testimony before them, that the Federal bureaucrat will oppose any move to guarantee the American people's right to know about their Government. Therefore, Senator Long and his cosponsors will need tremendous help from the news profession, under the obligation of the free press to inform the free people of their Government.

In introducing the bill, Senator Long quoted a statement from President James Madison made nearly 200 years ago, as follows:

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. 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."

RECOMMENDATION

Your committee recommends to the board of directors of Sigma Delta Chi that chapters urge their State legislatures to pass a resolution in support of a Federal law that all records of the Federal Government other than those of a security nature be opened constantly to the inspection of American citizens.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, November 13, 1963.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During the hearings before you on October 31, 1963, with respect to S. 1666, Mr. Cornelius Kennedy of your staff asked that your committee be supplied with information which would disclose the types of files which the Treasury and its various bureaus keep which contain information about private citizens, the disclosure of which might be harmful to those citizens.

I undertook to supply your committee with this information.

It would be possible for us to conduct an extensive survey of all of the files of the Department, and we shall do so if your committee requests such action. However, to undertake this course will entail a considerable measure of delay, and I assume by the context of the question that the following generalized statement will serve your committee's purpose:

The files of the Internal Revenue Service of course contain the income tax returns of all American taxpayers. They also contain returns relating to estate and gift taxes, employment taxes, miscellaneous excise taxes and alcohol and tobacco taxes. Besides tax returns, these files include reports of all tax audits and investigations. All of this material, to a greater or a lesser degree, reveals the business activities of all taxpayers throughout the United States. Disclosure of this material would convey much information relating to the financial status of all individual taxpayers. It would disclose what persons are dependent upon taxpayers, what amounts each taxpayer contributes to certain dependents, how much he gives to charities (and which charities), and similar information. It would also disclose all other personal tax deductions claimed, such as those for medical expenses, State and local taxes, casualty losses and the like. Many types of returns and accompanying information and the particulars of returns are now specifically protected from disclosure by statute, but others are not.

The Bureau of Customs files contain entries and invoices with respect to all merchandise imported into the United States, baggage declarations filed by incoming passengers and export declarations with respect to merchandise exported. They also contain voluminous records relating to investigations of customs irregularities such as the fraudulent undervaluation or misdescription of merchandise. These files reveal, among other things, what every importer has brought into the country, the name and address of the persons or firms from whom each importation was purchased, how much was paid for the goods, whether and to what extent any imported merchandise was incorporated into

goods manufactured in the United States and thereafter exported, to whom such merchandise was sent, and detailed information with respect to the costs and processes of manufacture. Passengers' baggage declarations reveal any large purchases made abroad and brought into the United States by any person who has been traveling abroad. The investigative files would reveal the details of the business activities of the importers and exporters throughout the country. Such files also include anonymous communications accusing importers and others of wrongdoing.

The files of the Coast Guard contain the records of all persons who have served in the Coast Guard as officers or enlisted personnel. They contain appraisals by his superiors of each such person's performance as well as records relating to disciplinary action taken against such persons. The Coast Guard's records include much information with respect to the investigations of merchant seamen and longshoremen (numbering many thousand a year), both with respect to security clearance and allegations of negligence, misconduct and incompetence.

The records of the Office of the Comptroller of the Currency contain detailed information with respect to all national banks. These banks are regularly examined, and considerable attention is given to records of loans and other banking transactions. These records reveal the names of individuals and companies to whom loans have been made and in what amount and a great variety of other information found in credit files. Moreover, they contain personal information concerning the competence and the other characteristics of various officers and directors of national banks.

The files of the Treasurer of the United States include all canceled checks which have been drawn on the Treasurer of the United States. These relate to every kind of payment made by the Government, for example, payments with respect to contracts, price supports, social security, and tax refunds. Disclosure of this information would relate to the private affairs of many millions of citizens.

The Bureau of the Public Debt files contain the name of every person who is or has been the owner of a registered Government bond and show the value of all such bonds held by every individual and corporation.

The files of the Office of Domestic Gold and Silver Operations contain license applications by every person who has applied for a gold license. These applications contain revealing information with respect to the business activities of the applicants.

The files of the Office of Foreign Assets Control contain many thousands of applications with respect to transactions affected by the foreign assets control and the Cuban assets control regulations. These contain information with respect to the business activities of applicants for licenses and others who are involved in transactions to which the applications relate. In addition, the files of the Foreign Assets Control include censuses of certain foreign-owned property held by persons in the United States. For example, every person holding assets for persons in Communist China has been required to report those assets to the Treasury Department. It is our understanding that many of the Chinese who held assets in the United States prior to 1950 and have been unable to leave Communist China would suffer the most severe penalties if information with respect to their holdings was disclosed and such information fell into the hands of the Red Chinese authorities.

The enforcement agencies of the Treasury Department, such as the Internal Revenue Service, the Bureau of Customs, the Bureau of Narcotics, and the U.S. Secret Service, have files which contain information relating to the identity of informers and the information which these people supply and have supplied. Disclosure of this information and identifying the informers would seriously prejudice the physical security of many of the informers, and would also dry up an important source of information upon which the Government depends for effective law enforcement.

The files of the Office of the Director of Practice contain a variety of information concerning both applicants for admission to practice before the Treasury and those enrolled concerning whom derogatory information has been received. In addition to information concerning the taxes of the subject individual, there may be information concerning advice which he has given to other taxpayers, raising questions of fraud. There may be information from State bar associations concerning complaints of his conduct, not going to the extent of disbarment proceedings. In addition, these files contain other information about the individual typical of other investigative files of the Government.

The files of the Department and of its various bureaus and offices also contain the personnel records of all employees and former employees and much material submitted by and with respect to applicants who may never have been employed. Among the records would be those bearing upon the mental and physical health of the people involved.

Much of the foregoing information would be of interest chiefly to those with motives to harm or take advantage of the individuals whom the information concerns. For example, the financial information, such as that concerning savings bonds and Government checks, could provide a ready checklist of attractive prospects for confidence men and other criminals.

I trust that the foregoing information will supply the committee's needs. I wish to reiterate that my effort has been to supply the committee with an overall view, rather than with a detailed statement.

If I can be of further assistance to the committee in this regard, I shall be pleased to comply with the committee's wishes.

* * * * * * *

On a different point raised during the hearings before your subcommittee, Mr. Fensterwald made the suggestion that, in case of the possibility that this bill might be passed without discretionary language in it, the Treasury supply language we thought would be necessary to protect certain categories which we mentioned as providing particular problems. While I undertook to cooperate with your committee and staff, I noted at that time that I thought S. 1666 was a hard bill to use as a basis. After further consideration, I am afraid I must report that it is sitll the Treasury view that S. 1666 cannot be amended satisfactorily by providing certain exceptions.

Our basic reason for this position is that to do away with the limited areas in which discretion is granted in the present section 3 of the Administrative Procedure Act, and to graft upon that act the additional conflicting requirements represented in subsections 3 (a), (b), (c), and (d) of S. 1666, would require so many specific exceptions as to be unmanageable. Moreover, the bill as now drafted includes overlapping and contradictory requirements which cannot be readily solved by amendment. These were pointed out at length in our report but, to highlight them, I would mention that both sections 3(a) and 3(b) deal with statements of policy and interpretations but make different requirements and provide different exceptions for these two categories. Section 3(c), by opening up to public inspection the agency records on which the material specified in sections 3(a) and 3(b) is based, nullifies to a large extent the limited protecttions and exceptions provided in those two preceding subsections.

The Treasury, of course, is not in a position to know what specific categories of matters within the jurisdiction of other agencies might need to be excepted, but in the areas in which this Department is responsible, there should at the very least be explicit exceptions protecting from public inspection records of the following types:

(*a*) Investigative files.

(*b*) Personnel files.

(*c*) Medical and psychiatric records.

(*d*) Matters pertaining to foreign relations, including operations in foreign exchange and gold for the purpose of exchange stabilization.

(*e*) Individual financial and securities records, such as Treasury checks and registered bonds, including savings bonds.

(*f*) Business records of individuals and firms, not only as to trade secrets and such matters but other business and financial data.

(*g*) Bank information.

(*h*) Information submitted on the basis of its being held confidential.

The foregoing list is by no means complete but is intended to include the more important problem areas. Perhaps certain of these categories could be somewhat limited, but only after careful study.

If new legislation were to do away with the provisions in the present section 3 which give the agency certain discretion, such as "required for good cause to be held confidential" (sec. 3(b)) and "made available to persons properly and directly concerned except information held confidential for good cause found" (sec. 3(c)), the foregoing exceptions would have to be very broadly drawn.

As we have said before, a bill drawn on the basic assumption that administrators cannot be trusted with any discretion, because of examples of misguided use of that discretion in the past, is bound to harm large numbers of the individual Americans to serve whom the executive agencies exist. A particularly unreasonable example of this mistrust of the agency is found at the end of sec-

tion 3(c) of the bill. Treasury has no particular objection to providing recourse to court to order production of records improperly withheld, although it is by no means clear that resort to court is not available at present. We see no justification for putting the burden on the agency to sustain its action by a preponderance of the evidence.

Nothwithstanding objections which have been voiced to past instances of misuse by agencies of the phrase in the present Administrative Procedure Act "be made available to *persons properly and directly concerned*" [emphasis supplied], we think that this is a very important limitation which should be maintained in some suitable form in any revision of the statute. There seems no reason why court review cannot provide a suitable corrective where needed without opening up the records to the entire public.

Finally, we have grave reservations about the advisability of any general legislation in this field which fails to discriminate between legitimate requirements of regulatory agencies, nonregulatory agencies, investigative agencies, and other types and, indeed, fails to distinguish between differing requirements of various agencies in any one of these categories. As a general approach to the problem, S. 1567, introduced in the 87th Congress, presents a preferable approach by avoiding some of the contradictions of S. 1666 and providing certain additional vitally needed protections in subsection (f). Nonetheless, we have grave reservations to S. 1567 also, especially in its omission of phrases in the present law leaving certain discretion with the agency and providing certain protections to those who are the subjects of the information.

In summary, the Treasury does not feel that the serious dangers to large numbers of individual Americans, and the vast and unnecessary time and expense occasioned to the agencies of the Government by S. 1666, can be readily remedied by amendment.

During the hearings I undertook to provide your committee with an analysis of the statutory prohibitions preventing the Treasury Department from furnishing information. This study is being completed and will be forwarded to your committee very shortly.

Sinecerly yours,

G. D'ANDELOT BELIN,
General Counsel.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C.

STATUTES PROHIBITING DISCLOSURE OF INFORMATION ACQUIRED BY THE TREASURY DEPARTMENT

This memorandum contains an analysis of the statutes which require the Treasury Department to withhold from the public information received by it. The pertinent statutes are grouped in four subject categories. Part I deals with the statutes generally prohibiting the disclosure of confidential information. Part II deals with the statutes prohibiting the disclosure of information obtained by the Internal Revenue Service. Part III deals with the statutes prohibiting disclosure of certain bank information. Part IV deals with miscellaneous statutes prohibiting the disclosure of certain information obtained under several unrelated acts of Congress.

This memorandum does not include the statutes which give the Department discretionary authority to withhold certain information as in 5 U.S.C. 1002 (sec. 3 of the Administrative Procedure Act) and 46 U.S.C. 784 (concerning subpenas in libel suits against U.S. vessels). Also not included are the statutes and the Executive orders prohibiting the disclosure of classified information affecting national security; see 18 U.S.C. 793, 794, and 798, and Executive Order 10501 (1953) as amended.

I. STATUTES PROHIBITING THE DISCLOSURE OF CONFIDENTIAL INFORMATION

A. Prohibited disclosure of certain confidential information

18 U.S.C. 1905 prohibits officers and employees of the United States from disclosing in any manner or to any extent not authorized by law information coming to them in the course of their duties, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits,

losses, or expenditures of any person; it also prohibits the disclosure of any income return or copy thereof or any book containing any abstract or particulars thereof to any person except as provided by law. The commission of any of the forbidden acts will result in a fine or imprisonment or both, and removal from office or employment.

18 U.S.C. 1905 is the consolidation by the act of June 25, 1948 (ch. 645, 62 Stat. 791), of 15 U.S.C. 176b (1940 ed.), 18 U.S.C. 216 (1940 ed.) and 19 U.S.C. 1335 (1940 ed.) which prohibited the disclosure of certain confidential information in relation to customs, internal revenue, and commerce and trade. This section and its forerunners, dating back to 1894, have not been construed to any significant extent by the courts. Although the court in *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission*, 6 F. 2d 491 (D.C. Cir. 1925), defined the term "trade secrets," the Supreme Court vacated this decision because the controversy was moot; see 274 U.S. 106 (1927).

There have been also several opinions of the Attorney General in point beginning with 31 O.A.G. 541 (1919) and 39 O.A.G. 1 (1937). But the only opinions that contain a significant construction of section 1905 are 41 O.A.G. 26 (Dec. 1, 1953) and 41 O.A.G. 53 (June 15, 1955). The opinion of December 1, 1953, held that the authority to liquidate the assets of the Reconstruction Finance Corporation conferred by statute includes by implication authority to disclose the borrowers' financial and profit-and-loss statements to prospective purchasers of receivables due the RFC, if efficient and economical liquidation is determined to require such disclosure. Disclosure pursuant to such a determination was held to be "authorized by law" within the meaning of section 1905 and, therefore, not prohibited. The opinion decided June 15, 1955, held that the Federal Communications Commission could disclose to a Senate committee financial information it received on a confidential basis from television stations and networks; 18 U.S.C. 1905 was held not to preclude such disclosure for such disclosure would be "authorized by law" under the Communications Act of 1934, the Commission's regulations and the Legislative Reorganization Act of 1946.

B. Prohibited disclosure of confidential information obtained by a Federal agency from another Federal agency

5 U.S.C. 139b(a) provides that if any information obtained in confidence by a Federal agency is released by that agency to another agency eligible to receive it under 5 U.S.C. 139b(b) it is to be protected against disclosure by all the provisions of law, including penalties, which apply to the officers and employees of the obtaining agency as well as by all the provisions which would apply had the information been obtained by the receiving agency. Thus, with respect to disclosure of confidential information obtained from other agencies, Treasury officers and employees are subject to the prohibitions of law relating to the other agencies, as well as to those pertaining if the information had been collected directly by the Treasury.

It is noteworthy that this section is a part of the act of December 24, 1942 (ch. 811, 56 Stat. 1078), which was designed to coordinate Federal reporting services. This act authorized the Director of the Bureau of the Budget to require any Federal agency to make available to any other Federal agency any information which it obtained from any person; see 5 U.S.C. 139a(e). Nevertheless, in the same subsection, the special confidentiality of much of the information received in the Treasury Department was recognized in that the act was stated not to apply to the obtaining or releasing of information by the Internal Revenue Service, the Comptroller of the Currency, the Bureau of the Public Debt, the Bureau of Accounts, and the Division of Foreign Funds Control of the Treasury Department.

II. STATUTES CONCERNING DISCLOSURE OF INFORMATION OBTAINED BY THE INTERNAL REVENUE SERVICE

A. General prohibition

In chapter 75, entitled "Crimes, Other Offenses and Forfeitures," of the Internal Revenue Code of 1954 there is the section, 26 U.S.C. 7213, which makes it a crime for any officer or employee of the United States to divulge or make known in any manner whatever not provided by law financial information disclosed in any income return or to permit any income return or particulars thereof to be examined by any person except as provided by law or to print or publish in any manner whatever not provided by law any income return or the financial information in any income return which may not be disclosed. The penalty is a

maximum fine of $1,000 or imprisonment for a year, or both, with payment of the costs of prosecution, and dismissal from office or employment. Because of the importance of the exact wording of the principal subsection of this statute the prohibitory provisions are quoted below.[1]

Other subsections of this statute penalize other types of disclosure. Subsections (a) (2) and (3) penalize unauthorized disclosure of income tax information by State employees and shareholders who may have obtained this information in accordance with law, 26 U.S.C. 6103; subsection (b) prohibits disclosure by an officer or employee of the United States in a manner not provided by law of the operations, style of work, or apparatus of any manufacturer visited by him in the discharge of his official duties. Finally, subsection (c) penalizes the use or disclosure of any film or reproduction in violation of the regulations under this statute.

The purpose of section 7213 and its forerunners has been stated to be: "* * * to prevent wholesale revelation of confidential information to persons not determined to have a legitimate interest therein" (*Kingsley* v. *Delaware, Lackawanna and Western R. Co.*, 20 F.R.D. 156 (S.D. N.Y. 1957); *Tollefsen* v. *Phillips*, 16 F.R.D. 348 (D. Mass. 1954)). In recognition of this purpose the Federal courts have been careful to protect the confidentiality of tax information given to the Government. The extent to which they have denied or permitted inspection of tax returns and related information is indicated in the following three classes of cases:

(1) Those cases holding that in a civil action in a State or Federal court between private litigants, especially where damages are claimed by the plaintiff for loss of earnings, the defendant may inspect pertinent parts of plaintiff's income tax returns for the years immediately preceding plaintiff's injury. In addition, there are several other instances in which disclosure will be required where the income, property, or status of a party is in issue and the information contained on that party's income return would be material. In each case the party will be required to disclose the return in his possession or will be required to obtain them from the Internal Revenue Service and then disclose them. (See *Bush* v. *Chicago, Burlington and Quincy Railroad Co.*, 22 F.R.D. 188 (D. Neb. 1958); *Karlsson* v. *Wolfson*, 18 F.R.D. 474 (D. Minn. 1956); *Tollefsen* v. *Phillips*, 16 F.R.D. 348 (D. Mass. 1954); *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn. 1940); dicta in a recent Supreme Court decision—*St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218–219 (1961).) For cases decided in State courts see Annot., 70 A.L.R. 2d 240 (1960). There are a few cases to the contrary that have held that the tax return is confidential under section 7213 and could not be disclosed in a civil suit between private litigants; see *Austin* v. *Aluminum Co., of America*, 15 F.R.D. 490 (E.D. Tenn. 1954) and cases cited therein.

(2) Those cases where a State court has attempted to require an agent of the Internal Revenue Service to disclose income returns or information in relation to such returns. The Federal courts hold that a State court may not compel such disclosure. See *Boske* v. *Comingore*, 177 U.S. 459 (1900); *Stegall* v. *Thurman*, 175 F. 813 (N.D. Ga. 1910); *In Re Lamberton*, 124 F. 446 (W.D. Ark. 1903).)

(3) Those cases in which the Government is a party and in which the Government has a direct interest e.g., a civil proceeding in relation to tax deficiency or a refund, or a criminal prosecution relating to the tax laws of the United States. In these cases the court will normally require the Internal Revenue Service to disclose the return or related information, and such disclosure is one "authorized by law." See *Blair* v. *Oesterlein Co.*, 275 U.S. 220 (1927); *Frazier* v. *Phinney*, 24 F.R.D. 406 (S.D. Tex. 1956). Compare this latter case with *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), where there was a criminal trial pending for tax fraud correlative to the civil litigation instituted by the taxpayer for a tax refund; the court held that the internal revenue

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[1] See the following:

"§ 7213 Unauthorized disclosure of information.

"(a) Income returns:

"(1) Federal employees and other persons: It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income profits, losses, or expenditures appearing in any income return; * * *."

agents' reports need not be disclosed on demand of the taxpayer in the preparation for his defense in the criminal trial, but indicated that for the civil suit after the criminal trial the taxpayer could have access to such reports for use in the civil suit as in the *Frazier* case, *supra; United States* v. *Foley*, 283 F. 2d 582 (2d Cir. 1960) ; *United States* v. *Andolscheck*, 142 F. 2d 503 (2d Cir. 1944).

B. Prohibited disclosure of certain tax return information

Subsection (a) of 26 U.S.C. 6103 makes specified returns[2] "public records" but provides that they shall be open to inspection only under regulations of the Secretary of the Treasury, approved or promulgated by the President. Subsection (b) authorizes access by proper officers of any State, upon request of the Governor, to returns of corporations and the inspection of all income returns by any State agency charged with the administration of tax law in such manner and at such times and places as prescribed by the regulations of this Department. Subsection (c) authorizes examination of the income return of a corporation by a 1 percent or more shareholder. Subsection (d) designates the committees of the Senate and House of Representatives to whom internal revenue information shall be furnished in executive session and which have the right to inspect returns as they may determine. Finally, subsection (f) provides that the Secretary shall make available to public inspection in the office of the principal internal revenue office of the district lists containing the name and address of each person making an income tax return in that district.

The substance of subsections (a) and (b) restricting inspection of income tax returns to persons authorized under Presidential regulations and to State income tax officials has been contained in the internal revenue laws since the first income tax law following adoption of the 16th amendment to the Constitution (see sec. II G(d) in the Tariff Act of October 3, 1913, ch. 16, 38 Stat. 114, 177, and annotation of 26 U.S.C.A. 6103. These provisions, with the more recent subsections, clearly prohibit inspection other than as authorized).

C. Prohibited disclosure of information concerning tax-exempt organizations

26 U.S.C. 6104 provides that the application filed by an organization for tax exemption, together with papers submitted in support of the application and the annual information returns, shall be open to public inspection in designated ways if an organization is determined to be exempt from taxation for any taxable year. Any inspection of such application may be made at such time, and in such manner as the Secretary or his delegate by regulations prescribes. In addition, other papers relating to such application shall be made available to the designated committees of Congress which are authorized by section 6103(d) of the code to receive internal revenue information on returns. However, subsection (a)(1)(B) of this section requires the Secretary or his delegate to withhold from public inspection upon the request of the organization submitting papers supporting its application for tax exemption, any information therein which he determines "relates to any trade secret, patent, process, style of work, or apparatus of the organization, if he determines that public disclosure of such information would adversely affect the organization." This provision provides similar protection to that provided business organizations and other persons making returns by 18 U.S.C. 1905 and 26 U.S.C. 7213(b).

D. Prohibited disclosure of information concerning unemployment tax returns

Unemployment tax returns are to be open to inspection by virtue of 26 U.S.C. 6106 only in the same manner as returns covered by section 6103, with certain particular exceptions.

E. Prohibited disclosure of information on returns and order forms relating to narcotic drugs and marihuana

26 U.S.C. 7237(e) prohibits Treasury officers and employees from disclosing the information contained in the statements or returns required under sections 4732(b) and 4754(a) concerning narcotic drugs and marihuana. Under these two sections the Secretary may require registered persons who receive narcotics or marihuana to file a return which sets out the names of the persons from whom the drugs were received, the quantity received and the date received;

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[2] The returns referred to are those made with respect to chs. 1, 2, 3, and 6 of the I.R.C. of 1954 (income taxes), ch. 5 (tax on transfers to avoid income tax, ch. 11 (estate tax), ch. 12 (gift tax), ch. 32 (manufacturers excise tax), subch. B, C. and D of ch. 33 (communications tax, transportation taxes, and tax on safe deposit boxes, respectively), and subch. B of ch. 37 (tax on coconut and palm oil).

this information may not be disclosed. Section 7237(e) further prohibits the disclosure of information contained in the forms required under sections 4705(e) and 4742(d). Both of these sections deal with the order forms and copies thereof required to be kept concerning a sale of narcotics and marihuana. The information contained on these forms and copies may not be disclosed. The exceptions to these prohibited disclosures, intended to facilitate law enforcement, are contained in subsections (1) through (3) of section 7237(e). A Treasury officer or employee who violates the prohibiting provisions is subject to a fine or imprisonment, or both.

III. STATUTES PROHIBITING THE DISCLOSURE OF BANK INFORMATION

A. Prohibited disclosure of the order and findings of fact which result in the removal of a bank director or officer from office

12 U.S.C. 77 provides for the removal of any director or officer of a national bank, or of a bank or trust company in the District of Columbia, or of a State member bank of the Federal Reserve System, if the director or officer, after having been warned, continues to violate any law relating to such bank or trust company or continues unsafe or unsound practices in conducting the business of such bank or trust company. This section further provides "That such order [of removal] and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section."

B. Prohibited disclosure of information by bank examiners

18 U.S.C. 1906 prohibits a bank examiner from disclosing "* * * the names of borrowers or the collateral for loans of any member bank of the Federal Reserve System, or bank insured by the Federal Deposit Insurance Corporation, examined by him, to other than the proper officers of such bank, without first having obtained the express permission in writing [from the appropriate agency or the board of directors of the bank] * * *." However, the bank examiner may disclose such information if ordered to do so by a court of competent jurisdiction, or by direction of Congress, or either House, or any committee of Congress duly authorized. If the examiner violates this provision he will be fined or imprisoned, or both.

IV. MISCELLANEOUS STATUTES PROHIBITING THE DISCLOSURE OF CERTAIN INFORMATION OBTAINED UNDER SEVERAL UNRELATED ACTS OF CONGRESS

A. Prohibited disclosure of information or speculation in securities affecting the Reconstruction Finance Corporation

Although the Reconstruction Finance Corporation was abolished by Reorganization Plan No. 1 of 1957 (see 15 U.S.C. 601 note), the Treasury Department has responsibility for completing the liquidation of certain of its loans. There is still in effect a provision, 18 U.S.C. 1904, which would prohibit Treasury officers and employees from giving any unauthorized information concerning any future action or plan of the Corporation which might affect the value of securities. It also prohibits officers and employees who have such knowledge from investing or speculating, directly or indirectly in the securities or property of any company, bank, or corporation receiving loans or other assistance from the Corporation. If a Treasury officer or employee violated this provision he would be fined or imprisoned, or both.

B. Prohibited disclosure of Coast Guard records of discharge books and certificates

46 U.S.C. 643(f) requires the Coast Guard to maintain certain informational records in regard to seamen and further provides that "Records so maintained shall not be open for general or public use or inspection."

C. Prohibited disclosure of confidential information obtained under the Export Control Act of 1949, as amended

50 U.S.C. App., 2026(c), prohibits any agency or official performing functions under the act from disclosing or publishing information obtained "which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information unless the head of such department or agency determines that the withholding thereof is contrary to the

national interest." The export control programs of the Government are largely enforced by the Bureau of Customs. Consequently, this act applies to officials in the Treasury Department.

G. D'ANDELOT BELIN,
General Counsel.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., November 18, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U. S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In the course of my testimony before your subcommittee on October 31, on S. 1666, you raised a question concerning wiretapping. I was not sure at the time that I understood your question clearly, nor was I informed in detail about Treasury's policies with respect to wiretapping other than to be aware that it was Treasury policy that wiretapping was not authorized by it investigative agencies.

Looking back on your question, it seems to me that what you may have had in mind was why the Treasury would support the bill which would authorize certain law-enforcement officers to intercept wire communications on which hearings were held in the last session, while professing concern over the invasion of privacy which we see as a danger in S. 1666.

The bill to which you referred is S. 2813, 87th Congress, to prohibit wiretapping by persons other than duly authorized law-enforcement officers engaged in the investigation or prevention of specified categories of criminal offenses. It should be noted at this juncture that the interest of the Treasury in having authority to intercept wire communications is very narrow and is confined to two areas, i.e., offenses relating to narcotics and marihuana and to counterfeiting. Offenses relating to narcotics and marihuana were included in S. 2813 as introduced and the addition of counterfeiting to the offenses covered by the bill was recommended by the Department in a report to the Senate Judiciary Committee dated March 13, 1962.

Returning to your query, however, I would like to emphasize that one of the principal purposes of S. 2813, as indicated by its title, is to clearly outlaw the unauthorized interception of wire communications by making such interception a criminal offense. The hearings on the bill before the Senate Committee on the Judiciary revealed that there was a considerable amount of wiretapping in the United States today and that the present Federal law provided no prohibitions against wiretapping. As stated by the Attorney General at such hearings, in order to prosecute under section 605 of the Federal Communications Act it must be proved not only that the wires have been tapped, but that information obtained from such tapping has been disclosed to other individuals. Thus, S. 2813 on the one hand was designed to prohibit the invasion of privacy by empowering the Federal Government to deal effectively with those who today can invade the telephone privacy of citizens with virtual impunity.

On the other hand, S. 2813 would permit wiretapping by law-enforcement officers engaged in the investigation of certain major crimes under carefully prescribed conditions. Wiretapping under the bill, except as to certain offenses involving national security, could only be done by Federal agencies upon the authorization of the Attorney General or an Assistant Attorney General designated by him and would require court approval. Restrictions would be prescribed both on the nature of the evidence which must support the application to the court as well as the length of time the authority to intercept communications would apply. Moreover, strict limitations would be placed on the disclosure and use of the evidence obtained through wiretapping. Thus, S. 2813 would permit wiretapping by Federal agencies only for major crimes of a serious nature with appropriate limitations and safeguards against abuse or the invasion of privacy.

Measures relating to wiretapping must be viewed in the light of the danger that could result to the public from the commission of serious major crimes because of the inability of law-enforcement officers to obtain evidence through means other than the interception of wire communications as against the natural concern we all have for assuring the fullest possible protection to all citizens against the invasion of privacy. We feel that S. 2813 represents a reasonable balance in weighing one consideration against the other.

In the meantime, and unless and until Congress enacts legislation in this field permitting law-enforcement officers to intercept wire communications in connection with the investigation of major crimes, it will continue to be Treasury's policy that its investigative agencies are not authorized to wiretap.

May I respectfully request that this letter be made a part of the record of the hearings on S. 1666.

Sincerely yours,

G. D'ANDELOT BELIN, *General Counsel.*

SMALL BUSINESS ADMINISTRATION,
Washington, D.C., October 28, 1963.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: Thank you for your invitation to testify on October 31, 1963, at the hearings of the Subcommittee on Administrative Practice and Procedure in connection with the "freedom of information" bill, S. 1666. The subject matter of that bill, and particularly SBA's policy of disclosure relative to affiliated transactions, are matters which have interested and concerned this agency for some time.

You may recall that policies of disclosure relative to affiliated transactions were the subject of hearings before Senator William Proxmire, chairman of the Subcommittee on Small Business of the Committee on Banking and Currency. My testimony before that subcommittee on September 5, 1963, outlined the current thinking of the agency with respect to the problems presented by affiliated transactions. By letter dated October 4, 1963, further detailed comments were provided to Chairman Proxmire. For your information these views are contained in the published reports of that subcommittee under date of September 5, 1963, entitled "Conflict of Interest Problems in SBIC's." I have taken the liberty of enclosing copies of my October 4, 1963, letter for easy reference purposes.

The transcript of those hearings sets out fully my position with respect to the disclosure by SBA of actions that it will take under the affiliated transaction rules governing small business investment companies. Consequently, I feel that my presence could add nothing further to your deliberations on this knotty problem and I respectfully request that this letter and exhibits attached hereto be used as my statement in connection with your hearings.

Sincerely,

EUGENE P. FOLEY, *Administrator.*

OCTOBER 4, 1963.

Hon. WILLIAM PROXMIRE,
Chairman, Subcommittee on Small Business,
Committee on Banking and Currency,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PROXMIRE: By letter dated September 6, 1963, you submitted to the Small Business Administration for comment a proposed amendment to the Small Business Investment Act of 1958, as amended (hereafter called the act) covering affiliated transactions on the part of licensed small business investment companies.

We have carefully reviewed the proposed amendment and it is our considered opinion that such amendment would hamper the flexibility necessary for efficient and successful administration of the small business investment company program, since existing legislation confers on the Small Business Administration full authority to regulate in this area and to take whatever action may appear necessary for the furtherance of the purposes of the act.

The development and regulation of the SBIC industry present the Small Business Administration with dynamic and ever-changing problems in administration, the fruitful solution of which requires that SBA have the maximum possible degree of administrative adaptability. Revision of the act would have the effect of freezing SBA's position with regard to affiliated transactions and of creating

limits on the authority of the Small Business Administration in this area which do not now exist. The Small Business Administration is, therefore, opposed to any new legislation on affiliated transactions.

The Small Business Administration clearly recognizes, however, the need for revision of its regulations on affiliated transactions. The attached draft marked "Exhibit A," of proposed regulations in this area, encompasses needed expansion of the purview of section 107.716 of the regulations to cover conflict of interest situations not now covered, publication of the criteria utilized by SBA in passing on affiliated transactions and disclosure of certain information on transactions approved by SBA under section 107.716. You will note that the proposed regulation is based upon the ideas embodied in your proposed amendment to the act. Adoption by SBA of this proposed regulation offers, in our opinion, the most effective means at this time of dealing with the problem of affiliated transactions while leaving SBA with the freedom necessary to adequately cope with unforeseen abuses in this area.

It is our intention, assuming the foregoing procedure is acceptable to you, to proceed to make effective the proposed regulation by publication in the Federal Register at an early date.

During the course of the hearings you will recall your request that we insert for the record the proposed procedure for publication of our decisions in the affiliated transactions and which I discussed. Exhibits B and C attached hereto set forth this procedure.

Sincerely,

EUGENE P. FOLEY, *Administrator.*

EXHIBIT A. SECTION 107.716 AFFILIATED TRANSACTIONS

(a) Without the prior written approval of SBA a Licensee shall not:
(1) purchase any security or other property from any affiliated person;
(2) sell any security or other property to any affiliated person except shares of stock of which the Licensee is the issuer;
(3) borrow money or other property from any affiliated person;
(4) lend money or other property to any affiliated person;
(5) provide consulting and advisory services to any affiliated person;
(6) participate in any joint enterprise in which any affiliated person is a participant, except that Licensees which are affiliated persons may participate in financing small business concerns of which they are not an affiliated person.

(b) Without the prior written approval of SBA a Licensee shall not enter into any transaction mentioned in subsection (a) of this section with a person who was an affiliated person of the Licensee within six months prior to such transaction.

(c) Without the prior written approval of SBA no Licensee shall purchase equity securities of or make a loan to a small business concern which is controlled by a person or persons who control another Licensee.

(d) A Licensee or any affiliated person thereof shall not borrow money or other properly from a small business concern or from any affiliated person of such concern, to which the Licensee has provided equity capital, made a long term loan or is providing consulting and advisory services.

(e) A Licensee shall not lend money or property to any person, directly or indirectly, if such person controls, or is under common control with the Licensee.

(f) For the purposes of this section only, any person who owns beneficially, either directly or through one or more controlled companies, 25 per centum or more of the voting securities of a company, shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. Such presumptions may be rebutted.

(g) Nothing contained in this section is intended to preclude a Licensee from permitting an officer, employee or representative from serving as a Director of a small business concern for the purpose of protecting its investment in such concern, nor is it intended to prevent a Licensee from taking such action, otherwise permissible under these regulations, as may be necessary to protect an investment that is in jeopardy. Moreover, nothing in this section is intended to preclude a Licensee from entering into any otherwise permissible transaction with a small business concern where an affiliation with the Licensee arises solely from the Licensee's having invested in such small business concern or the

Licensee's furnishing of consulting or advisory services to such small business concern.

(h) SBA shall not approve any transaction pursuant to subsection (a) of this section, unless it finds that: (1) a majority of the Board of Directors of such Licensee has no affiliation with the small business concern; (2) such transaction has received the affirmative approval of such majority, (3) the general terms upon which such transaction is to be made are not less favorable to such Licensee than those offered by it to other small business concerns, or those negotiated with the small business concern by the Licensee's affiliated person or persons in a transaction covered by subsection (a)(6) of this section; and (4) such transaction is in furtherance of the purposes of the Act.

(i) Whenever a transaction is approved under this section, the Small Business Administration shall promptly notify the Licensee in writing and cause to be published in a monthly bulletin to be issued by the Small Business Administration a summary setting forth the terms of the transaction, the nature of the affiliation requiring the granting of such approval and the application of the criteria set forth in subsection (h) of this section. Within ten days from the entering into of such a transaction, the Licensee shall publish in a newspaper of general circulation, in the locality in which it has its principal place of business, a notice setting forth the terms of the transaction and the nature of the affiliation which required that such transaction require the prior approval of the Small Business Administration.

(j) Any affiliated transaction by a Licensee which is subject to regulation by the Securities and Exchange Commission under the Investment Company Act of 1940, shall be exempt from subsection (i) of this section.

In addition, section 107.12 of the regulations would be amended by the addition thereto of the following definitions.

"*Affiliated Persons*" of another person means (a) any person directly or indirectly owning, controlling or holding with power to vote, 10 percentum or more of the outstanding voting securities of such other person; (b) any person 10 percentum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (c) any person directly or indirectly controlling, controlled by or under common control with, such other person; (d) any officer, director, partner, copartner or close relative of such other person; (e) if such other person is a small business investment company, any investment adviser (as covered by section 107.704(d) of these regulations) thereof; and (f) any affiliated person of such a person.

"*Close Relative*" means any lineal ancestor, lineal descendant, spouse, brothers or sisters (by the whole or half blood); any lineal ancestor, lineal descendant, brother or sister (by the whole or half blood) of a spouse; first cousins, uncles, aunts, nephews, nieces, (by blood or by marriage); all step relations in the above categories and lineal descendants.

"*Control*" means the power, directly or indirectly, to exercise a controlling influence over the management or policies of a company, through the ownership of voting securities, by contract or otherwise.

"*Joint Enterprise*" means any transaction or transactions whereby a small business concern receives financing from a Licensee and an affiliated person thereof either simultaneously or at different times.

"*Person*" means a natural person, a corporation, partnership, pension fund, profit-sharing fund, an association, a joint-stock company, a business trust and any other organization of whatever nature.

"*Voting Security*" means any security presently entitling the owner or holder thereof to vote for the election of directors of a company.

EXHIBIT B. PROCEDURE ON DISCLOSURE OF AFFILIATED TRANSACTIONS

The procedure for public disclosure of facts on transactions approved under section 107.716 of the regulations under the Small Business Investment Act of 1958, as amended, would encompass publication of basic information about the transaction and about the Small Business Administration's approval of it.

The matters to be disclosed are:

(1) The interrelationships between the Small business investment company and the small business concern that caused the transaction to require prior Small Business Administration approval under section 107.716.

(2) The essential terms of the transaction.

(3) The Small Business Administration's criteria and the manner of their application to the transaction.

With regard to disclosure of affiliations, all relationships would be identified with as much precision as possible, i.e., exact titles of officers would be given and the precise amount of stockholdings of ten or more percent would be disclosed.

As for the terms of the transaction, there would be disclosed, interest rate, maturity, amortization, and security, if any. Where there is an equity investment, the nature of the equity security, the proportion of the small business concern's equity which it represents and the price of such equity position would be disclosed. Similar disclosure would be made of basic terms of any other transaction falling under section 107.716.

The manner of disclosing the application of the criteria under section 107.716 can best be seen in the attached sample summary marked "Exhibit C." Since the Securities and Exchange Commission will publish a release on each of its actions affecting publicly held small business investment companies, to avoid duplication of effort we would attempt an arrangement between the Small Business Administration and the Securities and Exchange Commission whereby the Securities and Exchange Commission would include, in its order on the transaction, a statement to the effect that the Small Business Administration had approved the transaction under section 107.716.

Publication would be implemented by the issuance of a monthly bulletin by the Small Business Administration which would cover such transactions. In the case of public small business investment companies, the bulletin would simply make reference to the transaction and cite the appropriate Securities and Exchange Commission release. A mailing list for the bulletin would be established by combining present Small Business Administration mailing lists. Anyone who so requests would be placed on the mailing list for the bulletin, but all persons on the list will be required to indicate each year, a desire to continue to receive the bulletin or else their names will be removed from the list. A file of all such summaries would be maintained and available for public inspection. Copies of all or any part of such file could be available to members of the public on request, on payment of an appropriate fee.

EXHIBIT C. SAMPLE SUMMARY ON SECTION 107.716 TRANSACTION

On _____, 1963, a transaction between XYZ small business investment company, a Federal Licensee under the Small Business Investment Act of 1958, as amended, and the _____ company, a small business concern, was approved by the Small Business Administration, pursuant to section 107.716 of the regulations governing small business investment companies, (13 C.F.R. 107.716).

Section 107.716 prohibits a small business investment company from engaging in certain transactions with affiliated persons without the prior written approval of the Small Business Administration.

This investment was brought within the purview of section 107.716 by virtue of the following fact(s):

Mr. Jones, who is Secretary of, and a member of the Board of Directors of XYZ, is Treasurer of, and a member of the Board of Directors of the _____ company.

This investment consists of the purchase of a convertible debenture of _____ small business concern by XYZ, the small business investment company for the price of, and in the face amount of $50,000. The convertible debenture has a maturity of eight years and bears interest at eight percent. The debentures are convertible into 15 percent of the equity of the small business concern. The debentures are not secured, and amortization of the principal is to commence in the second year of the life of the debentures.

The general criteria employed by the Small Business Administration in granting or denying approval of investments under section 107.716 are:

(1) A majority of the Licensee's Directors must have no interest in the proposed transaction, and must have approved it by an affirmative vote.

(2) The terms of the investment must be fair and reasonable.

(3) The investment must serve the purposes of the Small Business Investment Act of 1958, as amended.

All of the Directors of the XYZ were informed of the above-mentioned individual's connection with the small business concern, and of the proposed investment in it before the Directors of the small business investment company voted on the transaction. The investment was approved by the Board of Directors of the XYZ in the absence of the member connected with the small business concern.

The Small Business Administration is satisfied that the terms of the investment are fair and reasonable and would not have been materially different in the absence of any affiliation between the small business investment company and the small business concern. Furthermore, the Small Business Administration is satisfied that this amendment serves the purposes of the Small Business Investment Act of 1958, as amended.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
December 16, 1963.

Hon. WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: Thank you for your letter of recent date, attaching a letter that you have received from Paul Conrad, secretary-manager of the Allied Daily Newspapers of Washington State, with reference to S. 1666, a bill to amend the Administrative Procedure Act.

This bill is presently under consideration by the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, and I am making Mr. Conrad's letter available to the subcommittee for its consideration and inclusion in the hearing record.

With kindest regards, I am,

Sincerely yours,

JAMES O. EASTLAND, *Chairman.*

ALLIED DAILY NEWSPAPERS OF WASHINGTON,
Olympia, Wash., November 12, 1963.

Senator WARREN G. MAGNUSON,
Senate Office Building, Washington, D.C.

DEAR SENATOR MAGNUSON: On behalf of the 22 Washington daily newspapers maintaining membership in this association, I wish to commend to you Senate bill 1666, sponsored by Senator Edward V. Long of Missouri and 19 cosponsors.

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.

We believe passage of S. 1666, as it would amend the Administrative Procedure Act, would render the statutes on access to information much nearer this vital balance.

Barriers to news access may appear to favor the administration in office. But expediency provides only an illusory advantage in a democracy. In the last analysis, both parties derive their strength from our form of government, and it derives its strength from sound legislation. We believe S. 1666 is sound legislation.

Sincerely,

PAUL CONRAD, *Secretary-Manager.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Washington, D.C., November 5, 1963.

Hon. EDWARD V. LONG,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: In reference to S. 1663 and S. 1666, amendments to the Administrative Procedure Act, we request that the following information be made available to members of the subcommittee, and ultimately to the full committee, during their consideration of the bills, and, if possible, be included in the record of the hearings.

The Railway Labor Executives' Association is composed of the heads of the various railway labor organizations which represent substantially all the railway employees in the country. We have a special interest in the Railroad Retirement and Railroad Unemployment Insurance Acts, which, as you know, provide

programs for retirement and unemployment benefits for employees in the railroad industry. Accordingly, we are equally concerned about the functions of the Railroad Retirement Board, which functions are, in general, confined to the administration of the two acts.

The Railroad Retirement Board is now exempt from the provisions of the Administrative Procedure Act except for section 3 thereof, which relates to public information requirements. The Board's exemption stems from section 2 of the Act which provides an exemption for "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them." The quoted language has been interpreted to include the National Railroad Adjustment Board and the Railroad Retirement Board among the agencies so exempted. (H. Rept. No. 1980, 79th Cong., 2d sess., p. 19; Attorney General's Manual on the Administrative Procedure Act, 1947, pp. 10–11.) This language, however, would be removed by the bill S. 1663. This would deprive the Board of the exemption it now enjoys even though the bill would continue such exemption for the National Railroad Adjustment Board through the exclusion from the act (except as to requirements of sec. 3) of "arbitration and mediation functions." (See p. 2, line 11, of S. 1663.)

We strongly urge a change in section 2 as proposed by the Railroad Retirement Board in its report on the bill, dated September 26, 1963, in order to continue the exclusion of the Railroad Retirement Board from the general coverage of the act. This could be accomplished by striking from line 14 on page 2 of the bill, "and (4)" and inserting in lieu thereof "(4) agencies composed of representatives of the parties or of representatives of the organizations of the parties to the disputes determined by them, and (5)."

The bill would also amend section 3 of the Administrative Procedure Act to which the Railroad Retirement Board is subject under present law. Section 3 relates to the publication and availability for public inspection of matters respecting agency functions. Subsection (c) of section 3 would be revised by the bill to require each "agency * * * to make its records promptly available except those * * * which are (1) specifically exempt from disclosure by statute, * * *."

Section 12 (d) and (n) of the Railroad Unemployment Insurance Act specifically preclude, with certain exceptions, the disclosure of information obtained in the administration of that act. Section 12(n) provides an absolute mandate against the disclosure of medical records except in court proceedings relative to a claim for benefits under the act. The Railroad Retirement Act contains no comparable provision. The Board has, however, taken the position that these provisions apply as well to records obtained in the administration of the Railroad Retirement Act since information, particularly that of a medical nature secured primarily for purposes of the Railroad Retirement Act, may be used, and is often used, for the purposes of the Railroad Unemployment Insurance Act. The Board's position in this respect was recently upheld by orders of the U.S. District Court for the Northern District of Illinois, entered on June 28, 1963 in the cases of *H. L. Allison* v. *Southern Railway Company*, Civil Action No. 60 C 1169 and *James Coley Haynie* v. *Southern Railway Company*, Civil Action No. 60 C 1185.

In its report on the bill, the Railroad Retirement Board has assumed that this amendment of section 3 is not intended to affect the Board's position in this regard. To clarify this point, however, the Board has proposed, and we endorse, an amendment which would insert after the word "statute" in the proposed revision of subsection (c) (in line 16 on p. 7 of the bill) the phrase, ", whether such exemption is expressed in the statute under which the records are primarily secured or in a related statute, administered by the same agency."

The Railroad Retirement Board has no functions except to administer the Railroad Retirement and Railroad Unemployment Insurance Acts. Because of the unique character of the railroad retirement and the railroad unemployment insurance systems which relate exclusively to the railroad industry, we believe that no constructive purpose would be served by including the Board in the general coverage of the Administrative Procedure Act as S. 1663 would appear to do. We note that the bill would continue the exemption for other agencies whose activities are devoted exclusively to railroad industry. If the Board were subject to the act in general, there would be a tendency to delay its procedures and add to its administrative costs without compensating advantages to persons who are involved, or are interested, in the procedures of the Board. We are not aware of any expressions of dissatisfaction with the Board's procedures on the basis of the fact that its procedures are not governed by the Administrative Procedure Act.

We therefore strongly urge the adoption of the amendment proposed by the Railroad Retirement Board to section 2 of the bill, in order to continue the Board's exclusion from the provisions of the act except section 3; and the amendment proposed by the Board to section 3 of the bill, in order to continue in effect the Board's position with regard to disclosure of information.

Very truly yours,

G. E. LEIGHTY, *Chairman.*

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, November 7, 1963.

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Although the views of the Federal Deposit Insurance Corporation have not been requested on S. 1666, a bill to amend section 3 of the Administrative Procedure Act to clarify and protect the right of the public, to information, and for other purposes, I feel the legislation proposed by this bill is of sufficient significance to the Corporation that my personal views thereon should be submitted to your committee.

As you are aware, since the expiration of the term of former Chairman Erle Cocke, Sr., Mr. James Saxon, Comptroller of the Currency, has been Acting Chairman of the Corporation. Inasmuch as Mr. Saxon, as Comptroller of the Currency, may express his views on the subjects in which you are interested, I cannot express the official position of the Corporation on these matters. Accordingly, the views presented herein represent my own personal views on S. 1666.

Our experience with the Administrative Procedure Act is that it has worked well in safeguarding the interests of those dealing with this Corporation. Of course, there may be areas that can be improved. However, the amendments of section 3 of the Administrative Procedure Act, as proposed by S. 1666, are not just improvements of the workability of the present act, but rather are basic revisions of existing administrative procedure.

Under the amendments proposed by S. 1666, the necessary confidentiality of all our official records would be removed. The regulation of banking has been necessarily and advantageously conducted by procedures wholly different from those which resemble the conventional judicial processes. (See Davis, "Administrative Law Treatise," sec. 4.04 on "Supervision of Banking," a copy of which is attached.) The exercise of supervisory powers over banks has traditionally been attended by confidentiality which is quite the opposite of the publicity that marks most regulatory activities and public hearing procedures. All of our major licensing procedures involve written applications, submission of evidence in writing, an on the ground investigation or examination and decision by our Board of Directors, with opportunity for discussion of the matter involved by the interested parties both before and after decision. Only one of our procedures involves a formal hearing—that for the termination of the insured status of a bank. Although judicial review is available, none of our decisions has ever been so reviewed. The opinions and orders made by our Board of Directors and other records in the adjudication of cases, like reports of examination, are required for good cause to be held confidential and privileged and are not published or made available for public inspection. (See *Bank of America Nat. Trust & Sav. Ass'n* v. *Douglas*, 105 F. 2d 100, 103–105.)

The present procedures of the Corporation in reference to the above and similar matters are fair and provide a practical administrative procedure for confidential and privileged matters which are considered by the agency in making its determinations. Any requirement, such as that contained in S. 1666, that records of such proceedings should be made available to the public would be in direct conflict with the established practices that are deemed a requirement to the proper administration and supervision of insured banks and contrary to the public interest. Section (c) of the bill provides that the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency is situtated, shall have jurisdiction upon complaint to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees for the complainant. If this provision is enacted into law the agencies would be required to produce demanded records or information in all parts of the United States.

It is my opinion that in the conduct of the public business the agencies should not be burdened with the requirement, where the production of records is ordered by the court, to produce such records anywhere in the United States for the convenience of a single complainant. It would appear more reasonable to require the production only within the district where the agency has its principle place of business or maintains a field or district office. This section should also at least require that the person demanding the records satisfy the court that he has a proper and direct interest in the matter to which the records sought relate. Under the present language of the bill the production of records or information would be subject to indiscriminate demand and could result in serious impairment of the conduct of the affected agency's business. With respect to the assessment of costs and attorneys' fees the language of the bill should, in my opinion, be amended to provide that in those cases where the district court determines that the production of the demanded records or information is properly withheld or denied by the agency, the costs and attorneys' fees shall be assessed against the complainant.

Under present law, agencies are permitted, in their discretion, to determine publication of final opinions and orders and are required to publish only statements of general policy and interpretations formulated and adopted for the guidance of the public. Under the proposed amendments, all final opinions, orders, statements of policy and interpretations affecting the public, regardless of their importance or unimportance, would have to be published. I deem this amendment to be burdensome and without substantial benefit to either banks with which this Corporation deals or to the public. Furthermore, as with the Corporation's records, disclosure of this information would, in many instances, involve matters which are of a confidential and privileged nature.

For the reasons above stated, I would not favor enactment of S. 1666.

Of course, these views being personal, they have not been submitted to the Bureau of the Budget for advice as to their relationship to the program of the administration.

Sincerely yours,

JESSE P. WOLCOTT, *Director.*

ADMINISTRATIVE LAW TREATISE

(By Kenneth Culp Davis (pp. 247–251))

"§ 4.04. *Supervision of Banking*

"Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks. The regulation of banking may be more intensive than the regulation of any other industry, and it is the oldest system of economic regulation. The system may be one of the most successful, if not the most successful. The regulation extends to all major steps in the establishment and development of a national bank, including not only entry into the business, changes in status, consolidations, reorganizations, but also the most intensive supervision of operations through regular examination of banks.

"The substantive systems of regulation by such nonbanking agencies as the ICC, FPC, AND FCC are much the same as one portion of the system of regulation by the banking agencies, the portion having to do with the requirement of licenses and approvals. The major substantive difference in the systems of regulation is that the banking agencies have and the nonbanking agencies lack the power of close supervision of day-to-day operations.

"The striking fact is that whereas the nonbanking agencies administer their systems of requiring licenses and approvals by conducting formal adjudications in most cases involving controversies, the banking agencies use methods of informal supervision, almost always without formal adjudication, even for the determination of controversies. The contrast is a striking one with respect to each parallel problem: for instance, the problem of the extent of community need is about the same whether the application is for establishment of a bank, a television station, or an airline, and yet the problem is handled in the banking field by the methods of the business man and in the other fields by the methods of the judge in his courtroom.

"Even though important groups in the nation are applying pressures to try further to judicialize the administrative process, a close study of the methods of supervision used in the regulation of banking, as compared with the methods

of determinations on a record of a formal proceeding, might well prove that the nonbanking agencies have a good deal to learn from the banking agencies.[1] Banking regulation is obviously superior in its efficiency; if, as those who are regulated seem generally to believe, banking regulation fully measures up in qualities of overall fairness, then the only major question remaining is relative effectiveness from the standpoint of protection of the public interest.

"Statutory provisions which elsewhere would be given meaning through formal adjudication are typically in the banking field given meaning only through supervision. For instance, a 1933 statute[2] gave the Board of Governors of the Federal Reserve System authority, after hearing, to suspend any member bank for 'undue use' of its credit for speculative purposes or other purposes inconsistent with sound credit conditions.[3] What happens is that the Board enforces the statute through methods of bank examiners, who call to the bank's attention the items which require correction. A bank which is inclined to disagree does not typically stand on its supposed rights and defy the Board to start a formal proceeding; suspension is too drastic a remedy for the bank to risk. The bank deals informally with the Board's representatives until some mutually satisfactory solution is worked out. Adjudication gives way almost entirely to supervision. The administrative mainstay is prevention rather than cure or punishment. The sanction is not the power of suspension but the power of instituting proceedings.

"Other provisions involving imposition of penalties are likewise administered by supervising, not adjudication. Even if formal proceedings are conducted the decisive determination occurs when the proceedings are instituted. The prehearing conferences are so intense and the Board is so reluctant to proceed to hearing that the ultimate decision 'can be little more than a formal gesture superimposed upon what everyone, including the respondents, concedes is a fait accompli. After the elaborate preliminaries, the hearings are nothing but the statutory addition of an otherwise unnecessary nail in the coffin.'[4]

"So powerful is the tradition of working out controversies by methods of negotiation rather than by formal proceedings that even the death sentence is imposed without a hearing. One who does not immerse himself in the customs of this particular regulatory process might wrongly guess that due process of law would be violated by taking such action without hearing. But the question has been carried to the Supreme Court of the United States, which allowed the appointment of a conservator for a savings and loan association, without a prior hearing. 'This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional.'[5]

"The Federal Deposit Insurance Corporation has statutory authority, after hearing, to terminate the insured status of a bank whenever it finds that the bank is following 'unsafe or unsound practices'.[6] Termination of insured status means termination of a state bank's membership in the Federal Reserve System, or action by the Comptroller of the Currency to force a national bank into receivership. Such drastic penalties are naturally avoided and the effective power becomes one of supervision rather than one of adjudication. In 20 years the FDIC took action against 177 banks, of which only 41 were suspended, but in the year 1956 over 10,000 examinations and investigations were conducted.[7] Letters from supervising examiners of the FDIC reinforcing the examiners' criticisms are probably the most effective administrative tool for inducing compliance. In addition to the threat of formal proceedings the FDIC has statutory authority to publish reports of examinations, but even this penalty

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[1] Compare Landis, Air Routes under the Civil Aeronautics Act, 15 J. of Air Law and Commerce 295 (1948). The former Chairman of the CAB in this article argues that methods of bankers, not methods of litigation, ought to be used for parceling out the air routes. The probability that his argument will prevail seems to be nil.

[2] Banking Act of 1933, 48 Stat. 162, 12 U.S.C.A. § 301.

[3] Att'y Gen. Comm. Ad. Proc. Monograph, Federal Reserve System 23 (1940). The factual description here presented is taken from the monograph and supplemented by a letter of May 23, 1949, from Mr. George B. Vest, General Counsel, Board of Governors of the Federal Reserve System.

[4] Id., at page 31. Not a single such hearing was held during 1956. FDIC Ann. Rept. Part I, 6 (1956).

[5] *Fahey* v. *Mallonee*, 322 U.S. 245, 253–254, 67 S. Ct. 1552, 1556, 91 L. Ed. 2030 (1947).

[6] Federal Deposit Insurance Act § 8(a), 64 Stat. 879 (1950), 12 U.S. C.A. § 1818(a).

[7] FDIC Ann. Rep., Part I, 4–7 (1956).

of publicity is usually too drastic for practical use and is valuable chiefly as a background threat.

"Some of the checks and balances affecting the exertion of supervisory pressures by the FDIC are unusually illuminating. When a supervising examiner concludes that nothing further can be accomplished through advice and warnings, he prepares a memorandum of facts and recommendations which first must be approved by the Legal Department and then is submitted to the Board of Directors of the FDIC. The Board adopts, in advance of instituting formal proceedings, a set of findings for submission to the appropriate regulatory authority—either the Federal Reserve Board, the Comptroller of the Currency, or the state banking authorities. The regulatory authority can then apply its pressure for correction. Submissions to the outside regulatory authority provide an important safeguard against unreasonable requirements. This procedure which precedes or obviates formal action is so effective that it was reported in 1940: '[O]f the several proceedings which have involved national banks, none has resulted in the issuance of a termination order, since the Comptroller has either secured correction or brought about the closing of the bank.'[8] Only if correction has not been made within 120 days after submission of the case to the regulatory authority is notice of a formal hearing served, and even then the proceeding is dropped whenever the required correction is made. The hearing, when one is held, is said to be 'merely a concession to convention, rather than a serious aid to the formation of an informed judgment. The formal hearing prior to termination brings forward no new knowledge * * * nor does it add materially to the respondent's protection, for when a hearing is commenced the decision has already, to all practical intents and purposes, been reached'.[9]

"Problems of fair procedure are just as important in the use of the supervisory power as they are in adjudication. Indeed, it is interesting that even some of the same problems arise. One of the controversies about adjudication is whether or not a hearing examiner should be allowed to make a report to the deciding officers without disclosing the report to the parties affected. In banking supervision, precisely the same problem is controversial. The custom of examiners of the Comptroller of the Currency is to make a report, a copy of which is furnished the bank, and also to make a confidential report to the district examiner and the Washington office. Bankers have complained to a congressional committee but the Comptroller continues to approve the practice.[10]

"The critical process in the federal control of banking is the supervising power, not adjudication or rulemaking. The supervising power is not and probably cannot be surrounded by procedural safeguards in formal hearings, and it is largely immune from the check of judicial review. Freedom from arbitrary or unfair administrative action must depend upon factors other than formal procedures or judicial review."

FEDERAL TRADE COMMISSION,
Washington, D.C., December 23, 1963.

Hon. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In accordance with the suggestion made by Senator Burdick during the course of my testimony at the hearings on October 31, 1963, regarding S. 1666, 88th Congress, 1st session, I am submitting, for the consideration of the subcommittee, three minor proposed amendments which, in my opinion, would obviate the problems the Commission would face under the bill as now drawn.

(1) In line 5 on page 2, before the word "authority" insert the word "final."

This would result in having this particular subsection of the bill read the same as the corresponding provision in the existing Administrative Procedure Act.

(2) In line 5 on page 4, eliminate the word "and"; in line 8 on the same page, substitute a semicolon for the period now appearing after the word "matters," and add thereafter the following: "(4) information secured

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[8] Att'y Gen. Comm. Ad. Proc. Monograph, Federal Reserve System 28 (1940).
[9] Id., at page 37.
[10] See Fox, Supervision of Banking by the Comptroller of the Currency, in Redford, Public Administration and Policy Formation 119, 163 (1956).

by an agency through the exercise of its statutory investigatory powers, which, in accordance with the published rules of the agency, is held confidential for good cause found; and (5) matters relating solely to the internal operations and management of an agency."

As I pointed out in my testimony, while I do not think it was the intent or desire of the sponsors of the legislation to require that there be made public, information furnished the Commission by applicants or complaining parties or obtained by the Commission through its investigations, the bill as now drafted might be subject to such an interpretation; furthermore, as I stated, the bill might also require that there be made public, information relating solely to internal operations and management of the Commission. With reference to that part of the suggested amendment which pertains to information secured through the exercise of statutory investigatory processes of an agency, we have attempted to have this proposal follow the language set forth in section 3(c) of the current Administrative Procedure Act. The adoption of this amendment, in my opinion, would remove any ambiguity as to the confidentiality of such information and of matters relating to the internal operations and management of an agency.

(3) In line 21 on page 4, between the words "every" and "agency" insert the word "final."

By such an amendment there would be no statutory obligation on the agency to disclose the votes of its individual members on all types of proceedings which came before it, and this requirement would be restricted to those votes cast in final agency proceedings.

These proposed amendments have been considered only as to how their adoption might affect the operations of the Federal Trade Commission.

I trust that these suggestions will be of assistance to the subcommittee in its consideration of this most important legislation.

Sincerely yours,

PAUL RAND DIXON, *Chairman.*

Agency Comments

U.S. Atomic Energy Commission,
Washington, D.C., October 25, 1963.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
U.S. Senate.

Dear Senator Eastland: This is in response to your request of June 14, 1963, for a report on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

As we understand the bill, it would amend section 3 of the Administrative Procedure Act of 1946 by—

(1) Revising subsection (a) to require the publication in the Federal Register of agency information additional to that presently required;

(2) Revising subsection (b) to narrow the areas of exemption from public inspection of an agency's final opinions and orders made in the adjudication of cases, as well as all rules, statements of policy and interpretations, and to require every agency to establish a current index of such records;

(3) Revising subsection (c) to narrow the areas of exemption from public inspection of agency records, and to authorize U.S. district courts to order the production of records improperly withheld from a complainant;

(4) Adding a new subsection (d), requiring that the votes of each member of an agency in every agency proceeding be recorded and made a matter of public record; and

(5) Adding a new subsection (e), prohibiting an agency from withholding information or limiting the availability of records to the public and to Congress except as specifically stated in section 3.

We believe that the proposed subsection (a) would be acceptable and would have some possible utility as clarification of the existing subsection (a), but improvements might be made in the proposed language. It should not be necessary to publish "descriptions of forms available"; we believe that identification of the general nature of such forms, with perhaps reference to appropriate form numbers, would be adequate. It is our view also that the proposal to delete from the present subsection (a) (3) the exception from publication of "rules addressed to and served upon named persons in accordance with law" might handicap the Commission if emergency action should be required in the interest of public health and safety or the national interest, since there might possibly be occasions when the Commission might find it requisite to make an emergency rule effective immediately by direction notice to all those concerned, at a time when publication in the Federal Register might require several days.

Th proposed subsection (b), which would generally revise the language of existing subsection (b) and impose certain minor additional requirements with respect to indexing of final orders, opinions, rules, statements of policy and interpretation, presents no special difficulties with regard to the Commission's activities. We believe, however, that the present exception for documents "required for good cause to be held confidential" should be retained. For example, the Atomic Energy Commission provides by regulation in 10 CFR 9.4 that a considerable number of categories of information are not included in the public records of the Commission and are not to be disclosed except in accordance with prescribed procedures. While we believe that the applicability of such considerations to opinions and orders would at most be limited, and there have not yet been any occasions when the Commission has had occasion to withhold publication of an order, opinion, rule, statement of policy, or interpretation on such grounds, we believe that to deprive an agency completely of authority to withhold publication on such grounds might in particular cases not be in the public interest.

We believe that special difficulties are presented by the language of the proposed subsection 3(c) which would deprive agencies of the authority to with-

hold from public inspection "information held confidential for good cause found," and which would exempt from public inspection only records which (1) are specifically exempt from disclosure by statute; (2) information specifically required by Executive order to be kept secret for the protection of the national defense; and (3) internal memorandums relating to consideration and disposition of adjudicatory and rulemaking matters. The areas of exemption identified are in our judgment too narrow to permit an agency such as the Atomic Energy Commission to perform its statutory functions effectively. The salutary purpose of this provision is of course to prohibit withholding information by administrative agencies through the ad hoc exercise of judgment by an agency in a particular case. The language of the present section 3(c) recognizes that there are areas which are properly excluded from public inspection. An unqualified requirement of exposure as proposed does not leave room for the effectuation of declared and justifiable agency policy as a proper basis for withholding information. For example, the Atomic Energy Commission provides by regulation in 10 CFR 9.4 that a considerable number of categories of information are not included in the public records of the Commission and are not to be disclosed except in accordance with prescribed procedures. We believe that the requirement of compulsory disclosure would present considerable difficulties even when the subject matter does not necessarily involve security restrictions. Certain of the Commission's records, identified in section 9.4, should be exempt from public inspection, or access limited at least to persons properly and directly concerned. Such records would include not only internal documents relating to the negotiation and administration of contracts, but would also include personnel matters, information concerning the health of such persons as reactor operators and other employees of licensees, "company confidential" material furnished by applicants and licensees, and other categories mentioned in that section. We therefore believe that section 3(c) should continue to provide for the withholding of information held confidential for good cause found.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

DWIGHT A. INK, *Assistant General Manager.*

CIVIL AERONAUTICS BOARD,
Washington, D.C., October 23, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your letter of June 14, 1963, requesting a report by the Board on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the rights of the public to information and for other purposes.

S. 1666 changes the present provisions of section 3 of the Administrative Procedure Act in many significant respects. Some of these changes, the Board believes, would improve the existing law but others, unless further amended or deleted, would severely hamper the Board in the discharge of its functions. For convenience of presentation, the Board comments are primarily in terms of proposed substantive changes rather than on a subsection-by-subsection basis.

THE REQUIREMENTS RELATING TO FEDERAL REGISTER PUBLICATION

The Board favors the proposed change which would require that the agencies publish in the Federal Register a description of forms available rather than the forms themselves, in that the present requirement that forms be published on occasion results in a costly inclusion in the Federal Register of lengthy forms without any commensurate benefit in terms of information to the public. Also, the Board has no objection to the proposed change which would require publication in the Federal Register of an agency's rules of procedure and amendments, revisions, or repeals of such rules, and the Board presently endeavors to publish these materials.

Section 3(a) presently requires that delegations of final authority be published, and S. 1666 would delete the word "final" from the statute. It is not believed that such deletion would serve to provide additional information to the public.

Any delegation of authority not presently embraced within the term "final" presumably would be only an authorization to take preliminary action concerning a matter, and information of this nature is included in the presently required description of organization and statement of the general course and method by which functions are channeled and determined. Hence, the proposed amendment may serve merely to create confusion as to what is expected of the agencies in response to the change without providing any additional information to the public, and hence the Board does not favor the change.

The bill would delete from section 3 the present exception from the requirement for Federal Register publication of "rules addressed to and served upon named persons in accordance with law." Such deletion, in the context of the present Administrative Procedure Act, might require the publication of so-called "particularized" rules and waivers from rules, notwithstanding that the persons involved are aware of the action and that no apparent public purpose would be served by publication. In this connection, it is noted that S. 1663, which encompasses S. 1666, alters the definition of "rulemaking" in such fashion as to delete therefrom particularized rules and waivers, and to place them in the category of orders. The result is that enactment of S. 1663 would not require Federal Register publication of particularized rules, but that enactment of only S. 1666 (section 3 of S. 1663) might have an entirely different effect. It is suggested, therefore, that if S. 1666 is to be separately considered the exception for publication of particularized rules should be restored.

THE REQUIREMENTS RELATING TO INDEXING

So far as the Board is aware, its present procedures for making available its formal opinions, orders, and rules have proved satisfactory, and indices relating to its opinions and orders in other than routine matters are now available. However, apart from the question of whether rulings and interpretations contained in correspondence and internal materials should be made public, the Board objects to the proposed provision which would require the indexing of such materials.

The proposal is one for the indexing of all interpretive materials "affecting the public," as opposed to those intended for the guidance of the public, and practically every interpretation and ruling could be said to affect the public in some sense of the term. Practically all of an agency's actions and correspondence might be involved, and the cost of indexing probably would outweigh any public benefits involved. In this connection, it is assumed that the indexing requirement is intended to extend only to those interpretations actually adopted by the agency or issued in its name under delegated authority, as opposed to those which represent only the views of the staff. If not, a substantial portion of the internal files of an agency would be affected, and the cost of indexing, in our view, would be clearly out of all proportion to any benefits.

THE REQUIREMENTS RELATING TO THE AVAILABILITY OF INTERNAL MATERIALS

The proposed amendments would require the opening up of most of the internal files of the agencies in that all records would be made public except those which are specifically exempt from disclosure by statute, those withheld for the protection of the national defense pursuant to an Executive order, and those internal memorandums which relate to the consideration and disposition of adjudicatory and rulemaking matters. These amendments would seriously hamper the effective functioning of the Board. For example, the Board could not hope to effectively discharge its accident investigation or overall enforcement functions if its investigative files are made public. Many persons would be reluctant to provide information under such conditions, and injustices also could result through making available unsupported charges and accusations against innocent persons.

It has long been recognized that the disclosure of internal governmental materials containing staff views and recommendations tends to destroy candor in presentation contrary to the public interest, and the courts have accorded a qualified public policy privilege to such materials for this reason. See *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939. As there stated by Mr. Justice Reed (at pp. 945–946) :

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame

for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

"There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief * * *."

The present bill embodies this principle to the extent that it would not require disclosure of internal memorandums relating to the consideration and disposition of adjudicatory and rulemaking matters. However, there are other areas in which the principle is of equal importance to the Board. For example, the Board is charged by section 701(e) of the Federal Aviation Act with responsibility for ascertaining the causes of aircraft accidents and making recommendations designed to avoid future such accidents, and the opening up of the Board's internal files containing staff views and statements in this area would, in the Board's judgment, be contrary to the public interest in that it would impede and hamper the discharge of this important function.

Similarly, many internal recommendations and views are made in general terms in relation to overall programs and policies, as opposed to specific cases, and the same considerations which militate against making public communications concerning specific problems likewise apply to these general recommendations. Indeed, the agencies require at least the same freedom of internal discussion in overall planning and formulating long-range objectives as they do in deciding specific cases. Furthermore, the Board acts as the adviser to the President in matters relating to foreign air transportation (see sec. 801 of the act) and actively participates in many matters involving international negotiations, all of which presumably might become public under the proposed legislation. Again, the proposed revision does not encompass such matters as internal files relating to court litigation, legal research and the like, all of which, in our judgment, should not be made generally available.[1]

Furthermore, the overall approach to the disclosure problem embodied in S. 1666 is such that delays in amdinistrative proceedings and additional administrative burdens could be expected from its enactment. Under that approach, a person is entitled to a judicial order requiring the production of those records which the agency does not affirmatively establish to fall within an exception against disclosure, with venue to compel production being conferred in districts other than the one in which the records are located.[2] The opportunities presented for delay in administrative procedings are apparent. A litigant could contend that it was entitled to certain information which the Board deemed to fall within an exception, that such information was necessary to its case, and that the proceeding accordingly should be held up until the question of production is litigated. Further, and apart from this very likely result, the agencies would have the additional task of passing on requests for information and defending the court actions involving the subject matter which S. 1666 would encourage.[3]

The Board recognizes the overall desirability of making factual information available to the public to the fullest extent consistent with the effective discharge of the public business and the private rights of the persons from whom the information is obtained. In furtherance of this objective, the Board does attempt to make factual information in its possession available to private persons

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[1] Sec. 1104 of the Federal Aviation Act empowers the Board, at the request of the person providing it, to withhold information from public disclosure when the Board determines that the disclosure would adversely affect the interests of the person and is not required in the interest of the public. This provision does not empower the Board to withhold information on its own initiative. Further, it may be argued that the enactment of S. 1666 would have the effect of repealing sec. 1104, since S. 1666 would require the disclosure of records not "specifically exempt from disclosure by statute" and since sec. 1104 is a grant of authority to withhold from disclosure rather than a specific exemption for named records.

[2] Sec. 3(c) of S. 1666 would empower a district court, where the complainant resides or has his principal place of business, to "order the production of any records or information improperly withheld from the complainant" irrespective of where such records might be located, and also to assess the court costs and attorney's fees against the agency if the complainant should prevail. Furthermore, the district court is empowered "to determine the matter de novo," and the burden of proof to justify the withholding is placed upon the agency.

[3] The proposed sec. 3(c) also could lead to less, rather than more, information to the public. The provision in terms could be so applied as to require an agency to produce original records in the judicial district where the complainant resides, even though the effect would be to remove such records from the agency's custody and thus to make them unavailable to other members of the public.

to the fullest possible extent. Thus, the Board makes factual information relating to aircraft accidents available for the use of private litigants when it cannot be obtained from other sources. The Board also makes available various statistical and other information relating to air carriers, and section 1103 of the Federal Aviation Act specifies that most of the matters filed with the Board by air carriers and other persons shall be treated as public records. Consequently, there is little in the way of factual information which is not now available to the public. Indeed the Board is not aware of any complaints concerning its present informational policies with respect to basic factual matters, as opposed to demands which are made from time to time for the disclosure of matters reflecting internal views and recommendations which, in the Board's judgment, ought not to be made public.

The Board also recognizes that the problem of governmental information presents many difficulties, and that conflicting interests are involved on which an overall balance must be reached. However, since the problems involved vary with the duties of the various components of Government, we seriously question whether the subject matter can be adequately dealt with in terms of detailed legislation of general applicability. Rather, the problem is believed to be initially one best handled by rules promulated by each agency in the light of its own particular problems, and that is the present law. If individual abuses exist, it is suggested that the more appropriate remedy is to treat with these specific abuses rather than to change the entire approach to the overall problem. In the absence of any showing of any necessity for legislation of the type here proposed in relation to the Board, and in view of the undesirable features pointed out above, the Board opposes the provisions relating to disclosure of internal materials. However, if it be thought that legislation along the general lines of S. 1666 should be enacted, the Board recommends that the exception from public disclosure be broadened to include files relating to investigations international negotiations, court litigation, legal research, and internal recomemndations and advice concerning overall programs and policies as well as specific proceedings.

THE REQUIREMENT FOR A RECORD OF INDIVIDUAL VOTES

Section 3(d) would require the agencies to keep a record of the individual votes of the members in every agency proceeding and generally to make sure record available for public inspection. These requirements are similar to those already contained in section 1001 of the Federal Aviation Act, and the Board has no objection to the proposed provision.

The Board has been advised by the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

ROBERT T. MURPHY,
Vice Chairman.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., July 19, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in further reply to your letter of June 14, 1963, requesting the Commission's views on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes.

S. 1666 would divide section 3 of the Administrative Procedure Act into five subsections. Each of these subsections is considered in relation to the effect it would have on Civil Service Commission operations. Before doing so, however, it is necessary to observe that, whereas the present section 3 has two exceptions that apply to the whole section, the proposed revision has no general exceptions, and one must look to each subsection to find the exceptions to it.

Subsection (a) requires publication in the Federal Register of agency rules and certain information about the agency. The two general exceptions contained in the present section 3, "(1) any function of the United States requiring

secrecy in the public interest or (2) any matter relating solely to the internal management of an agency," are repeated verbatim in the subsection. The exception of matters relating to the internal management of an agency has been interpreted by the Attorney General as including matters relating to the internal management of the Federal Government as a whole. Thus, except for matters relating to the application of the Hatch Act to State employees, and matters relating to the removal of hearing examiners (the latter are specifically included by present section 5), the Commission is not covered by the present requirements of section 3. We assume this interpretation will still be valid, and consequently do not object to it.

Subsection (b) relates to the availability to the public of agency opinions and orders made in the adjudication of cases, and all agency rules, statements of policy, and interpretations affecting the public. There are three exceptions: (1) matter that is specifically excepted from disclosure by statute, (2) matter that involves any function of the United States requiring secrecy to protect the national defense and is specifically excepted from disclosure by Executive order, and (3) matter that relates solely to the internal employment rules and practices of any agency. The third exception, matter that relates solely to the internal employment rules and practices of any agency, would seem to be susceptible of interpretation as applicable to the internal employment rules and practices of the Federal Government as a whole. This would exclude the Commission to, a large extent, from coverage. The subsection differs from the present subsection (b) in that opinions are to be made available for copying as well as inspection; a current index of final orders, opinions, rules, statements of policy, and interpretations must be maintained and made available for public inspection and copying; and these orders, etc., may not be relied on or cited as precedent unless indexed and made available or published. We do not object to these provisions as far as Hatch Act State cases and removal of hearing examiners are concerned.

Subsection (c) requires that agencies make their records available in accordance with published rules. Three types of particular records or parts of records are excepted: (1) those specifically exempt from disclosure by statute; (2) those specifically required by Executive order to be kept secret for the protection of the national defense; and (3) internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters. The first exception would apply to none of the Commission's records. The second exception might apply to some of the Commission's records if President Truman's directive of March 13, 1948, is considered as an Executive order. The third exception will enable the Commission to continue to keep this type of record confidential. It is assumed that this subsection will permit the Commission to continue its present practice of restricting records that pertain to a particular individual to persons who show a legitimate interest in order that the rights and interests of the individual concerned be protected.

Subsection (d) requires making available for public inspection the record of the votes of each agency member in every agency proceeding. "Agency proceeding" is defined in section 2(g) of the Administrative Procedure Act as any agency process as defined in subsections (c), (d), and (e) of section 2. These subsections define rulemaking, adjudication, and licensing. The Commission is excepted from the rulemaking provisions of section 4 of the Act and the adjudication provisions of section 5 (except for State Hatch Act cases and removal of hearing examiners) and does no licensing. Hence we would interpret subsection (d) as not applicable to the Commission.

Subsection (e) is designed to prevent section 3 being used in the future as authority for withholding information from Congress or the public, except as specifically stated in the section. The Commission does not object to this provision.

The Bureau of the Budget advises that, from the standpoint of the administration's program, there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

JOHN W. MACY, JR.,
Chairman.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., September 30, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request of June 14, 1963, for a report on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

The Department recommends that the bill be not passed.

Subsection (a) of the proposed amendment of section 3 of the Administrative Procedure Act (hereafter called APA) is substantially the same as the present subsection (a) (relating to matters required to be published in the Federal Register), except in the stated effect of the failure to publish, the deletion of the word "final" before "authority," and the deletion of the exception for rules addressed to and served upon named persons. Under the present APA, no person is "required to resort to" unpublished organization or procedure. Under the proposed amendment, neither is such person to "be bound or adversely affected by" unpublished material.

Subsection (b) of the proposed amendment would substantially revise the publication requirements as to agency opinions, orders, and rules. Section 3(b) of the present APA states that every agency shall publish or, in accordance with published rules, 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. The proposed revision would require the above categories of material to be made available either for public inspection and copying or by prompt publication with copies offered for sale, with nothing being withheld unless it comes within one of three specific categories, as follows:

1. Matters specifically exempted by statute;
2. Matters requiring secrecy to protect the national defense and specifically exempted from disclosure by Executive order; and
3. Matters relating solely to the internal employment rules and practices of any agency.

By reason of the definition of "rule" (which includes general statements of policy or interpretations), Department agencies now publish statements of policy and general interpretations. Nevertheless, the revision would specifically require publication of "statements of policy, and interpretations adopted by the agency and affecting the public." To the extent required to protect the public interest an agency, when publishing opinions and orders, would be permitted to delete identifying details but only after a "fully explained" justification in writing. Finally, agencies would be required to maintain a current index of each "final order, opinion, rule, statement of policy, and interpretation." None of these could be "relied upon, used, or cited as precedent" against any private party unless indexed and published as provided in the subsection.

Subsection (c) of the proposed amendment would susbtantially broaden the availability of agency records to public inspection. Section 3(c) of the present APA requires that "matters of official record" must be made available except "information held confidential for good cause found," but only to "persons properly and directly concerned." The proposed subsection (c) would establish an inverse rule whereunder *no information could be withheld* by an agency except to the extent that it comes within one of three specific exemptions, as follows:

1. Records specifically exempt from disclosure by statute;
2. Records specifically required by Executive order to be kept secret to protect the national defense; and
3. The internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters.

The subsection also confers on any district court "where the complainant resides, or has his principal place of business, or in which the agency is situated" jurisdiction to compel production of agency records improperly withheld. Burden of proof to sustain its action is placed on the agency, with responsibility for costs and attorneys' fees in case it loses.

Proposed subsections (d) and (e) have no counterparts in the present APA. Subsection (d) would require every agency having more than one member to

keep a record of individual votes and, except to protect the national defense, make this record available to the public. Subsection (e) declares that nothing in the section authorizes "withholding of information or limiting availability of records to the public" except as specifically stated nor shall the section be authority to withhold information from Congress.

Our comments on these subsections are as follows:

1. *Subsection (a).*—We have no objection to any necessary clarifying changes in subsection (a). However, it is impossible to estimate what effect the changed wording with respect to failure to publish might have. At the very least, it might have the undesirable effect of encouraging technical defenses in both administrative proceedings and court cases based on the contention that the Government is relying on information not made public. Likewise, the full impact of the deletion of the word "final" before "authority" cannot now be gaged, although the fact that a word has been deleted here would raise questions. Finally, a number of our orders (such as rate orders under the Packers and Stockyards Act) are directed to named persons and are, therefore, not presently published. We see no good reason for changing the rule on orders of this class.

2. *Subsection (b).*—We believe the three grounds for withholding information may be too restrictive, with the result that agency determinations may be published which should be withheld in the public interest. We are not aware of any abuse of the "good cause to be held confidential" test which suggests the need for the more restrictive exceptions now proposed.

3. *Subsection (c).*—The proposed broadening of availability of agency records to public inspection would, in our judgment, go too far in the direction of opening up Government files for general inspection. The Department has a policy of making its official records available to the public to the maximum extent possible. The major exceptions are instances where, by direction of the President, the Congress, or other authorities, the Department is required to withhold information from the public. These cases fall essentially within the three specific categories in the proposed subsection (c). However, there are certain additional categories of records, all set forth in departmental regulations (see 7 CFR 1.4), which the Department has determined must be made available in a manner that will protect the public welfare as well as avoid giving undue advantage to any person or to the representatives of special interests. As we construe the proposed subsection (e), these regulations of the Department would be inconsistent therewith.

There is a serious question whether legislation which would attempt to deny to the executive branch the right by appropriate published rule to keep certain information confidential in the public interest would invade the executive power of the President under the Constitution and the separation of powers provided therein. However, aside from this question, it seems that purely as a matter of good business management and efficiency, it would be undesirable to require everything reduced to writing by every agency official, when engaged in the consideration and disposition of other than adjudicatory and rulemaking matters, to be made available, presently or anytime in the future, to private counsel, Government contractors, speculators, the press, or anyone else. One result would be a serious interference with internal exchanges because officials would be fearful of reducing matters to writing.

Moreover, much of the Department's research data are voluntarily supplied to the Department on the basis of our assurance that they will not be disclosed except as part of summary tables and figures. Inability to make such a commitment would result in drying up our sources of information and would cause inestimable harm to research programs which are based on confidence built over many years.

The Department receives many informal complaints in regulatory matters on a confidential basis, and reports of possible fraud or other violations of law from individuals who desire their identity to be protected. Particularly in program operations at the farm level, it is necessary to depend upon information furnished in confidence by a farmer's neighbors and others in the community. Although such information is not relied upon as a basis for any determination which may adversely affect an individual, such information is an important means of turning up questionable cases which may require further investigation and consideration in order to enforce program requirements and provisions, such as those relating to the acreage history and yields of crops grown on the farm. General knowledge that the Department could not keep this information confidential would dry up an important source of information necessary to the enforcement of law.

The Department undertakes programs of broad economic impact with respect to which care must be taken in the timely release of information to the public. Access to the records, as this proposed bill would permit, would result in advance "leaks," before timely public release should be made.

For the foregoing reasons, it is our opinion that the public information requirement must preserve to the agencies, or at least to this Department, discretion to withhold from random public inspection that which the public interest requires to be withheld, including information relative to internal operations.

4. *Subsection (d).*—Presumably this subsection would have no application to the Department as such, but would be construed to apply to the boards of directors of the Commodity Credit Corporation and the Federal Crop Insurance Corporation, because of the broad definition of "agency" contained in section 1 of APA. We have difficulty in understanding why it should be deemed necessary in the public interest or to protect private rights to make full public disclosure of how each board member voted on each matter which comes before these boards. Our experience has failed to disclose such a need.

5. *Subsection (e).*—As indicated above, we consider that the bill should allow greater agency discretion. If the scope of agency discretion is clearly defined in the statute, we would see no need for the further disclaimer (in this section) against an implication of ever greater discretion. As to the release of information to the Congress, we think this is adequately covered by existing instructions from the President.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., October 11, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of this Department with respect to S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

We are in accord with the general objectives of this bill which would make major revisions in section 3 of the Administrative Procedure Act, originally enacted in 1946. In this connection we note with approval the final report of the Administrative Conference of the United States (December 15, 1962) which emphasizes the need for improved comprehensibility of Federal Register documents (recommendation No. 10).

S. 1666 is designed to make information in Government agencies more readily available and to delineate more clearly the areas in which and the purposes for which information may be withheld. It consists of five subsections, the first three dealing with (*a*) Publication in the Federal Register, (*b*) agency opinions, orders, and rules, and (*c*) agency records, all of which are significant revisions of the same subsections of the present law. The last two subsections in the bill, dealing with agency proceedings and limitation of exemptions, are new and do not appear in the present law.

GENERAL

We note that S. 1666 is identical with section 3 of S. 1663, a proposed comprehensive revision of the entire Administrative Procedure Act, which is also pending before your committee. We also note that S. 1663 contemplates important changes in the definition section of the law while S. 1666, if enacted, would be tied to the current definitions in the law. While we draw no conclusions about the significance of this fact, we assume that the committee has addressed or will address itself to possible problems that may result.

For example, the definition of "rule" in section 2(c) of S. 1663 applies only to a rule of general applicability whereas the present law defines rule as a statement of general or *particular* applicability. On the other hand, section 3(a) of the present law excepts from publication in the Federal Register rules addressed to and served upon named persons in accordance with law but this exception has been deleted from section 3(a) of S. 1666. Thus if S. 1666 were

enacted alone, section 3(a) would appear to cover rules of general or particular applicability even though the intent seems to be to exclude the latter.

SECTION 3(A)

Turning now to the specific provisions of the bill, we comment first on section 3(a)—publication in the Federal Register. This subsection requires each agency to publish descriptions of its organization (including delegations of authority), statements of the general way in which its functions are performed, and of its substantive rules and general policy. The current law provides no person shall be required to resort to organization or procedure not so published. The proposed amendment broadens this language to add that no person shall be bound or adversely affected if there is a failure to publish in the Federal Register. Here we would urge addition of the words "unless such person has actual knowledge" or similar language.

SECTION 3(B)

Section 3(b) of S. 1666 provides for making available for public inspection and copying, or publication, of all final opinions and orders made in the adjudication of cases and of all rules, statements of policy and interpretations affecting the public. Exceptions are provided where there is a specific exemption from disclosure by statute, or a specific exemption in an executive order to protect the national defense, or where the matter applies solely to the internal employment rules and practices of an agency. These exceptions are considerably narrower than those applicable to section 3(b) of the existing law under which exceptions are provided for any function requiring secrecy in the public interest and for any matter relating solely to the internal management of an agency.

One problem we have with the proposed section 3(b) is the exception where "specifically exempt from disclosure by statute." The difficulty with relating back to an exemption statute (e.g., 18 U.S.C. 1905 which makes it a criminal offense to disclose confidential information generally "to any extent not authorized by law") is that the proposed section 3(b) could be construed as "authorizing by law" disclosure in those cases where there is no absolute prohibition in a nondisclosure statute. We also question the desirability of requiring an Executive order in every situation involving national defense and of limiting internal management matters to those relating solely to employment rules and practices.

The last sentence of section 3(b) provides no final order, opinion, rule, statement of policy, or interpretation may be relied upon or used as a precedent by any agency against any private party unless it has been indexed and either made available or published. Here we make a recommendation similar to the one we made under section 3(a)—addition of the words "or such private party has actual knowledge."

SECTION 3(C)

Section 3(c) is a complete revision and expansion of the same section of the current law which simply provides that save as otherwise required by statute, matters of official record shall be made available to persons properly and directly concerned except information held confidential for good cause shown. The proposed revision would require an agency to make its records available to anyone except those records (1) specifically exempt from disclosure by statute, (2) specifically required by Executive order to be kept secret for protection of national defense, and (3) the internal memorandums of agency personnel relating to adjudicatory and rulemaking matters.

Our comments under section 3(b) relating to specific statutory exemption and requirement for Executive order in matters of national defense are also applicable to section 3(c). We seriously question the desirability of requiring each agency to make all its records available to anyone upon demand except within the framework of the narrow exceptions in section 3(c).

We think it would be disruptive to the conduct of the Government's business particularly in view of the provision for private suit in district courts to compel production of records in which the agency would have to sustain its refusal by a preponderance of the evidence and be subject to assessment of costs and attorney's fees of complainant. We believe a judgment on the merits of section 3(c) must involve a thoughtful balancing between the bill's objective to make information more freely available to the public on the one hand, and on the

other the public interest in efficient and effective management of the Government's business.

Section 3(c) presents many problems with respect to specific activities of the Department:

1. In the Area Redevelopment Administration certain confidential information is obtained from applicants as part of an application for financial assistance. These records are considered confidential because they contain financial data and individual trade information. Section 18(b) of the Area Redevelopment Act prohibits disclosure of unauthorized information concerning any future action or plan of the Secretary which might affect the value of securities and section 20 provides that the Secretary shall maintain and make available certain specific information about applications as soon as they are approved. The language of the new section 3(c) would appear to broaden availability of information considerably beyond the scope specifically spelled out in the Area Redevelopment Act.

2. There is a serious question as to whether patent applications would be considered "records" under this subsection. While there is a provision for confidentiality in 35 U.S.C. 122, that section provides for maintaining confidence "unless necessary to carry out the provisions of any Act of Congress."

3. A number of records collected by the Bureau of International Commerce and the Business and Defense Services Administration have been considered confidential because they contain individual trade data. Both the Export Control Act (sec. 6) and the Defense Production Act (sec. 705) contain provisions for nondisclosure of information obtained under these statutes.

4. The subsection would appear to require public availability for personnel records. Inasmuch as the records contain individual data as to employees, investigative reports, medical records, and similar personal papers it would not seem consistent with the public interest to make such records available.

5. It would appear that the subsection would make available for public inspection the investigative files of an agency. These files, similar to FBI investigative files, contain raw data, names of informers, perhaps unverified accusations and other material which would be most harmful if disclosed and which would breach the privacy of the individual affected.

SECTION 3 (D)

This section is new and does not appear in the existing Administrative Procedure Act. It would require each agency having more than one member to keep a record of the individual votes of each member in every agency proceeding and, except where required to protect the national defense, to make such records available for public inspection. Under the existing Administrative Procedure Act "agency proceeding" includes rule, rulemaking, order, adjudication, license, and licensing. Under S. 1663, "agency proceeding" would also include opinion and decision. Section 3(d) appears to be unnecessarily broad. For example, it would cover "rulemaking" which is defined in both the current law and S. 1663 as agency process for the formulation, amendment, or repeal of a rule.

SECTION 3 (E)

This section is new and does not appear in the existing Administrative Procedure Act. It provides that nothing in section 3 authorizes withholding of information or limiting the availability of records to the public except as specifically stated in section 3, nor shall it be authority to withhold information from the Congress. It appears to be patterned after the 1958 amendment to 5 U.S.C. 22 which authorizes the head of each department to prescribe regulations for the conduct of his department's business. The 1958 amendment added that the section does not authorize withholding information from the public or limiting availability of records to the public.

Here again we have a similar problem to the one we discussed under sections 3(b) and 3(c). The ambiguity could be compounded by the language "except as specifically stated in this section". We also question the need for the new section 3(e).

CONCLUSION

As our foregoing comments indicate we have a number of reservations about various provisions in S. 1666. In addition, we are attaching specific comments from some of the Department's bureaus and offices (Bureau of International

Commerce, Business and Defense Services Administration, Maritime Administration, Patent Office, and Assistant Secretary for Administration). We are also attaching specific comments of the Foreign-Trade Zones Board to which you addressed a separate request for its views on S. 1666.

The Department of Commerce does not recommend enactment of S. 1666 in its present form.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

ROBERT E. GILES.

ASSISTANT SECRETARY FOR ADMINISTRATION COMMENTS ON S. 1666

Section 3 of the act of June 11, 1946, 60 Stat. 238 (5 U.S.C. 1002), which the bill proposes to amend, presently includes the following exceptions applicable to all provisions of section 3:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) *any matter relating solely to the internal management of an agency* * * *." [Italic supplied.]

Under the italicized language, section 3 of the act does not presently require disclosure of agency records relating to personnel.

The above-quoted language is modified in S. 1666, however, so as to apply only to subsection 3(a) of the act, relating to publication of certain data in the Federal Register and not to agency records.

The requirements of the proposed subsection 3(c) of the act, relating to availability of agency records, would thus apply to all agency records except as otherwise provided therein. The proposed subsection 3(c) includes the following language of exemption:

"* * * except those particular records or parts thereof which are (1) specifically exempt from disclosure by statute; (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory rulemaking matters."

The foregoing language affords virtually no exemption for agency records relating to personnel.

Disclosure of agency records relating to personnel would, in many instances, appear not to be in the public interest. There is no objection, of course, to disclosing to anyone, upon request, such information as the name, position, salary, and official station of any employee, subject to consideration of costs and effect upon the efficiency of carrying out the public business. It is not believed consistent with the public interest, however, to disclose many types of information relating to personnel, including but not limited to, investigative reports, medical reports, civil service examination papers, claims and litigation, information relating to employees' personal history, private activities, and many other matters of a personal nature.

It is noted from a speech of one of the sponsors of S. 1666, Senator Long of Missouri (Congressional Record, June 4, 1963, p. 9394) that the failure to exempt agency personnel records may have been unintentional. The Senator stated:

"The bill provides for three main exceptions: First, where there is a statute providing for exemption; *second, where a matter relates solely to the internal workings of an agency;* and third, where secrecy is vital to the national defense." [Italic supplied.]

It is further noted that the proposed section 3(b), a parallel subsection relating to agency opinions, orders, and rules, provides the following exceptions:

"Except to the extent that matter (1) is specifically exempted from disclosure by statute, or (2) involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order; or (3) *relates solely to the internal employment rules and practices of any agency* * * *." [Italic supplied.]

We would urge that if S. 1666 is to be enacted, section 3(c) be amended to exempt records relating solely to the internal management of an agency and to agency personnel.

BUSINESS AND DEFENSE SERVICES ADMINISTRATION COMMENTS ON S. 1666

In terms of BDSA's current operations, the effect of the bill would be felt principally in two areas: (1) administration of section 402 of the Federal Property and Administrative Services Act (foreign excess property), and (2) the administration of the Defense Production Act of 1950, as amended, particularly title I, Priorities and Allocations Powers. Although section 709 of the Defense Production Act frees operations under that act from most requirements of the Administrative Procedure Act, it does not relieve compliance with section 3 of the Administrative Procedure Act which S. 1666 proposes to revise.

In the case of foreign excess property, S. 1666 would apparently work little change in our present information practices. As respects our administration under the Defense Production Act, however, the bill could add serious, although not insurmountable, administrative burdens, as for example the required maintenance for public inspection of an index (or docket) of administrative actions. Under conditions of extensive priorities and allocations activity, the number of administrative actions could become so great as to render the indexing-docketing chore a very formidable task.

The bill would require a change in the longstanding BDSA practice of according access to records of official action only to persons found by the agency to be directly and properly concerned. This practice is currently authorized under the present section 3(c) of the Administrative Procedure Act. (See Attorney General's Manual on the Administrative Procedure Act, p. 25.) Under S. 1666 access must be accorded to any member of the public at large—competitors, curiosity seekers, or otherwise, with very limited exceptions.

The withholding of information from a member of the public could subject this agency to suit under the court remedy provided in section 3(c) of S. 1666. In any such proceeding the agency would be required to sustain the burden of establishing the propriety of its withholding. The court would be under no constraint to indulge or respect the discretionary authority of the agency in such matters, which is presently accorded under section 3(c) of the Administrative Procedure Act.

Specifically, there is doubt as to the practicability of that feature of section 3(b) of S. 1666 which permits agency deletion of identifying details in making available public records of official actions. In a case where a specific record is asked for by reference to the required public index, it would do little good to delete identifying details since the agency by its response to the request would itself supply the necessary identification.

BUREAU OF INTERNATIONAL COMMERCE COMMENTS ON S. 1666

Section 3(a)—Publication in the Federal Register

Present law excepts publication of rules addressed to and served upon named persons in accordance with law. The proposed amendment deletes this exception. This would require publication in the Federal Register of individual license revocations, orders to exporters to hold up shipment of goods or to unload goods or to bring them back to the United States; in effect, all temporary suspensions of either validated or general licenses taken in the interest of good administration and enforcement of the Export Control Act, which are not now published in the Federal Register by virtue of the exemption. Under the bill as drafted, these orders would not take effect until so published, but in most instances such publication could not possibly be made in time to prevent the export from being made.

The proposed new section (a) would also require publication of delegations of all agency authority rather than, as at present, only those of final authority. The meaning of this amendment is not clear, but we think it is merely a requirement that all delegations of authority be published, and if so, would not present any problem since they are already published.

Section 3(b)—Agency opinions, orders, and rules

The amendment of this section provides for making available for inspection and copying all final opinions and orders made in the adjudication of cases except those specifically exempted from disclosure by statute, those requiring secrecy to protect the national defense and specially exempted by Executive order, and internal rules. The present law excepts orders and opinions which

are required for good cause to be held confidential and not cited as precedent. The amendment also provides that none of this material may be relied upon, used or cited as precedent against any party unless it has been indexed and either made available or published. Since the term "order" includes "licensing," this would appear to require indexing and publication or the making available for public inspection and copying, of each export license granted or denied by the Department. The same requirements would apply to every interpretation of the regulations, regardless of how unimportant (and whether or not the regulation is clear to everyone but the person who requested the interpretation), and to all statements of policy. In publication of this material the amendment permits the deletion of identifying details to the extent required to protect the public interest. Whenever this is done, however, an explanation in writing must accompany the deleted version. It is not at all clear whether, with respect to licenses, the present practice of making publicly available the commodity, value, and country of destination for all exports would meet the proposed rule. This publicity does not include applications which are rejected. Even so, the problem of indexing either by commodity or country of destination would not appear to add to the usefulness of the publication and would undoubtedly be time consuming.

In the field of export control there are often situations, due to quick changes in the international situation, or in some few instances to correct an inadvertance or oversight of employees of the Government, where it is necessary to take emergency action to issue a rule or order to stop goods before they can be exported from the country. The amendment requiring publication of such order or rule would operate to put the interests of the agency and the general public at a distinct disadvantage, and might well result in exportations occurring, even after they had been determined to be contrary to the national interest.

Section 3(c)—Agency records

The amendment to this section goes much beyond the present law, and would require the making available, under published rules, of all records except those specifically exempt from disclosure by statute; those required by Executive order to be kept secret for the protection of the national defense; and internal memorandums of the agency relating to consideration and disposition of adjudicatory and rulemaking matters. Under present law such records (save those held confidential for good cause found) are required to be made available only to persons properly and directly concerned. This latter clause has been generally construed to mean the party furnishing the record or information.

This particular section of the amendment would have its most far-reaching effects in the field of the general records of the Bureau of International Commerce, and could conceivably turn the files into public reading rooms. There is some question whether the confidentiality provision in the Export Control Act will remain unaffected and continue to be adequate to protect export control records. There is even more question as to whether 18 U.S.C. 1905 and 15 U.S.C. 176a will continue to afford protection to confidential information suplied by businessmen and relating to their businesses. Section 3(c) does not even have the saving provision, about deletion of identifying details, found in section 3(b). Furthermore, it provides for complaint to any U.S. district court for an order to produce the records and to assess against the Department costs and attorneys' fees of the complaint. It puts the burden upon the Department to sustain its refusal to make the records available by a preponderance of the evidence. This would appear to invite the institution of lawsuits in even the most frivolous cases.

In opening up the files, the amendment would accomplish no real purpose in the sense of making the public either aware of maladministration on the part of the Department or contribute to knowledge required by the public. On the other hand, since it is not clear that 18 U.S.C. 1905 and 15 U.S.C. 176a continue to be fully applicable, it might open up to fishing expeditions every person's business, his trade secrets, his methods of doing business and all other business matters now generally protected from disclosure.

MARITIME ADMINISTRATION COMMENTS ON S. 1666

Section 3(c) of the bill would require every agency to make available to the public its records with certain exceptions. The first classification excepted by section 3(c) of the bill is those records which are "specifically exempt from disclosure by statute." The principal relevant statutes of concern to this agency are 18 U.S.C. 1905 and 26 U.S.C. 7213. We are concerned by the effect of the proposed bill on these statutes since they prohibit, respectively, the disclosure of the specified classes of information only to the extent that such disclosure is "not authorized by law" or "in any manner whatever not provided by law." The courts could interpret the language of the bill to constitute authorization "by law" for disclosure. If this is true, the aforesaid statutes would, in effect, be nullified. Many undesirable consequences would follow, such as: (1) destruction of the citizen's right to privacy by revealing information he has given to assist law-enforcement agencies or information contained in an employee's records which would be of a personal or confidential nature; (2) law-enforcement investigations would be greatly weakened because of the hesitancy of an individual to reveal his sources and his information if they were available to the public, and a premature disclosure might impede the entire investigation; and (3) business interests may be injured by disclosure to their competitors of financial data, trade information, and other such information which was obtained by the agency in confidence.

Even if statutes such as 18 U.S.C. 1905 and 26 U.S.C. 7213 were to be considered, records which would be of a personal or confidential nature; (2) law-enforce-disclosure, it should be noted that they are basically related to business matters. Hence, they would not necessarily save from disclosure confidential matters of a personal nature such as personnel and medical records, etc.

PATENT OFFICE COMMENTS ON S. 1666

Subsection 3(b) of the proposed amendment, with certain exceptions, provides that all final opinions, and orders made in the adjudication of cases and all rules, statements of policy, and interpretations adopted by the agency and affecting the public shall be made available for public inspection and copying.

In connection with its registration for practice of patent attorneys and patent agents, the Patent Office carries on disciplinary proceedings (see 35 U.S.C. 31 and 32, and rules 341 and 348 of the Rules of Practice of the U.S. Patent Office in Patent Cases, 37 C.F.R. 1.341 and 1.348). These attorneys and agents are not employees of the Patent Office so as to exempt such action from publicity (3(b)(3)), and yet there should be an exception for these activities.

As described more fully below with respect to the effect of subsection 3(c), patent applications are kept in confidence as are the decisions of appellate boards and rulings on petitions to the Commissioner unless and until the patent issues when the file becomes available. Authority exists, when the subject matter would be of special interest to practitioners, to publish opinions even though the patent does not issue.

In addition to applications for patent, the Patent Office deals with applications for trademark registration. As shown by the annual report of the Commissioner of Patents for fiscal year 1962, the annual average number of applications for trademark registration filed, for the fiscal years 1953 to 1962, was 21,724. We assume that present practices in this field would satisfy the directors of 3(b). Trademark practitioners appear to be entirely satisfied with the public records the Patent Office now maintains on such cases and with the access they now have and may obtain to the cases. These matters are governed by rule 2.27 of the Rules of Practice in Trademark Cases, 37 C.F.R. 2.27.

As in the case of 3(b), 3(c) provides, with certain exceptions, for the prompt availability of records. Section 122 of the patent laws (35 U.S.C.), provides that applications for patents shall be kept in confidence and no information regarding applications shall be given without the authority of the applicant or owner unless necessary to carry out an act of Congress or in such special circumstances as may be determined by the Commissioner. This rule, in one form or another, has been in effect for about a hundred years, and, as presently in effect, makes no distinction between pending and abandoned applications.

Applications on file with the Patent Office may very well be classified as records of this Office, subject to the directions of subsection 3(c). We are not, of course, discussing applications kept secret because of security reasons under chapter 17 of the patent laws. There appears to be an ambiguity as to whether the existing statute (sec. 122) providing for confidential status of applications would be characterized as falling within the exception provided by subsection 3(c)(1). This difficulty is further aggravated by the implications of subsection 3(e) limiting exceptions to the directions of the amendment except as specifically stated in this section. If section 122 does not qualify as a statutory exception under 3(c)(1), there is a danger that 3(e) may be interpreted to repeal section 122 of the patent laws. If such were the case, the lack of confidentiality would be an invitation under present patent practice to fraudulent applicants to take advantage of information obtained as applications are filed.

FOREIGN-TRADE ZONES BOARD—COMMENTS ON S. 1666

The Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), authorizes the Foreign-Trade Zones Board created by the act to grant to qualified public or private corporations permission to establish and operate foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States. Foreign and domestic merchandise may be brought into a zone with relative freedom from U.S. customs laws and, subject to the provisions of the act, may be stored, exhibited, mixed with domestic merchandise, otherwise handled or manipulated, or be manufactured before reexportation or entry into U.S. customs territory. When merchandise is sent from a zone into U.S. customs territory, it is subject to laws and regulations affecting imported merchandise. Currently, there are six zones and two subzones in operation.

The act designates as members of the Board the Secretary of Commerce (who is also designated Chairman and Executive Officer), the Secretary of the Treasury, and the Secretary of the Army. In general, the Board has supervisory authority over the operation, maintenance, and administration of zones. The act also vests certain releated but separate authority and responsibility in the Secretary of the Treasury, for the protection of the revenue properly to be derived from goods involved in zone operations. That division of functions is reflected insofar as possible in separate regulations promulgated by each agency.

The comments presented here on S. 1666 are directed to the proposed amendments as they apply to the activities of the Foreign-Trade Zones Board, and are not intended to indicate the views of the individual members on the amendments as they would apply to other activities and agencies under their respective jurisdictions.

It should be noted that this report relates to the activities of the Foreign-Trade Zones Board as a board and not to the actual operations which take place within the foreign trade zones. Although the Board exercises supervisory responsibility with respect to such operations, they are actually conducted by personnel of the operators of the zones; governmental supervision and regulation on an operating level at the zones is carried out by personnel of the Treasury Department's Bureau of Customs. The Treasury Department is submitting comments separately on S. 1666 and these will include observations made with respect to the effect which S. 1666 would have on customs operations.

Subsection 3(a)

1. Subsection 3(a) would be amended by the bill to require that delegations of authority be published in the Federal Register. Subsection (a) presently provides for publication of delegations of "final authority." The intended effect of the deletion of the word "final" is not clear. In any event, to the extent the amendment would include delegation of some intermediate authority, it would not appear to be unduly burdensome as related to Board activities. Such delegations of authority, including authority to recommend, are shown in the Foreign-Trade Zones Board Regulations (15 CFR pt. 400). On the other hand, no necessity for this amendment is perceived since we are aware of no instance in which any person has been prejudiced by reason of a failure to publish any delegation relating to zone operations.

2. The bill would also amend subsection 3(a) by eliminating the present exemption (from publication in the Federal Register) for rules addressed to and

served upon named persons in accordance with law. The number of actual Board actions, over the years, considered to fall within the exemption has been relatively small. It would appear, therefore, that this requirement for publication in the Federal Register would not be burdensome. Once again, however, we perceive no reason for the change. Under normal legal concepts, actual notice is preferred to constructive notice.

Subsection 3(b)

Subsection 3(b) would be extensively amended. The subsection presently requires that every agency publish (not necessarily in the Federal Register) or make available to public inspection all final opinions or orders in the adjudication of cases and all rules. It exempts such opinions and orders required for good cause to be held confidential and not cited as precedents.

The bill would require that agencies provide for making available to public inspection and copying all final opinions and orders made in the adjudication of cases, and all rules, statements of policy, and interpretations adopted by the agency and affecting the public, unless they are promptly published and copies offered for sale. The amendment would also authorize the deletion of identifying details to the extent required to protect the public interest, provided the justification for the deletion is fully explained in writing, presumably accompanying the deleted version.

Each agency would also be required to maintain and make available for inspection and copying "a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation." None of these could be relied upon, used, or cited as precedent against any private person "unless it has been indexed and either made available or published" as provided in subsection (b) above.

The present rule regarding confidentiality would be changed to cover matters (1) specifically exempted from disclosure by statute, (2) involving any function of the United States requiring secrecy to protect the national defense, and which is specifically exempted from disclosure by Executive order, and (3) internal employment rules and practices of the agency.

There is no plain indication as to whether the amendment calling for indexing would be prospective or retroactive. It is to be noted that a summary of Board orders briefly describing the nature of actions taken by the Board since 1935 has been published in a Board publication. These descriptions of orders are listed in numerical sequence. The publication is available to the public through the Office of the Executive Secretary of the Board and the Government Printing Office. ("Laws, Regulations, and other Information Relating to Foreign-Trade Zones in the United States," as reprinted November 1962, with revisions.) In the absence of some guidance as to what is considered "adequate information," it is, of course, not possible to say whether or not this would meet that proposed standard.

In any event, taking into account the annual volume of Board actions over the past several years, there would appear to be no special difficulty, other than the need for additional expenditures and personnel, in complying with the proposed amendments of subsection 3(b) as to publication or making available to inspection and copying, nor with the provision for indexing. The proposed modification of the confidentiality rule would be unduly restrictive, and perhaps affect parties adversely, should the Board encounter exceptional instances where public interest considerations, not comprehended within any of the proposed exemptions, warrant nondisclosure of the Board action.

Subsection 3(c)

Subsection (c) presently provides that except as otherwise required by statute, "matters of official record" of an agency shall, in accordance with published rule, be made available to persons properly and directly concerned except information held confidential for good cause found.

Subsection 3(c) would be amended to require every agency to make its records promptly available except those (1) specifically exempt from disclosure by statute, (2) specifically required by Executive order to be kept secret for the protection of the national defense, and (3) the internal memoranda of the members and employees of the agency relating to the consideration and disposition of adjudicatory and rulemaking matters. The Federal district courts would be authorized, upon complaint of private persons to order production of any agency records or information improperly withheld by the agency from the complainant and to assess against the agency cost and reasonable attorneys' fees. The court would determine the matter de novo and the burden would be on the agency to sustain its action.

The proposed amendment would bring about a far-reaching change in the present rule. It would, in effect, require that records be made available to private persons whether or not they are properly or directly concerned. Moreover, the scope of records to be made available is apparently broadened by the deletion of the term "official." On the other hand, the proposed exemptions from availability would be more restricted than the present exemption; and, in contrast to subsection (b), no provision is made for deletion of identifying details from records when made available.

In the case of the Foreign-Trade Zones Board, agency records would include applications to establish and operate zones, and applications for other Board actions pertaining to zones, related documents and reports, and inquiries and general correspondence from business firms, Government agencies, members of the public, and Members of Congress.

We do not believe that the broad inspection rights, as proposed by the amendment, should be accorded with respect to the activities of the Foreign-Trade Zones Board. In this connection, it should be noted that the Board pursues a liberal policy of information disclosure under the present law. A considerable amount of information regarding the Foreign-Trade Zones Act and zones' operations, much of it in published form, is now continually disseminated and made available in answer to inquiries. Information is also distributed by the several zone operators about zone services and facilities. In addition, the annual reports of the Board made to the Congress, required by the act, not only contain information of Board activities but also detailed information reported by each of the zones concerning their operations.

The proposed amendment would open agency records upon demand to persons who may want to use the information for purposes not connected with the administration of the Foreign-Trade Zones Act or activities thereunder. There would appear to be no substantive public interest served in making many records available for inspection as a matter of course to persons who do not have a valid interest related to the Foreign-Trade Zones Act.

On the other side, there is cause for concern that inquiries from business sources regarding zone facilities and possible use may be discouraged if their communications, as part of an agency record, were open to general inspection.

Apart from absence of any "interest" standard, the proposed exception for matters specifically exempt from disclosure by statute gives rise to questions of interpretation. It is not clear that information received from other Government agencies could be withheld from inspection even though those agencies may have obtained the information on a confidential basis in the first instance. It is assumed, although not clear, that the exception would authorize withholding of trade data of the kind specifically prohibited from disclosure by 18 U.S.C. 1905.

Here, also, the stated exemptions from disclosure would be unduly restrictive in not providing for exceptional instances where other public interest considerations warrant withholding of access to agency record material.

Subsection (d)

The bill would add a new provision (d) requiring that every agency having more than one member keep a record of the individual votes of each member in every agency proceeding and make such record available for public inspection, except to the extent required to protect the national defense.

Records of the individual votes of each member of the Foreign-Trade Zones Board in agency proceedings are kept in the Board's official records. It is not clear that the public interest would be served by making such Board records generally available for inspection to persons not having a legitimate interest in the outcome of Board action. If the proposal is adopted, provision should also be made here for nondisclosure in exceptional circumstances not involving the national defense.

In accordance with the foregoing reasons, we are opposed to enactment of S. 1666.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., October 4, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on S. 1666, a bill to amend section 3 of the Administrative

Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

The bill would amend section 3 of the Administrative Procedure Act, which now provides:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) 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.

"(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found (June 11, 1946, c. 324, sec. 3, 60 Stat. 238)."

S. 1666 would amend section 3(a) by including in its publishing requirement the now excepted "rules addressed to and served upon named persons," and by providing that no person shall be adversely affected by any rule required to be, but not actually published. It would amend sections 3 (b) and (c) by deleting the present authorization to withold information held confidential for good cause found, and by restricting to 3(a) the present authorization to withold information concerning (1) any function requiring secrecy in the public interest or (2) any matter related solely to the internal management of the agency. 3(c)'s limitation of dissemination to persons properly and directly concerned would also be eliminated. Instead, the only exceptions applicable would be for 3(b), matters (1) specifically exempt from disclosure by statute, (2) requiring secrecy to protect the national defense and specifically exempted from disclosure by Executive order, or (3) related solely to internal employment rules and practices; for 3(c), records likewise exempted by statute or specifically required to be kept secret for national defense, and also "the internal memorandums of the members and employees of a agency relating to the consideration and disposition of adjudicatory and rulemaking matters."

With respect to 3(a), it is believed that requiring publication in the Federal Register of "rules addressed to and served upon named persons" would impose an unnecessary additional burden upon the Department of Defense and other agencies without a compensating benefit to the interest of the public in disclosure of agency activities. Adequate disclosure of such rules of limited applicablity would be provided for by the requirement of 3(b) that every agency make available for public inspection and copying "* * * all rules * * *." Moreover, as pointed out in the Attorney General's Manual on the Administrative Procedure Act (1947), at page 22, to require the publication of such rules could fill the Federal Register with "a great mass of particularized rulemaking."

Further with respect to 3(a), the addition of the provision that no person may be adversely affected by any rule required be published in the Federal Register, but not so published, could be interpreted to preclude enforcement of regulations not listed in the Federal Register but known to the parties against whom enforcement is sought. No reason is perceived why enforcement should be barred in such a case.

With respect to 3(b), without the provision excepting orders and opinions required for good cause to be held confidential, the section might be urged as a basis for demanding access to the decisions of courts-martial, investigative boards probing performance of military personnel, and similar boards, in all of whose findings the public interest in dissemination is minimal and the possible harm

to the individuals concerned great. The exception provided by the amendment for matters "which relate solely to the internal employment rules and practices of any agency" is inadequate to give the needed protection, since it could be interpreted as applicable only to broad personnel policies, and not to action taken in individual cases.

More importantly, the substitution of this specialized exception for the present act's more general exemption of "matters relating solely to the internal management of an agency" introduces a doubt as to the status of directives and regulations which are not concerned with internal employment rules, do not affect the public, and are not classified, but which should still not be disseminated generally. Such a directive is DOD Directive 4105.46, which prescribes the permissable price latitudes for Department negotiators in cost-plus-fixed-fee contract negotiations. The undesirability of making such information generally available is obvious. Yet under the proposed revision, it is uncertain whether there would be a clear statutory basis for refusing a demand for this instruction or for any similar to it.

With respect to section 3(c), without the dual provisions that records need be disseminated only to persons directly and properly concerned, and then only if not held confidential for good cause, there is left in the act no authority for preventing the curious from probing a serviceman's personnel and medical record, from acquiring advance information on Defense Department procurement plans, from obtaining Government examination questions and answers, from getting the names of the Department's confidential informants, from perusing information received by the Department in confidence from private firms in connection with contract bids, or even from obtaining unclassified information furnished the United States in confidence by foreign nations. The exception provided by the amendment for matters "required to be kept secret for protection of the national defense" is too narrow to be adequate, unless "national defense" is defined broadly. Since the new phrasing would replace a present exception for matters requiring secrecy in "the public interest," it is not certain that the interpretation of the new phrasing would be as broad as necessary.

Moreover, the proposed change to 3(c) affords grounds for a misunderstanding of the status of internal memorandums. The present act requires that matters of "official record" be made available; S. 1666 omits the adjective "official." Since Attorney General Clark interpreted "official records" as not including internal memorandums (see Attorney General's Manual on the Administrative Procedure Act (1947) at p. 25), alteration of the term raises a question as to congressional intent, notwithstanding the provision of 3(c) which excepts "the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking power." That clause could be construed as applying to only two particular types of memorandums, those relating to adjudication and those relating to rulemaking. In such event the vast majority of Defense preliminary memorandums would be unprotected by the act. An argument could even be made that inter, as against intra, agency communications were unprotected.

The bill would also create a section 3(d) requiring that a public record be kept of individual votes in agency proceedings. This section's provisions could be interpreted as applying to courts-martial, selection boards, discharge review boards, and records correction boards, all of which meet the definition of "agency." In the case of courts-martial, this might be construed to repeal by implication the secret ballot required by 10 U.S.C. 851(a). In the case of all such boards any public record of the votes of each member would be deleterious to the board's proper functioning.

For the reasons noted above, the Department of Defense opposes enactment of S. 1666.

We have been advised by the Bureau of the Budget that there is no objection to the submission of this report to the committee.

Sincerely,

JOHN T. MCNAUGHTON.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., November 15, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: Your committee has requested this Department's comments on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

S. 1666 amends the existing provisions of section 3 of the Administrative Procedure Act (5 U.S.C. 1002), which is the public information section of the act. The bill makes a substantial number of changes to this section.

The act now requires in section 3(a)(1), redesignated by S. 1666 as section 3(a)(A), that every agency shall publish, among other things, delegations of final authority. This is understood to encompass all delegations of authority to dispose finally of cases or matters pending before an agency. S. 1666, however, deletes the term "final" from this section of the act. We are uncertain as to the effect on the procedures of this Department, if the term is deleted. Certainly, there is an inference, if this legislation is enacted, that every agency would be required to publish all delegations of authority without regard to whether they relate to delegation of final authority or not, except those exempted by other provisions of this section of the bill. We question whether this is necessary or intended. In any event, we are not aware of any need for this change in the present law.

The bill amends section 3(a)(2) of the act by adding a requirement that agency rules of procedure must be published in the Federal Register. It also clarifies the present requirement that forms available to the public must be published in the Federal Register. In our opinion both of these amendments are desirable. In the latter case, the amendment clarifies the present law requiring the publication of forms. In reporting on this provision of S. 7, a bill later enacted, with amendments, as the Administrative Procedure Act, the House Committee on the Judiciary explained:

"Where it is not desirable to publish complicated forms at length and in full-spread fashion in the Federal Register, under this provision an agency may publish in the Federal Register a simple statement of the contents of the form and, if blanks are available, state where they may be obtained" (H. Rept. 1980, 79th Cong. 2d sess.).

Thus, under this new provision the publication requirement could be adequately met in every case by publishing a list of the forms available to the general public with a reference to where and how they may be obtained.

A new section 3(a)(D) is added to the act by S. 1666, which requires that every amendment, revision, or repeal of the matters required to be published in sections 3(a)(A) to section 3(a)(C) shall also be published. Clearly, the principal purpose of this change in existing law is to insure that all publications will be kept current. We believe this revision is desirable.

Presently, section 3(a) provides that no one shall in any manner be required to resort to unpublished organization or procedure. S. 1666 expands this, by requiring that no one shall, in any manner, be required to resort to, or be bound or adversely affected by any unpublished organization, procedure, or other rule, statement, or interpretation thereof that is required to be published. This provision is intended to fill a void that presently exists in the act by specifying what consequences will flow to any agency that fails to publish according to this subsection. However, like the present law the amendment does not take cognizance of the situations where a person has actual notice of the unpublished material. We believe that such persons should be bound, notwithstanding whether there was publication or not.

Section 3(b) of the Administrative Procedure Act now directs each agency to publish or, pursuant to a published rule, make available for public inspection all final opinions or orders in the adjudication of cases and all rules. This provision excepts parenthetically confidential opinions and orders where there is good cause and when they are not cited as precedent.

S. 1666 provides in section 3(b) that every agency shall make available for public inspection and copying all final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases and all rules,

statements of policy, and interpretations adopted by the agency and affecting the public, unless such materials are promptly published and copies offered for sale. This amendment, as well as the present provisions of section 3(b) of the act, is principally intended to make available to the public final decisions, particularized rules, or orders not normally published under section 3(a) of the act. In addition, S. 1666 expands the present section 3(b) by making available statements of policy and interpretations adopted by an agency. We are uncertain as to what effect this provision will have on the operations of this Department or what matters would be encompassed by it. Finally, we are not aware of any need for the change.

S. 1666 also makes certain specific exceptions to the above requirements of availability in section 3(b). These exceptions include, and are limited to, matters (1) that are specifically exempted by statute, (2) that involve any Federal function requiring secrecy to protect the national defense and are specifically exempted by Executive order, or (3) that relate solely to the internal employment rules and practices of any agency.

We regard the second exception from the general requirements of the new section 3(b) to be too restrictive. We believe that it is not in the public interest to require the President to issue an Executive order for each governmental function where secrecy in the national defense is required to be maintained. Clearly, if the President or the head of an agency determines that certain functions and all matters related to these functions must be kept secret in the interest of national defense, it should not be necessary to issue an Executive order. Thus, we believe this exemption provision should be revised.

The new section 3(b) further provides that in meeting the requirements of this section an agency may delete identifying details when it is necessary to protect the public interest. A written justification is required when this provision is exercised. We believe this provision is desirable.

Finally, the new section 3(b) provides that all such final orders and opinions, statements of policy, and interpretations must be indexed and may not be relied upon, used, or cited as precedent by the agency against any private party unless so indexed and either published or made available to the public. While we agree with the objective of this provision which is to provide a centralized and orderly system of locating decisions and other similar matters of a particular agency, we question whether an index established in each agency can be administered in a manner that will accomplish this objective adequately. The diversity of matters handled by this Department and other agencies and the number of field offices throughout the United States handling these matters portends a difficult and costly task of administering such a system. Before requiring such an index procedure, we believe further consideration should be given to the need for such a procedure on this large scale and to the cost of instituting and maintaining an adequate index system in every Federal agency.

Section 3(c) of the APA now directs, except as otherwise required by law, that matters of official record shall be made available to anyone properly and directly concerned. A further exception to this provision is concerned with confidential records.

S. 1666 greatly expands the present requirements of the act on this subject by directing that all records, confidential or not, shall be made available to the public without regard to whether there was a showing of interest or a need to know, except where such records are specifically exempted by statute, or by Executive order for the protection of the national defense, or where the records include internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicating and rulemaking matters. In our opinion this broad revision of the present section 3(c) of the act impinges on the authority of the executive branch to determine whether official records should be made available.

Presently, this Department is authorized by section 2 of the act of August 24, 1912 (5 U.S.C., sec. 489) to prescribe such rules and regulations (sec. 43 CFR, pt. 2) as may be necessary governing the inspection of departmental records by the general public. It also provides that any person having any particular interest in any of these records may be permitted to take copies thereof pursuant to published rules and regulations. In addition, section 1 of the 1912 act (5 U.S.C. sec. 488) authorizes the Secretary to furnish copies of books, papers, records, documents, maps, and other similar matters to the public when not prejudicial to the interests of the Government.

This new section 3(c) of S. 1666 would seriously restrict the authority of the Secretary under the 1912 act, because of the provisions of section 3(e) of

the bill limiting exemptions from the requirements of section 3 to those specifically stated therein. We are unaware of any need for such action. Clearly, there are many situations where it is not in the public interest or where it is prejudicial to the interests of the Government to make official records available to the public. Some examples of this, are records involved in pending or impending litigation, internal memoranda used in formulating policy, and background material used in preparing legislative or budgetary reports, to name just a few. We believe that such a blanket disclosure requirement will lead to "fishing expeditions" which we do not believe are contemplated or intended by this bill.

In addition, the bill deletes the present provision in section 3(c) of the act exempting certain information normally required by contract or otherwise to be kept confidential. We believe this is unfortunate. This Department in gathering statistics for the publication of mineral production reports or reports on our commercial fisheries has access to information furnished by these interests, which, if not kept confidential, would seriously inhibit the assembling of such reports and would adversely affect the industry involved. In addition, the Bonneville Power Administration presently makes available for public inspection bids received in response to its invitations, but does not do so when a bidder has included in his material classified as trade secrets on the "know-how" of that bidder. While the information is needed to evaluate a bid, the bidder would refuse to submit any bid if this information was open to inspection by his competition. We believe that such information should be exempted from the records requirement of this section.

Finally, the new section 3(c) of the bill gives jurisdiction to the district courts of the United States to hear the complaint of any person seeking the production of agency records improperly withheld. The courts shall determine the matter de novo and an agency must sustain its action by a preponderance of the evidence. If it is determined that section 3(c) is necessary in its present form, we would not object to judicial review, except we do not believe an agency should be required to prove its case by a preponderance of evidence. This amounts to a weighing of the evidence by the court. While this is not a new concept in judicial proceedings, we question whether it is appropriate in cases involving administrative determinations. In addition, this would run counter to the general principle—recognized in both judicial and administrative proceedings—that the burden of proof is upon the moving party and not the defendant.

While we believe that some of the changes made in section 3 of the Administrative Procedure Act are desirable and helpful, we find that others are not. In any event, we are unaware of a need for such an extensive revision of this section of the act. Accordingly, we recommend against the enactment of S. 1666 in its present form.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

DEPARTMENT OF STATE,
Washington D.C., October 28, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter of June 14, 1963, requested comments by the Department of State on S. 1666 which seeks to amend section 3 of the Administrative Procedures Act, 60 Stat. 238.

It would appear that S. 1666 is intended to guarantee the public's right to information from agencies engaged primarily in regulatory and adjudicatory activities. However, the Department of State's functions in those areas are comparatively few, being limited primarily to passport, visa, and citizenship proceedings.

The Department's primary concern is the conduct of the foreign policy of the United States and not carrying on regulatory or adjudicatory functions. From the inclusion of a "national defense" exemption in sections 3b and 3c it would appear that the sponsors of the bill have in mind the need to preserve privacy which is so essential to the successful execution of foreign policy. However, the Department is concerned that the standard set forth in the bill might be

interpreted as narrower than that contained in the present law and retained in subsection (a). The Department therefore urges that the exemption read "any function of the United States requiring secrecy in the public interest." If the committee believes that this standard is too sweeping in its general application to the executive branch as a whole, sections 3b and 3c should provide for the exemption of any function of the United States requiring secrecy to protect the national defense or the conduct of foreign relations.

As you know, it has been the practice of the Department to make available to the public the fullest flow of information consistent with the national interest. But it would be manifestly impossible to conduct our foreign relations if every document which contained a statement of a U.S. policy toward a particular foreign country or government would have to be made public unless protection of the national defense was involved. This country differs, for example, even with its closest allies on a wide variety of international problems which may affect some or all of the people of the United States—and the fact that the public is affected is one criterion for disclosure under the bill. To make available to the public indiscriminately the documents which set forth these differences and our policies for meeting them would be a poor way of attempting to deal with them. Moreover, since the formulation of foreign policy fluctuates from day to day, it may well adversely affect the execution of that policy if premature or other untimely disclosures of such material were made. There is also substantial risk that the free flow of opinions and views from our Foreign Service posts abroad, and other more informal communications received from individuals and groups here and abroad, would be lessened in scope, quantity, and quality if it were known that they were to be exposed to public scrutiny. For example, reports received by the Department in the economic and political fields which could affect the interests of some sections of the public if publicly released might disclose activities of the internal affairs of host governments which would embarrass the United States and seriously impair the ability of reporting officers in the future to gather such information. Nor would it be feasible to disclose material received in confidence from foreign governments.

There is another aspect to the foreign affairs exclusion deserving of the committee's attention. The committee would, we are sure, agree that the Department is in a better position to determine whether the conduct of foreign policy requires that a matter not be disclosed than a court would be. Nevertheless, the bill appears to require that the Department assume the burden of proof in court against a complainant seeking material. Such a procedure clearly assumes that the court will have access to the information in order to determine whether it must be disclosed. It additionally creates the risk that the court will disagree with the Department's conclusion that the material must be withheld in the interest of our foreign policy. Whether or not safeguards are inserted to limit the court's access to the nature of the information and its independence of judgment, once the judiciary has been interjected into this sphere it is uncertain whether its rulings will accord with the Department's appraisal of what must be withheld in furtherance of the conduct of our foreign policy. The Department therefore further proposes that the language of the foreign affairs exclusion in subsection (b) and (c) read "any function of the United States which the President determines requires secrecy to protect the national defense or the conduct of foreign relations."

With respect to internal administration, the Department prefers that the exemptions of subsections (b) and (c) be broadened to include "any matter relating solely to the internal management of an agency," the standard incorporated in the present legislation and retained for purposes of subsection (a). As currently proposed, subsections (b) and (c) would not permit the Department to deny disclosure of material involving a veriety of strictly internal activities inasmuch as virtually any piece of paper may be interpreted to affect the public in some way or to constitute a record. This material comprehends voluminous and scattered rules, regulations, delegations of authority, and many more informal documents. To require its disclosure would impose an onerous burden on the Department's personnel and facilities which would either disrupt our services to the public, or result in a large increase in personnel, facilities, and appropriations, with relatively little benefit to the public. It might also hamper the administration of the Department by choking off the free expression of ideas in the determination of policies if the threat of publicity loomed over every statement.

The Department has been advised by the Bureau of the Budget that from the standpoint of the administration's program there is no objection to the submission of this report.

Sincerely yours,

FREDERICK G. DUTTON,
Assistant Secretary
(For the Secretary of State).

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., September 27, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1666, to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

The Treasury Department is in full accord with the view that it is desirable for the citizen to be able to obtain full information about the actions of his Government. We are convinced, however, that S. 1666, which apparently is intended to make this right of the citizen more effective, would take from the citizen far more than it would give him. For the very limited benefits which would be bestowed by S. 1666, the citizen would pay an extremely high price in losing valuable rights of privacy, suffering from less effective law enforcement, and by having to finance greater and unnecessary Government expenditures.

We believe that if S. 1666 were enacted it would direct the Government to make public the private concerns of private citizens to their detriment and to no public advantage. We believe that it would call for large expenditures by the Government in compiling, indexing, and publishing information which is not required or desired by the public; and these expenditures would impose upon the taxpayer a financial burden which would not be offset by any commensurate benefit. We believe also that if the provisions of S. 1666 were to be enforced the result would be serious and in some cases unconstitutional interference with the effective execution of many of the laws which Congress has enacted for the public benefit. For example, the bill would appear to require the divulging of agency records relating to informers, a result which would be devastating to the work of various law enforcement agencies, both in the Treasury and elsewhere.

Finally, S. 1666 is in many ways internally inconsistent. A primary example of this difficulty is found in the differing requirements of section 3 (a) and (b), both of which deal with statements of policy and interpretations adopted by the agency, but which impose quite different requirements as to such statements of policy and interpretations.

For all of these reasons, the Treasury Department is opposed to the enactment of S. 1666.

We have set forth the Treasury's views in some detail in the attached statement.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

G. D'ANDELOT BELIN,
General Counsel.

STATEMENT IN DETAIL OF TREASURY DEPARTMENT OBJECTIONS TO S. 1666

OUTLINE

Infringement of the citizen's right to privacy in his private affairs.
Statutes prohibiting disclosure of information.
Examples of the consequences which might follow from the view that section 1905 would no longer be effective.
Statutes prohibiting the disclosure of Internal Revenue information.
Amendment of S. 1666 to continue the effectiveness of existing statutes will not cure the evil.
Rights of privacy of the citizen other than those protected by statute have been traditionally protected by law.
How the citizen's right of privacy would be invaded even assuming present statutes prohibiting disclosure remain unimpaired.

S. 1666 would direct that the Government breach the privacy which exists between physician and patient.
If S. 1666 became effective it would destroy the ability of the Government to get important information on a confidential basis.
Although this aspect of S. 1666 would undoubtedly be stricken in the courts it would nonetheless do harm.
This aspect of S. 1666 is contrary to a recent and clear expression of congressional intent.
Investigations of a noncriminal nature are not safeguarded by section 1905.
Limited applicability of statutes prohibiting the disclosure of tax information.
Frustration of the Government in executing the laws which Congress has enacted.
Aid to counterfeiters.
Aid to tax evaders.
Disclosure of information which could imperil the President.
Hindrance of law enforcement generally.
Inconsistency between the subsections of S. 1666 on what may be withheld from disclosure on grounds of secrecy.
Some illustrations of the need for secrecy where the protection of the national defense is not directly involved.
Stability of the dollar, speculation, relations with foreign governments and American business abroad.
The gold laws.
Foreign relations.
Revelation of financial and economic information obtained by the United States in foreign countries.
Inadequacy of S. 1666 to protect internal documents within the Government.
Inconsistency between sections of S. 1666 with respect to deletion of identification.
Failure to protect documents which, although internal within the Government, involve more than one agency.
Destruction of attorney-client confidentiality when the Government is the client.
Cost to the public.
Scope of present publications.
Scope of indexing of customs adjudications and orders which have no precedential value or general interest.
Desirability of deleting identification before indexing.
Illustration of the volume involved.
Lack of purpose to be served by such an index.
Indexing Internal Revenue rulings and interpretations which have no precedential value.
S. 1666 does not make clear whether its rules for publishing and indexing are to be applied retroactively.
Effect of retroactivity.
The paperwork and recordkeeping which S. 1666 would require would be inconsistent with the intent of Congress as elsewhere expressed.
The pressure to publish and index needlessly.
Confusion as to the requirements for publication because of differences in language between sections 3(a) and 3(b) of S. 1666.
Problems created by the requirement that delegations other than final delegations be published.
The erroneous concept that it is the Federal agency rather than the public which suffers when the agency cannot enforce the laws which Congress has enacted.
Departure from the concept of excusing agency error where such error has not caused substantial prejudice to the person who complains is not desirable.
The provision that unpublished and unindexed interpretations may not be used appears to give rise to a number of problems.
S. 1666 is unconstitutional to the extent that it purports to require disclosure to the public of information in the executive branch which the President determines should not be disclosed in the public interest.
The Treasury Department is fully in accord with the basic purpose of S. 1666, although not with the bill itself.
There are no grounds for complacency—but it should be noted that the agencies, and the Treasury Department in particular, do publish and otherwise make available a very large amount of information.
Despite its objection to S. 1666 the Treasury Department believes that there are important affirmative measures which could be taken to increase the flow of information.

Statement in Detail of Objections to S. 1666

S. 1666, while intended to serve the very important and laudable purpose of making freely available to the public information concerning Government actions affecting individuals, goes far beyond that point, to the extent where it would injure the citizen far more than it would benefit him. If this bill is passed, it will seriously embarrass and, in a number of cases, such as those involving enforcement agencies, limit or render ineffective the work of the Government. It will add very substantially to the expense of Government. Its implications in the field of foreign policy and our international relations are appalling to contemplate. Perhaps even more important than all these effects, however, is the harm it will cause to millions of American citizens who are the ones who will be injured by the removal of confidentiality in their dealings with their Government in such ordinary affairs as their taxes, their savings bonds, their military records, their bank affairs, their Government personnel records.

The following material discusses in some detail the dangers seen by the Treasury Department from various parts of this bill. The consideration of the points does not follow the order of the sections of the bill itself since many of the points relate to more than one of these.

Infringement of the citizen's right to privacy in his private affairs

One of the worst features of the bill is that it infringes seriously upon the existing rights of confidentiality which belong to the private citizen in that it would make Government records containing information about private citizens available to anyone who asks for them. Under existing law such records are made available only to persons properly and directly concerned and are not made available if they are considered to be confidential "for good cause found." Under this rule, the Government's records relating to the affairs of private individuals have not been shown to creditors, business competitors, prying relatives or disaffected neighbors. The proposed bill deletes this protection and substitutes a right to withhold records which fall within one of three categories, each of which is very narrowly confined. If the records do not come within one of these categories, they must be made available to anyone who asks for them regardless of whether he has a legitimate concern with them and regardless of how injurious the disclosure may be to the person to whom the records relate. If this result is really intended, it is hard to conceive what could justify such a drastic change in concept.

Statutes prohibiting disclosure of information

The first classification excepted by section 3(c) of the bill is those records which are "specifically exempt from disclosure by statute." In order to appraise what this exception means, it is necessary to look at the statutes now in effect which prohibit the disclosure of information. Insofar as the Treasury Department is concerned, except to the extent that the disclosure of tax information is involved, the principal relevant statute is 18 U.S.C. 1905.[1] We are troubled, however, by the effect of the proposed bill on this statute since section 1905 prohibits the disclosure of the specified classes of information only to the extent that such disclosure is "not authorized by law." We believe that the proposed bill may be considered to constitute authorization "by law" for disclosure. If this is true, section 1905 would be, in effect, repealed or rendered a dead letter. Examples of the undesirable consequences which would flow from such a result include these:

Examples of the consequences which might follow from the view that section 1905 would no longer be effective

(1) Every business concern could claim authority to examine the customs entries and invoices filed by its competitors. These documents would disclose from whom the competitors were buying goods, what prices were being paid for the goods, and the quantities which specific competitors were importing. A traditional and important protection to the businessman would thus be lost.

(2) Information submitted in confidence to the Treasury Department and to other agencies, both by domestic industry in connection with its operations and by foreign exporters in connection with theirs, would be denied statutory protection. Among other things, such information would disclose prices at which goods were sold by the firms involved, and the volume of their production and sales. There seems little doubt but that affected companies, knowing that such information could be made public, would refuse to supply it, and the activities of the Government in enforcing the antidumping law, for example, would suffer thereby.

(3) There would be no statutory basis on which the Bureau of the Public Debt could rely to refuse to disclose information with regard to the holdings of registered bonds and other registered securities by all of the persons and firms holding such securities. Presumably, under the bill, any collection or credit agency or, indeed, any confidence man must be given such information upon his request. As the committee is well aware, many billions of dollars of such

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[1] "SEC. 1905. Disclosure of confidential information generally. Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than 1 year, or both; and shall be removed from office or employment. (June 25, 1948, ch. 645, 62 Stat. 791.)"

securities have been issued, and the continued issuance of such securities is an essential part of the necessary financial arrangements of this Government. We could expect that investors, large and small alike, faced with the knowledge that their investments in such Government bonds would become known, whereas ordinarily their private investments would not be, would regard the purchase of registered Government securities as much less desirable than at present. This could be expected to reduce seriously the purchases of registered Government securities, including savings bonds which, of course, play a vital part in Government financing.

Some measure of the extent of this problem can be gaged from the fact that currently more than 451 million individual savings bonds are outstanding. Estimates for fiscal year 1964 are that there will be about 181 million redemptions and purchases of savings bonds. The scope of the work involved and the expense of supplying information with regard to these bonds alone can be only dimly imagined.

(4) It would appear that S. 1666 would purport to make the records of examinations of national banks available for examination. A separate statute, 18 U.S.C. 1906, precludes an examiner from disclosing information obtained from the examination of banks, and, unlike section 1905, this prohibition is absolute. However, section 1906 does not prohibit the Comptroller of the Currency or his subordinates other than bank examiners from making disclosures of the results of bank examintions. They are prohibited from such activity today only by the provisions of section 1905.

Examinations of banks reveal vast amounts of information with regard to deposits and financial activities of individuals and companies throughout the country. Presumably, creditors, collection agencies, and the like could be expected to demand information with regard to deposits and other items in all examined banks. Making such information available would be a major change in the rights of the citizen and could be expected to have a serious effect upon the activities of the banking system. It would drastically limit the effectiveness of the examination system and of the supervision of banks by the Comptroller and other Federal supervisory agencies.

It is essential to the ready flow of information from the banks to the examiners and the Comptroller's Office that the banks be able to count on the latter to hold confidential all appropriate types of information. Enactment of the legislation would inhibit the banks in providing much information that is now freely and voluntarily furnished.

Similar examples could readily be multiplied.

Statutes prohibiting the disclosure of Internal Revenue information

Insofar as the disclosure of Internal Revenue information is concerned, there would be similar problems. 26 U.S.C. 6103 and 26 U.S.C. 7213 are the two principal statutes which prohibit the disclosure of various kinds of information relating to the tax affairs of the public. As is the case with 18 U.S.C. 1905, which prohibits disclosure of certain business secrets, the passage of S. 1666 would cause serious questions of the impact of S. 1666 upon these two sections of the Internal Revenue Code. The argument doubtless would be made that S. 1666 would constitute an implied repealer, particularly with respect to 26 U.S.C. 7213.

Congress has long appreciated, and by its action in passing 26 U.S.C. 6103 and 26 U.S.C. 7213, has specifically recognized the need for confidentiality with regard to tax information. Congress has always been conscious of the fact that in any self-assessment system of taxation, such as our Federal tax system, an assurance of confidentiality is necessary if full and accurate returns are to be obtained from the taxpaying public. It has long been aware that the disclosure of information supplied by the taxpayer could obviously hurt the taxpayer in a multitude of ways.

Amendment of S. 1666 to continue the effectiveness of existing statutes will not cure the evil

Unfortunately, no simple solution is to be found in a provision which would merely state specifically that it is not the intention of Congress that S. 1666 should repeal the provisions of statutes such as 18 U.S.C. 1905, 26 U.S.C. 6103, and 26 U.S.C. 7213.

The reason for this conclusion is that statutes such as these do not form a comprehensive body of law which is intended to preserve the confidentiality

of everything which should be kept confidential. These statutes have been passed against a background of constitutional law and common law which should not be lost sight of.

Rights of privacy of the citizen other than those protected by statute have been traditionally protected by law

Prior to the enactment of specific Federal statutes against disclosure, the citizen had rights of confidentiality which rested on the American tradition of enforcing the laws in such a way as not to infringe the citizen's right of privacy; some of these rights were buttressed by State legislation. Among his rights in most States is the physician-patient privilege which has protected the citizen against any disclosure by a Government doctor or hospital with respect to the citizen's mental or physical condition or any treatment which the citizen has received from them.

The statutory enactments which prohibit Government disclosure of the citizen's affairs have merely reinforced some of the more important existing rights of the citizen; they have specifically prohibited particular classes of disclosure which Congress has felt would be most detrimental to the citizen, in some classes of cases by providing for criminal penalties against any executive branch official who might offend against the prohibitions. Title 5 U.S.C. section 139b [2] points this up very closely.

Title 5 U.S.C., section 139b prohibits the employees of a Federal agency which has received information from another Federal agency from disclosing the information thus received, if the first agency obtained the information in confidence. In short, Congress appeared to assume, in enacting this statute, that if an agency obtained information in confidence it would respect that confidence and not disclose that information. It certainly must have been aware that the departments and agencies had regulations which provided penalties against their employees if they disclosed such information. The statute was enacted to prevent another Federal agency from revealing that which the first agency obviously would not reveal.

It should be mentioned in passing, however, that 5 U.S.C. 139b, like 18 U.S.C. 1905 and other statutes which have been referred to earlier, would be clouded by the enactment of S. 1666. Like many other statutes, it prohibits only unauthorized disclosure, and the question would arise whether S. 1666 would not, in substance, authorize the disclosure of all of the things that 5 U.S.C. 139b was designed to protect.

It is perhaps also worth mentioning that all bureaus of the Treasury Department are not equally concerned with the fate of 5 U.S.C. 139b. The Internal Revenue Service, the Office of the Comptroller of the Currency and the Bureau of the Public Debt, for example, are specifically excepted from the application of 5 U.S.C. 139b by the language of another subsection of the Federal Reports Act, of which section 139b is a part. One reason for this exclusion was to give these bureaus protection from having to disclose information even to other Federal agencies.

Because statutes prohibiting disclosure of information reinforced rather than created rights for the citizen, Congress never had occasion to consider the whole gamut of information found in the Government's files and to determine which classes of information must be held confidential for the citizen's benefit. Unfortunately, S. 1666 appears to proceed on the assumption that Congress has

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[2] "SEC. 139b. Unlawful disclosure of information; penalties; release of information to other agencies. (a) In the event that any information obtained in confidence by a Federal agency is released by that agency to another Federal agency, all the provisions of law (including penalties) which relate to the unlawful disclosure of any such information shall apply to the officers and employees of the agency to which such information is released to the same extent and in the same manner as such provisions apply to the officers and employees of the agency which originally obtained such information; and the officers and employees of the agency to which the information is released shall in addition be subject to the same provisions of law (including penalties) relating to the unlawful disclosure of such information as if the information has been collected directly by such agency.

"(b) Information obtained by a Federal agency from any person or persons may, pursuant to sections 139–139f of this title, be released to any other Federal agency only if (1) the information shall be released in the form of statistical totals or summaries; or (2) the information as supplied by persons to a Federal agency shall not, at the time of collection, have been declared by that agency or by any superior authority to be confidential; or (3) the persons supplying the information shall consent to the release of it to a second agency by the agency to which the information was originally supplied; or (4) the Federal agency to which another Federal agency shall release the information has authority to collect the information itself and such authority is supported by legal provision for criminal penalties against persons failing to supply such information. (Dec. 24, 1942, ch. 811, sec. 4, 56 Stat. 1079.)"

enacted a comprehensive legislative scheme covering all necessary areas of confidentiality.

How the citizen's right of privacy would be invaded even assuming present statutes prohibiting disclosure remain unimpaired

It is important, therefore, to point out areas in which the citizen's right would be seriously infringed even if Congress were to make clear that S. 1666 was intended to have no repealing effect upon any existing statutory prohibitions against disclosure.

Section 1905, insofar as any generalized statement can be made with respect to it, is primarily directed to the protection of information relating to business activities. But clearly other aspects of the citizen's activities which are reflected in the records of the Government are worthy of protection.

A majority of States recognize that one of the rights of the citizen is that his private affairs shall not be disclosed, and State court actions lie when this right is infringed. Enactment of S. 1666 in its present form would appear in many respects to be inconsistent with this right of the citizen. It may be that Congress desires to curtail the existing privileges of the citizen, but if it does not, it should be aware of this incidental effect of S. 1666.

The citizen's right to privacy serves two purposes:

First, it protects him from embarrassment and from the distasteful effect of having others prying into and publishing his private affairs. It also protects him from disclosures which would affect his standing in the community and his ability to earn a living.

Second, his knowledge that he can communicate facts to the Government without the Government's broadcasting information received is an asset to the Government in the enforcement of the laws which Congress has enacted.

In the latter regard, the right involved is, perhaps, not so much a right of privacy but a privilege of the kind which attaches to various kinds of communication under existing principles of law. Privileges such as that which exist between the penitent and his clergyman or priest, the client and his attorney, the patient and his doctor, have long granted protection to the individual. Similar public policy has protected certain communications between the citizen and his Government.

S. 1666 would direct that the Government breach the privacy which exists between physician and patient

It should be noted that under the existing language of S. 1666 the Government is directed to breach the privilege between the patient and his physician which exists in most States. As presently drafted, the bill would appear to make available, to anyone who asked for them, all records of a medical nature in the Government's hands. Obviously, millions of citizens would be affected: Those who serve or have served in the Armed Forces, those who work for or have worked for the Govenment, those who for one reason or another have been treated by any medical facility of the Public Health Service, the Veterans' Administration, or the Armed Forces would all be in this category. As drafted, the legislation would require that the medical departments of the Government make public all information in their files with regard to the physical or mental health, including any unconfirmed diagnosis, of every person who has resorted or may resort to these agencies.

If S. 1666 became effective it would destroy the ability of the Government to get important information on a confidential basis

An example of the limited scope of the existing statutory prohibitions against disclosure (even if they are not impaired by the proposed bill) can be seen in the effect which the bill would have on the Bureau of Narcotics of this Department. Unless we seriously misinterpret the bill, it provides that anyone, including criminals, could demand the names of all informers who have supplied the Bureau of Narcotics with information about illegal dealings in heroin and marihuana. The result of making such information available (to known criminals and their representatives, among others) can readily be imagined. Clearly, the narcotics enforcement program, which in large measure depends on a flow of information from informers, would be seriously crippled if that flow were interrupted. If the protection of confidentiality were not afforded to informers, the likelihood of receiving necessary information would be seriously diminished.

The observation made with respect to the Bureau of Narcotics is equally true with respect to the activities of other enforcement agencies both within the Treas-

ury Department, such as the Secret Service, the Alcohol and Tobacco Tax Division, and the Customs Agency Service, and outside the Treasury Department, such as the FBI.

As your committee is well aware, the day-to-day activities of the enforcement agencies of the Federal Government require large numbers of investigations. The enforcement agents of this Department, of the Department of Justice, and of many other agencies are constantly investigating allegations of wrongdoing. Some of these investigations lead to indictments and convictions. Others do not. Formal charges are never brought against many persons whose activities are investigated. In advance of the completion of an investigation it can never be known what the investigation will produce. Obviously it is the duty of an enforcement agency to begin investigations based on reasonable suspicion that the law is being or has been violated. Such investigations very frequently produce much collateral information bearing on the activities of persons and firms who are not the subjects of the investigation but who may, in one way or another, have had dealings with the subject of the investigation.

Much of the information disclosed by enforcement investigations and heretofore kept confidential would be thrown open to the public gaze to the detriment of affected individuals if the provisions of S. 1666 were to become effective. Some such information might, it is true, be protected under the provisions of section 1905, if the effectiveness of that section is continued, but much information would be disclosed because it did not fall within the section's narrow ambit.

Although this aspect of S. 1666 would undoubtedly be stricken in the courts it would nonetheless do harm

Although we do not believe that the Federal courts would compel this result, even if S. 1666 were enacted, because of the constitutional right of the President to withhold information, the disclosure of which would hinder the execution of the functions of his office, we believe that mere enactment of the bill would have a harmful effect. Until the matter was tested in court, no informer could feel that he could safely rely upon the Government's promise that his identity would be preserved from disclosure. In passing, it should be noted also that the effectiveness of the informer in law enforcement proceedings has long been recognized specifically by the Congress.

For example, Congress, in enacting the Tariff Act of 1930 and it predecessors, has provided specifically for payments to an informer for compensation in the form of a share of recovery made by the Government on the basis of the information which the informer supplied. (See 19 U.S.C. 1619.)

This aspect of S. 1666 is contrary to a recent and clear expression of congressional intent

To the extent that S. 1666 would invade the secrecy of information bearing on law enforcement, it would be contrary to the intent of Congress as that intent was demonstrated by the enactment in 1957 of 18 U.S.C. 3500. That statute, which was intended to modify some of the impact of the so-called Jencks rule of the Supreme Court, limits the availability of statements or reports in the possession of the United States which were made by Government witnesses or prospective Government witnesses. However, section 3500, like section 1905, falls far short of giving the protection to Government records and enforcement matters that would clearly seem to be essential in the interest of the public.

Investigations of a noncriminal nature are not safeguarded by section 1905

It may be noted in passing that section 1905 does not provide protection to the personnel records of present or past Government employees. Investigations relating to applications for employment, including those with respect to applicants who were never employed, seem not to enjoy statutory immunity from disclosure. Such investigations have, of course, been made with respect to millions of citizens. The Coast Guard has responsibility for a security screening program with respect to applicants for employment as seamen and dock workers. Presumably the investigation records in the cases of these hundreds of thousands of employees of private companies would also be open to any curious member of the public.

Limited applicability of statutes prohibiting the disclosure of tax information

Turning to the principal statutes which affect the disclosure of Internal Revenue information; namely, sections 6103 and 7213 of title 26 of the United States Code, we see much the same thing. Section 6103, for example, by no means affords confidentiality to all of the information which is required to be submitted by taxpayers. For example, this section does not apply to information in the

files of the Internal Revenue Service as a result of the administration of retailers excise taxes, taxes on admissions and dues, documentary stamp taxes, taxes on wagering or regulatory taxes. Moreover, neither section 6103 nor section 7213 affords full protection to the taxpayer even with regard to income tax information. Both sections are chiefly limited to tax returns. To the extent that information is derived, as much information is derived, from audits and inspections by Internal Revenue employees, little protection is afforded to the taxpayer by either of these statutes.

It would appear, therefore, that the enactment of S. 1666 would purport to open up to the public view a vast body of information relating to the private affairs of the citizen in the tax field which the Congress clearly has indicated should not be made available.

Frustration of the Government in executing the laws which Congress has enacted

Apart from the direct harm done to each citizen in terms of the unwarranted disclosure of his affairs by the enactment of S. 1666, this bill would adversely affect the public welfare in another way: it would frustrate the execution of the laws which Congress has passed for the public's protection and benefit. For example:

Aid to counterfeiters.—Each member of the public has a right to confidence in the integrity of the currency and obligations of the United States. The Government struggles hard in its effort to prevent the counterfeiting of U.S. currency and securities. It employs many measures. One of these is the use of secret formulas for the ink which the Bureau of Engraving and Printing uses. These formulas, however, are matters of agency record and would have to be disclosed upon demand under S. 1666. No one would benefit from such a disclosure except counterfeiters, who also would benefit from the fact that records relating to the methods of detecting counterfeits would also have to be made available on demand.

Aid to tax evaders.—Every citizen has a right to expect that all citizens will share equally in the burdens of Government. Every honest taxpayer is hurt when a dishonest person evades the payment of his proper share of the tax burden. The Internal Revenue Service has manuals for use by its employees which describe the methods which they shall pursue in ferreting out tax evasion. These manuals describe among other things the methods of audit which should be used to detect fraudulent evasions as well as methods of selecting tax returns for detailed scrutiny. The honest taxpayer has no need for information as to these methods. Disclosure of these methods, which would be required under S. 1666, since they are matters of agency record, would assist only the dishonest.

Disclosure of information which could imperil the President.—The files of the U.S. Secret Service contain records relating to the operating procedures of that agency relating to its functions in protecting the President and his family and the Vice President. The compelled disclosure of much of such information would quite obviously be unthinkable.

Hindrance of law enforcement generally.—In short, in every enforcement activity of the Treasury Department—suppression of the narcotics traffic, suppression of smuggling and of frauds on the tariff laws, controls to prevent dealings in illicit alcohol, the prevention of tax evasion—enactment of S. 1666 would hurt the public interest by destroying confidentiality with respect to enforcement methods. By requiring the disclosure of records relating to informers and the information which they supply, it would be inevitable that sources of information would dry up. By making known to the criminal the methods used to prevent and detect his crimes, it could be expected that crime would be encouraged and its detection made more difficult. No advantage to the public can be seen from this result, but it would be the greatest boon to criminals of all sorts which Congress could conceivably bestow.

Inconsistency between the subsections of S. 1666 on what may be withheld from disclosure on grounds of secrecy

An anomaly of S. 1666 is that by section 3(a) it appears to afford a measure of protection from disclosure "to any function of the United States requiring secrecy *in the public interest*," while sections 3(b) and 3(c) grossly undercut this protection. In particular, section 3(c), insofar as protection based on the need for secrecy is concerned, protects only agency records "specifically required by executive order to be kept secret for the protection of the national

defense." This much narrower limitation is the one which would apply to all or virtually all cases and, accordingly, the broader protection of section 3(a) would be illusory.

It is our belief that authority to withhold disclosure of records only in the narrow circumstances of secrecy for protection of the national defense is totally inadequate. The withholding of much information which is not directly related to the national defense is vitally important to the public well-being. This feature of the bill reflects a mistaken concept that only considerations of national defense can legitimately require the Government to decline to publicize information. Some illustrations have been given above, but there are many others. The field of international financial transactions may serve as an example.

Some illustrations of the need for secrecy where the protection of the national defense is not directly involved

Stability of the dollar, speculation, relations with foreign governments and American business abroad.—S. 1666 would seriously jeopardize the operations of the Exchange Stabilization Fund in carrying out its statutory functions of stabilizing the exchange value of the dollar under section 10 of the Gold Reserve Act and the cooperative arrangements now being carried out by the Exchange Stabilization Fund and the Federal Reserve System to maintain the stability of the dollar in world exchange markets and to counter any threatening pressures against it. These activities involve purchases and sales of foreign currencies and cooperative arrangements with other governments. It is vital to their success that speculators shall not have knowledge of the general arrangements for and terms of governmental intervention in the exchange markets. Not only would persons having such knowledge be in a position to make large profits, but any operations based on such knowledge would work at cross purposes to operations carried out by the Treasury and Federal Reserve System.

Also, these operations are carried on in cooperation with the monetary authorities of other governments involved, and to make public information provided by them would seriously jeopardize our relationships with these governments. It is also obvious that the effect of this provision insofar as general relationships with foreign governments and central banks are concerned would be extremely undesirable in that it would make it difficult, if not impossible, for us to obtain any financial information from any foreign government.

To the extent that section 3(c) would require disclosure of records relating to the Treasury's foreign exchange reports system, it would have a very serious adverse effect. The Treasury foreign exchange reports filed pursuant to the regulations in part 128 of title 31 of the Code of Federal Regulations by banks, brokers, exporters, importers, industrial and commercial concerns and others; data from individual reports which identify the reporter; and beakdowns in statistical totals that disclose the position of individual reporters, or the position of foreign official entities which hold assets here or against which reporting institutions have claims, or for which certain securities transactions may be conducted are all matters of agency record.

To maintain an effective statistical reporting system, it is necessary that there be a full and complete disclosure to the Government. The ordinary desire for privacy on the part of reporters and on the part of customers of reporters is a serious deterrent to adequate disclosure of information unless assurances of confidentiality are extended and completely fulfilled. If the reports on the Treasury foreign exchange forms were to be made subject to a requirement of public disclosure of records such as is contained in section 3(c) of the proposed legislation, the reliability of a body of information which is fundamental to policy determinations by the Government on international and financial and balance-of-payments problems would be gravely impaired.

Further, the requirement to make available reports of individual banks and business concerns would have the undesirable effect of compelling the Treasury to disclose information with respect to the business operations abroad of such banks and other firms that could be useful to their competitors. Such a requirement of disclosure would constitute a significant departure from the traditional confidentiality of the affairs of the reporting banks, and would reduce the willingness of foreigners to hold funds in the United States. This would itself produce a balance-of-payments problem for the United States, as well as interfere with the ability of U.S. banks and other concerns to conduct business with foreigners.

The gold laws.—Disclosure of information derived from the licensing of gold transactions could also jeopardize enforcement of the gold regulations. Records in this regard contain detailed information obtained from individual gold

licensees on the nature of their businesses, the amounts of gold used, where it was acquired, and the use to which it has been put. The requirement that this information be reported by each licensee is important to the effective enforcement of the gold regulations and the prevention of diversion of gold into unauthorized channels.

Foreign relations.—This Department is greatly troubled by the scope of the limitations which are evidently designed to preclude any exercise of judgment or discretion by the executive branch; in no field would more damage be done to the United States than in that of foreign affairs. As we read section 3(c), the agencies such as the Treasury Department (and to a greater extent, obviously, the Department of State and others) would be required to disclose reports which they receive from American embassies and intelligence sources abroad unless such nondisclosure was authorized by Executive order "for the protection of the national defense." This would appear to mean that any information received from such sources must be made available even though it might prejudice our foreign relations, cause hardship to Americans living abroad, prejudice the business activities of Americans in foreign countries or otherwise do a public disservice, unless the revelation of such information would be contrary to the "protection of the national defense."

It seems too clear to warrant further discussion that the interests of the United States could be severely prejudiced by the revelation of much information which is not connected with the national defense.

The significance of the unfortunate revelation of reports not connected with the national defense can be recalled from the episode, not long ago, in Africa, in which a young girl overseas with the Peace Corps made comments on a post card about conditions in the country in which she was stationed. The revelation of the comments on this post card gave rise to a wave of anti-Americanism which obviously was undesirable. Yet under the bill as written, every comment by a U.S. economic attaché abroad would presumably have to be made available, no matter how much such action would hurt U.S. interests.

Revelation of financial and economic information obtained by the United States in foreign countries

An example of one result of this proposed provision is the fact that apparently an attorney registered as a foreign agent employed by the Soviet Union could demand copies of all economic and financial reports, views and opinions submitted by the American Foreign Service with respect to all of the foreign countries in which we have representatives stationed. The language of the bill would purport to compel the Federal courts to order the disclosure of such information if the agencies on commonsense grounds were to refuse to make it available, unless a "national defense" objection could be shown. Clearly any argument that "national defense" includes all of the foreign affairs interests of the United States would be difficult to make under S. 1666, although the agencies would probably believe themselves obliged to make this argument to the courts. Of course, the agencies would also urge to the courts the view that a statute which would compel such a result would be pro tanto unconstitutional.

Inadequacy of S. 1666 to protect internal documents within the Government

Although S. 1666 appears to recognize the legitimate need of the executive branch to maintain confidentiality with regard to various internal documents, the language of the exemption which is provided in section 3(c) is so narrow as to present many serious problems.

Section 3(c) authorizes the nondisclosure of records or parts of records which are "the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters." Passing the question of whether documents which are not in memorandum form would be protected, we should like to point out several of the more obvious matters which are excluded from the exemption.

Since the exemption would apply only to adjudicatory and rulemaking matters, it clearly would not protect internal documents which do not fall into these categories. No protection would be afforded, for example, to personnel records. The comments of a supervisor as to the fitness of employees would be given no protection from public scrutiny. Advice from subordinates to superiors with respect to the appropriateness of procedural and organizational matters would be unprotected. The advice of an agency's attorney with respect to possible lines of argument or evidence in pending litigation, by or against the agency, or with respect to the wisdom of accepting or rejecting a compromise

settlement, would be open to examination by adversary parties, even during the pendency of proceedings. In no activity engaged in by an agency, other than adjudication or rulemaking, could the agency's advisers give advice to the agency's head or to other superior officials without such advice being furnished with the reservations which are natural to one who knows that he is speaking on a public record where his expressions may be misinterpreted by those who do not have a full background in the matters involved. The frank expression of the views of subordinates, which are vital to informed judgments by their superiors, could not be expected to flourish in such an atmosphere.

Moreover, the exemption would not cover reports of Federal agencies on legislative proposals in response to congressional requests for comment. Ordinarily, when these reports have been cleared with the Bureau of the Budget and sent to the appropriate congressional committee, the department leaves up to that committee any questions of publication or distribution of such reports. However, such "records," under the literal language of S. 1666, would presumably be available for inspection by the public long before a final agency position had been arrived at, before that position had been communicated to the Bureau of the Budget for coordination within the executive branch, and before the views of the executive branch had been made known to the appropriate congressional committees.

Presumably, copies of all, or most, correspondence with members of the public, congressional committees, and Members of Congress would be opened up for public inspection.

Inconsistency between sections of S. 1666 with respect to deletion of identification

Perhaps one of the oddest aspects of S. 1666 is that although section 3(b) authorizes the deletion of identifying details when an agency makes available or publishes a final order, opinion, rule, statement, or interpretation, no similar provision is found in section 3(c) which requires that agency records be made available. This inconsistency is all the more amazing since the records required to be made available are much more numerous and far-ranging than the opinions, orders, rules, statements, and interpretations covered by section 3(b). The effect of section 3(c) appears to undo entirely the protection afforded the public by section 3(b).

Failure to protect documents which, although internal within the Government, involve more than one agency

Although S. 1666 would not destroy the confidentiality of every memorandum which is internal to one agency, section 3(c) would not protect memorandums or other communications between more than one executive agency. For example, section 3(c) would purport to subject to disclosure all communications on all matters between executive departments and agencies, including the Bureau of the Budget and the White House, unless they were exempt under the provisions relating to secrecy "for the protection of the national defense" or were specifically exempt from disclosure by statute.

Destruction of attorney-client confidentiality when the Government is the client

One striking result is this: With limited exemptions, the Department of Justice and the U.S. attorneys represent the executive agencies in litigation, including judicial appeals. S. 1666 would appear to provide that communications between the executive agencies and their attorneys would not be exempt from disclosure, even during the pendency of litigation. We can perceive no merit in this infringement of the traditional attorney-client privilege.

Cost to the public

No small part of the detriment which would be suffered by the public through the enactment of S. 1666 would be the enormous burden of cost which the taxpayers would have to bear as a result of this legislation. These costs would be brought about primarily by the provisions of section 3(b) and section 3(c). Under section 3(b) every agency is required to "maintain and make available for public inspection and copying a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy and interpretation." This requirement is not related in any way to any public need for information.

There would also be a very heavy burden requiring substantial additional personnel in certain bureaus in the deletion of identifying details found, for example, in taxpayer rulings, of which over 30,000 are issue deach year. Not only names but other identifying circumstances would have to be edited, with the incidental

result in many cases that the published ruling would be virtually meaningless.

The Treasury has tried to make some estimate of the additional requirements of funds for personnel, space, and equipment which this feature of section 3(b) would impose on its many affected bureaus, but can only state at this time that the added cost would be very large indeed.

Scope of present publications

At the present time the Government publishes vast amounts of information which is designed to make the public fully familiar with rules, orders, and other matters which have precedential value or are otherwise of public interest. In this connection, for example, the Internal Revenue Service publishes Internal a large body of material in the Federal Register. It also issues numerous other Revenue Bulletins, Cumulative Bulletins, Technical Information Bulletins, and publications which are intended to assist and inform taxpayers. Similarly, the Bureau of Customs, for example, publishes weekly Treasury Decisions which provide information with regard to customs rulings of precedential value, and much customs material is also published in the Federal Register.

To require these materials to be supplemented by a complete indexing system for rulings and adjudications of nonprecedential value would be to impose an enormous and needless burden on the agency, the cost of which would fall on the taxpayer.

Scope of indexing of customs adjudications and orders which have no precedential value or general interest

To put the matter in some perspective, let us consider what section 3(b) would mean to the Bureau of Customs. During the fiscal year 1962, that Bureau handled 1,571,016 formal entries of imported merchandise. With respect to each customs entry, the Bureau takes two final actions which are adjudications and which would presumably have to be indexed. One action is an "appraisement"; the other is a "liquidation." The first serves to make a final determination of value of the imported merchandise. The second serves to make a final determination of the amount of duty, if any, payable on the imported merchandise. Each is subject to judicial review.

By reason of the proposed amendment, the Bureau of Customs would, annually, have to index over 3 million actions taken with respect to formal customs entries alone. In addition to formal customs entries, there are a vast number of informal entries and many other classes of action taken by the Bureau which could be regarded as orders made in the adjudication of cases and would thus also be subject to indexing.

Desirability of deleting identification before indexing

The Treasury Department believes that it would not be in the public interest to identify importers, the value of the goods which, as individuals, they import, or the amounts of duty which they have to pay. Such identification could be the cause of serious interference with the importer's business and with international trade. Accordingly, before any of these millions of customs decisions could be indexed, it would be necessary to edit them to delete identifying information. And with respect to each it would be necessary to explain this deletion. Such a burden could be undertaken only with enormous increase in staff which would require greatly increased appropriations for the operations of the Customs Bureau. The Treasury Department does not perceive any way in which this added burden on the taxpayer would be justified.

Illustration of the volume involved

In order to get some idea of what the indexing of 3 million decisions—even without editing—would mean, the committee should bear in mind that according to the Chesapeake & Potomac Telephone Co. the current District of Columbia edition of the telephone book contained 638,473 listings. Moreover, the telephone book merely lists names, addresses, and telephone numbers. Obviously, an index of 3 million cases which would include a digest of each decision would, in book form, be, conservatively, 20 times as large as the Washington telephone book. On index cards the size would be even more staggering.

Lack of purpose to be served by such an index

But quite apart from the question of cost, there is the question of what purpose would be served by such an index. An item dealing with an appraisement might be as follows:

"The appraiser of merchandise at New York on November 13, 1963, appraised the merchandise covered by New York entry 123456 of October 24, 1963. The

merchandise, which was exported from Guatemala by (name withheld) was imported by (name withheld) on October 22, 1963, who declared it to consist of 13,130 pounds of bananas worth $656.50. The appraiser found the declared value to be correct. The names and addresses of the importer and exporter have been withheld because it is believed that it is undesirable, in the public interest, to make known such details in connection with import transactions. It is believed that the disclosure of such information would prejudice the parties more than it would benefit the public."

It might shortly thereafter be followed by another, such as this, dealing with the liquidation of the same imported merchandise:

"The collector of customs at New York on December 24, 1963, liquidated New York entry 123456 of October 24, 1963. The merchandise which was exported by (name withheld) was imported by (name withheld) on October 22, 1963, was declared to consist of 13,130 pounds of bananas of Guatemalan origin worth $656.50. It was claimed that the merchandise was free of duty under the provisions of item 146.40 of the Tariff Schedules of the United States, which authorizes the free importation of 'Bananas * * *: Fresh.' The merchandise was appraised on November 13, 1963. The collector, upon liquidation, determined that the claimed classification was correct and authorized entry without payment of duty. The names and addresses of the importer and exporter have been withheld because it is believed that it is undesirable, in the public interest, to make known such details in connection with import transactions. It is believed that the disclosure of such information would prejudice the parties more than it would benefit the public."

It is likely that items such as these could be somewhat condensed. Perhaps they could even be put into skeleton form. Possibly despite the wording of the bill which appears to indicate to the contrary, a statement regarding the desirability of deleting identifying information could be prefaced to the index rather than repeated with respect to each item.

On the other hand it should be noted that the items set forth as examples relate to a very simple importation—one that involves a bulk shipment of one commodity. It should be realized, however, that a very large number of customs entries are far more complicated. One entry made by a department store or a wholesale grocer, for example, may cover scores or more of different items, each of different values and each classified under different tariff paragraphs. A single invoice may consist of 15 or more pages listing different commodities. Indexes relating to such entries, no matter how much simplified, would be both burdensome to produce and costly.

But the real objection is that any such indexing would obviously be completely pointless. Everyone who is interested in the matter knows or can readily find out that imported bananas are, by law, free of duty. There were more than 3,000 separate importations of bananas into the United States during 1962. Writing and filing more than 6,000 index items relating to these separate importations of bananas would not, in our view, help anyone. Nor would such indexes serve a useful statistical purpose in view of the fact that the Department of Commerce publishes both monthly and annual import figures showing the quantity and value of commodities imported from all countries. Incidentally, although, as we have indicated, we should feel constrained to delete identifying information from the index, we fear that our efforts to protect the businessman in this regard would be frustrated by the provisions of section 3(c) which do not provide for deletion of identification in making records available.

Indexing Internal Revenue rulings and interpretations which have no precedential value

Indexing in the field of nonprecedential Internal Revenue rulings and interpretations would appear to be equally lacking in merit. The following is illustrative:

It is a well-known rule of income tax law, published in the instructions relating to the filing of form 1040 and in the Treasury pamphlet "Your Federal Income Tax," as well as elsewhere, that the expenses incurred by a taxpayer in traveling from his home to his place of work and back are not properly allowable as business expenses. Yet taxpayers constantly write to the Internal Revenue Service stating their own factual situation and asking for a ruling or interpretation on whether their expenditures of this type constitute allowable deductions. An example of such a question would be this. "I spend $300 a year in commuting from a suburb to the city in which I work. May I claim this as a business deduction?" Of course, the answer is, "No." Under the provisions of

section 3(b) of S. 1666, it would, however, be necessary for the Internal Revenue Service to index the ruling or interpretation which it gives to each such inquirer. A myriad of other rulings or interpretations on similarly clear points would also have to be indexed at considerable expense and for no benefit that this Department can perceive. Informal rulings such as the above illustration are not compiled centrally or counted. However, formal taxpayer rulings and requests from field offices for technical advice amount to 35,000 to 37,000 a year.

S. 1666 does not make clear whether its rules for publishing and indexing are to be applied retroactively

At this point it may be well to mention that S. 1666 makes no distinction insofar as publication and indexing are concerned between orders, opinions, rules, statements of policy, or interpretations which may have been made in the past and those which may be made in the future. In its literal terms, it would appear to apply to all of these matters whenever they came into being. If this retroactive effect, which would seem to flow from the language of the bill, were to become law, its effect would be inconceivable.

Effect of retroactivity

In this connection, it need only be mentioned that the U.S. tariff laws and their enforcement and interpretation began in 1789. Although it is, of course, true that the tariff acts have changed greatly over the years and many, probably most, of the interpretations issued during the first century of the customs service are without practical importance, it remains true, nonetheless, that many existing provisions of law have been long unchanged or virtually unchanged. Many date from the 19th century, and the current Tariff Act was passed more than 30 years ago.

No exaggeration is involved in saying that the task of indexing retroactively as applied to the customs service would be an impossible one. To a greater or lesser extent, the same problems would exist with respect to the Internal Revenue Service, the Coast Guard, and other agencies within and outside the Treasury Department.

The paperwork and recordkeeping which S. 1666 would require would be inconsistent with the intent of Congress as elsewhere expressed

The volume of paperwork imposed upon the administrative agencies by the adoption of S. 1666 would appear to run contrary to the desires of Congress as expressed in other legislation. In this regard, the committee's attention is directed to a report (No. 2140) made by Senator McClellan in the 81st Congress to accompany S. 3959 of that Congress which amended the Federal Property and Administrative Services Act of 1949. A major purpose of that bill was to curtail Government expenses in connection with the maintenance of records. Senator McClellan, at page 4 of the report, stated:

"It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis. The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization."

Representative Holifield, on the floor of the House, in connection with the same legislation, pointed out that the Hoover Commission had estimated that each file cabinet used by the Government cost $29 a year. How much this cost may have risen in the meantime, we do not know. But we can say with assurance that the cost of developing, editing, and maintaining the additional records called for by S. 1666 would be a burden of no inconsiderable dimensions, and, as we have already several times indicated, it is a burden which would fall squarely on the taxpayer.

As an operating matter it should be noted that the need to make records available during the pendency of matters before the agency would also have a serious effect in slowing up the operations of an agency.

The pressure to publish and index needlessly

One final word on the subject of cost. S. 1666, by the provisions in the last sentence of section 3(a) and the last sentence of section 3(b), would exert a prodigious influence on the executive agencies to overpublish and overindex. These sentences, in effect, provide that agency action shall be ineffective where

there has been a failure to publish and index as required by law. Any conscientious administrator would be constrained to publish material, or to index it, whenever there was doubt, in order that agency effectiveness should not be impaired.

Proliferation of paperwork would be sanctified by legislative enactment.

Confusion as to the requirements for publication because of differences in language between sections 3(a) and 3(b) of S. 1666

On the subject of publishing and indexing, it should be noted that a curious inconsistency exists between the language of sections 3(a) and 3(b) of S. 1666.

Although section 3(a)(C) requires the publication of "substantive rules adopted as authorized by law and statements of general policy or interpretations," section 3(b) seems to suggest that if "rules, statements of policy, and interpretations" are made available for public inspection and copying and if they are indexed, they may be relied upon by the agency. However, each section provides, in effect, that no person may be adversely affected by a rule, statement, or interpretation which is not handled in accordance with the provisions of the section.

Since the scope of section 3(a) includes much that is in section 3(b), it would appear that the election to publish or make available and index, which 3(b) purports to afford, is in large part vitiated and that agencies may be required to publish very large amounts of material of no general interest whatsoever. And, as has been indicated, a cautious and conscientious administrator will always publish if he is in doubt.

It may well be that the Federal Register will, if this bill is enacted, become overladen with materials the publication of which could not be justified in the public interest.

Problems created by the requirement that delegations other than final delegations be published

The requirement in section 3(a) for publication of "delegations by the agency of authority," as distinguished from the present requirement of publication of delegations of "final" authority, will create additional serious practical difficulties which relate not to cost but rather to the effectiveness of Government.

Almost every agency employee who deals with the public has authority to take certain actions, however limited such authority may be. For example, in the field of customs enforcement an entry clerk may reject a proffered bond because it is unsigned or because it was signed by a person without authority to sign it. He may reject an entry because it contains mathematical mistakes or because it erroneously states that certain classes of goods fall within one paragraph of the Tariff Act when, patently, they fall within another. Customs officials such as examiners have the authority to take certain actions in the names of the appraisers of merchandise. Any erroneous action taken by any of these people, all of whom act in the names of their superiors, are reviewable both administratively and in the customs court.

Moreover, it is not apparent what advantage to the public there would be, for example, in having the Federal Register set forth formal statements of the delegations of various inspectors of customs at the ports and along the borders, when it is clear to everyone dealing with these people that they act for and in the names of the collectors of customs.

Under existing law, if an employee's actions are wrong, they can readily be reversed. Under the proposal, it would appear that even though his actions may be correct, they are subject to being reversed if by some inadvertance an appropriate delegation has not been published in the Federal Register. This triumph of error would take place notwithstanding that the final action taken by the collector of customs or the appraiser was taken under a properly published delegation.

The erroneous concept that it is the Federal agency rather than the public which suffers when the agency cannot enforce the laws which Congress has enacted

Basic to S. 1666 appears to be the concept that an agency's action should be frustrated if for any reason the agency has failed to comply with one of the technical requirements of the bill; if an agency has errer, it should suffer the consequences of its error. This point of view assumes that the agency acts on its own behalf; that it profits and that it loses; and that rendering its activities ineffectual is the way to cause it to lose, thus punishing it. But, of course, this is not the case. Agencies act on behalf of the Congress in carrying out the laws

which the Congress has enacted, and they act on behalf of the public in the sense that those laws are for the public good. The following might be an example:

If the passenger disembarks from the *Queen Mary*, declares imported goods worth $10,000 to a customs inspector and pays duties of a thousand dollars to a customs cashier, it would appear under S. 1666 that notwithstanding that the duties were due and owing and properly collected they would have to be refunded to the importer if the importer could later prove that a proper delegation order had not been published setting forth the authority of the inspector who had calculated the amount of duties owing or the authority of the customs cashier who had collected the duties.

The losers in this situation would be the taxpayers, generally, as well as the domestic industries which were supposed to derive protection from the tariff on the commodities on which the importer escaped paying duty.

Similarly, an inability to collect internal revenue taxes because of the failure to publish a delegation to a deputy collector would prejudice all taxpayers, not the Internal Revenue Service.

Worse still would be the prejudice to the safety of the public if they should become passengers on an unseaworthy vessel which was able to sail because the marine inspection officers assigned by the Coast Guard who had found the vessel unseaworthy were discovered to have acted without a proper published authority, notwithstanding that the delegation to them and their actions were, in every other respect, correct.

It is the public which would suffer from eating diseased meat or consuming unsafe drugs—a drug such as thalidomide, for example—if such items escape Government condemnation by reason of an agency's failure to publish a delegation notice in the Federal Register; any detriment to a Federal agency would be minor and inconsequential by comparison with these consequences to the public.

Departure from the concept of excusing agency error where such error has not caused substantial prejudice to the person who complains is not desirable

The deletion from subsection (a) of the exemption from publication of rules addressed to and served upon named persons in accordance with law would be a retrogressive step. Without disputing the proposition that it is undesirable to fail to publish that which should be published, we wonder what gain there is to the public for an agency to act as if a person who has received actual notice has received no notice at all, merely because the notice which he received in person was not also published in the Federal Register.

Despite the best efforts of every agency, it seems likely that from time to time human error will cause Government employees to fail to publish what should be published. Also, there will be many times when a real question arises as to whether publication is necessary under the law. Given either of these circumstances, it is hard to see why an individual who has notice of a rule affecting him should not be bound by it because the rule has not been printed in the Federal Register.

This is not to suggest that, if there should be a case of substantial prejudice to a party by reason of a failure of publication, the party should be bound even though he had direct notice. But we believe that it is wrong to make an invariable rule that failure to publish vitiates a rule with respect to a person to whom it is addressed and who has actually been advised of the rule by the Government.

The provision that unpublished and unindexed interpretations may not be used appears to give rise to a number of problems

The final sentences in sections 3(a) and 3(b) create an area of considerable uncertainty. The existing law provides that: "No person shall in any manner be required to resort to organization or procedure not so published." The proposed revision would, in effect, state that an individual would also not be bound or adversely affected by any substantive rule or interpretation required to be published or indexed but not so published or indexed.

To take a simple example which would pose a problem: Suppose the Bureau of Customs has to determine whether a particular commodity is classifiable under one of two different paragraphs of the Tariff Act, each of which imposes a different rate of duty. After studying the matter, consulting customs court decisions and the like, the Bureau concludes that the proper classification is under the first of the two Tariff Act paragraphs. It so classifies the goods in

question. If it fails to publish this decision, does this mean, under the proposed amendment, that when the same importer imports the same type of merchandise a month later, the Bureau of Customs is precluded from classifying the merchandise under the first of the two paragraphs? Does it mean that it is precluded from classifying the same merchandise under the proper paragraph when it is imported by another importer? Does it mean that if an importer should be dissatisfied with a classification and should protest the classification to the U.S. customs court, the court would have to reverse the Bureau's ruling, solely by reason of the fact that the Bureau failed to publish an interpretation which it had given to the first importer, even though the court considered that the Bureau's ruling accurately interpreted the intention of Congress so far as the Tariff Act is concerned? After all, it is the duty of the Government to interpret the law correctly, to the best of its understanding. Precedents are cited chiefly for the benefit of the parties in the matter and to contribute to the understanding of those dealing with related problems.

S. 1666 is unconstitutional to the extent that it purports to require disclosure to the public of information in the executive branch which the President determines should not be disclosed in the public interest.

Throughout this statement conditional terms have been used in referring to the effect which S. 1666 would have if it were enacted. This has been done deliberately because in the opinion of this Department various aspects of S. 1666 would clearly be unconstitutional.

It has long been recognized that under the division of powers between the Congress, the executive, and the judiciary, the President has a constitutional power to refuse to disclose information which requires secrecy in the public interest.

This power of the executive was first invoked by President Washington in 1796 with respect to the availability of certain papers relating to negotiations with Great Britain. Numerous Presidents since have reaffirmed that the President cannot be compelled to make disclosures contrary to the public interest.

Courts, including the Supreme Court of the United States, have recognized that the proper conduct of the Government allows the withholding of information, for example, which would disclose the identiy of informers whose information is required for proper law enforcement. Nor is there any doubt that the President and the executive branch are not required to disclose information, for example, which would prejudice the conduct of foreign affairs. The following statement by President Hoover in 1930, reported on 6 Cannon's Precedents of the House of Representatives (1936) section 433, well states the position:

"This treaty, like all other international negotiations, has involved statements, reports, tentative and informal proposals as to subjects, persons, and governments given to me in confidence. The Executive, under the duty of guarding the interests of the United States, in the protection of future negotiations, and in maintaining relations of amity with other nations, must now allow himself to become guilty of a breach of trust by betrayal of these confidences. He must not affront representatives of other nations, and thus make future dealings with those nations more difficult and less frank. To make public in debate or in the press such confidences would violate the invariable practice of nations. It would close to the United States those avenues of information which are essential for future negotiations and amicable intercourse with the nations of the world. I am sure the Senate does not wish me to commit such a breach of trust."

It should be noted, however, that it is not necessary to consider problems of "executive privilege" as it relates to the relationships between the executive branch and the Congress. President Kennedy has made clear that this privilege will not be invoked except upon his own personal decision and only in a case of the utmost gravity, where failure to do so would be inconsistent with his constitutional responsibility to the United States.

The problem of executive privilege, as such, is evidently not involved because the issue presented by S. 1666 does not purport to deal with the President's power to withhold from Congress information on good and proper grounds. Rather, S. 1666 presents the issue of whether a private citizen, as distinguished from Congress, may, on the basis of a statute, demand and be entitled to receive information in the hands of the executive branch regardless of the damage which disclosure of such information will do to the United States generally or to the private interests of particular citizens; and this, regardless of any legitimate need by the inquirer for the information which he asks.

It seems clear, beyond doubt, that the President's constitutional responsibility of proper execution of the laws is such that he may not be compelled by a private citizen to act contrary to the public interest.

The Treasury Department does not take the position that the executive branch should withhold information lightly, from a private person. But by the same token, it is clear that the President cannot, in the proper exercise of his responsibilities, fail to insist on nondiscloseure whenever the disclosure requested would be prejudicial to the interests of the United States.

The Treasury Department is fully in accord with the basic purposes of S. 1666, although not with the bill itself

In conclusion, the Treasury Department is in full accord with the view of the proponents of S. 1666 that it is desirable for the citizen to be able to obtain adequate information about the actions of his Government. It is our belief, however, that, in general, the officers and employees of the executive branch do, in fact, regularly make available the information which can properly be expected from them. We are, of course, aware of the fact that committees of Congress and others have, from time to time, been seriously critical of failures by the Government to disclose information which properly should have been disclosed. Without question, such occasions have existed.

Federal officials, like others, are fallible, and their judgments are not always correct. They can be expected to err from time to time, and they do. But, considering the tremendous impact of Government in the modern world, the millions of rulings and adjudications which are made annually throughout the executive branch, it is notable that the close scrutiny of those who are critical of Government disclosure policies have produced comparatively few illustrations of error.

There are no grounds for complacency—but it should be noted that the agencies, and the Treasury Department in particular, do publish and otherwise make available a very large amount of information

We do not believe that because those errors have been relatively few that we have grounds for complacency. We share with the proponents of S. 1666 the view that every effort should be made to maximize the disclosure of information as fully as can properly be done. The Treasury Department has been pursuing this objective vigorously. For example, the Internal Revenue Service has, of its own volition moved toward a more liberal disclosure of tax information to State governments, the Congress, other Federal agencies, and the general public. This is evidenced by the increasing number of tax-exchange agreements entered into by the Service and the various States; the sponsoring of legislation to open to inspection the applications for tax-exempt status; the more liberal policies adopted by the present Commissioner of Internal Revenue with regard to requests for information by State disciplinary and prosecuting functions; and the sponsoring of legislation permitting the Service to cooperate with private parties or institutions in the compilation of statistical information.

This brief list of recent steps to provide still more information is, of course, in addition to the Treasury's constant and determined program of publication, which places before interested members of the public as quickly and as fully as possible, all information of precedential value or otherwise of direct interest to them.

Despite its objection to S. 1666, the Treasury Department believes that there are important affirmative measures which could be taken to increase the flow of information

It is our belief that although the Treasury Department must object to S. 1666 for the reasons stated, problems related to the disclosure of information remain important and worthy of detailed consideration. We do not believe that an approach to the problem along the lines of S. 1666 is the proper way to deal with the matter. We do not, however, take the position that the question should be swept aside or put on the shelf.

It is our belief that if the Congress should establish an Administrative Conference of the United States along the lines of S. 1664, the consideration of additional disclosure by the Government could well be a subject of its early attention. If such a conference should undertake a study of this nature, it would do well to consider, separately, disclosure as it relates to agencies, the roles of which are primarily regulatory, and disclosure with respect to agencies whose functions are primarily other than regulatory. The multiplicity and diversity of Federal governmental functions should be taken into account. Such an approach might lead to productive results.

In any serious study which is made of this subject, it is important to have in mind that access to information in Government files, although a highly desirable objective, is not an absolute right. The Constitution protects freedom of speech in uncompromising terms, but it has long been held that even this cornerstone of our freedom is not without limitation. One cannot, with impunity, raise a false cry of "Fire" in a crowded theater, nor slander his neighbor. Consideration of the difficult subject of access to information held by the Government must likewise recognize that it is a right which also has limitations. Any ground rules which are established must recognize that the general public good is an objective which should not be lost sight of in our efforts to keep private persons as fully informed as possible.

FEDERAL AVIATION AGENCY,
Washington, D.C., November 7, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Agency with respect to S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 323, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

This bill seeks several important changes in section 3 of the Administrative Procedure Act (APA) which governs publication and dissemination of Agency orders, rules, and other documents.

At line 5, page 2 of S. 1666, the word "final" is deleted from the existing law's description of what delegations of authority need be published. This deletion is intended, we understand, to broaden the publication requirement for delegations to the end that private citizens may know who in fact—out at the fingertips of an organization—is responsible for action on a given matter. This Agency has been substantially decentralized during the past few years and full statements of regional structure and authorities are currently being published. We have received no indication that further publications are needed to apprise citizens of the locus of decisional authority. In general, too, we believe the objective of the amendment is already met by the requirement of existing law that there be published "the established places at which, and methods whereby, the public may secure information or make submittals or requests" (sec. 3(a)(1)).

At line 16, page 2 of S. 1666, language in the existing law has been deleted which obviates the publication of rules "addressed to and served upon named persons." This provision in the existing law was intended to avoid publication in the Federal Register of materials for which publication was pointless. No need appears for publication of these particularized materials since, by the existing definition, they will be served upon the only person concerned. Accordingly, we would prefer that the exception be retained and that the Federal Register remain a repository for items of general applicability.

Lines 17 through 20, on page 2 of S. 1666, considerably strengthen the sanctions which may be applied for a failure to publish. Existing law requires only that no person is "required to resort to organization and procedure not * * * published" as required (sec. 3(a)). S. 1666 would provide that no person "shall be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation thereof required to be published * * * and not so published."

All must concede, of course, the validity of the principle that rules and procedures affecting the public should be brought to the attention of the public. A logical corollary is that an agency's failure to take this step should not prejudice members of the public.

The suggested language, however, may go beyond this principle and its corollary. We are concerned that the proposal may produce onerous burdens on agencies which are not offset by corresponding benefits to the public. The language, in effect, makes the legal validity of every agency document turn on whether or not the agency has met any publication requirement which may exist with respect to the document. The number and variety of agency documents, however, coupled with the generality of the definition of what must be published, produce considerable uncertainty in many cases as to what the publication requirement actually is. The sanction of invalidity which S 1666 would apply to an agency decision in this difficult area would tend to encourage the

publication of every document about which there might be any question. The result would be a vast increase in the quantity (and expense) of publication.

There is nothing in the experience of this Agency to suggest that such a development would in any way improve the lot of the citizen. Indeed, as a taxpayer, the citizen might have every right to object. In the absence of some showing that the existing system operates to the prejudice of the public, we would oppose this change with its attendant expenses and complications.

Moreover, the proposal may have a serious adverse effect on this Agency's emergency rulemaking authority under section 1005 of the Federal Aviation Act (49 U.S.C. 1485(a)). Where the needs of air safety require this Agency to take rulemaking action prior to the time when formal publication is possible, those affected by the rule are given actual written notice. Pending formal publication, of course, no attempt is made to enforce the rule against others. The proposed language, however, is broad enough to free an individual from the effect of an unpublished rule even though he may have actual notice of it. If a case can be made for the basic proposal, we would recommend that the words "who has not had actual knowledge thereof" be added after the word "person" on line 17, page 2, to insure that such emergency action will still be effective.

The provisions of section 3(c) of S. 1666 raise a number of basic questions concerning the availability of agency records and documents. The existing statute provides that only "matters of official record" need be made available, that they need be made available only to "persons properly and directly concerned" and that even these documents may be held confidential "for good cause found." The three quoted limitations operate to give agencies broad discretion as to what may be withheld. All three of the limitations are omitted from S. 1666. In addition, a judicial procedure for compelling disclosure is provided which begins with the presumption that the agency has improperly withheld the information sought—a presumption which the agency must overcome to vindicate its nondisclosure.

We understand subsection (c) is intended to increase the availability of agency factual material as distinguished from materials concerning internal agency deliberations and views and from privileged mattter. If some broadening of the existing statute is thought desirable, we believe these limitations should be spelled out. The word "factual" should be inserted before the word "records" where it appears on line 1, page 4, and specific exceptions should be added to cover matters relating to internal management and matters for which privileges may exist, such as investigative materials, trade secrets, and medical records.

We are opposed to lines 8 through 18 of page 4 which grant broad authority to district courts to compel disclosure of agency materials. The underlying issue here is where discretion should lie to decide what matters are properly withheld. The existing statute places that discretion in the agencies. S. 1666 will in large measure place the discretion in the Federal district court. It is our belief that agencies are in a better position to determine the precise consequences of releasing a given document and for that reason should retain initial discretion to decide what should be disclosed. Placing this discretion in the courts can only be justified by a clear showing that agencies are abusing their powers. It has not been our experience that such a charge has been or could be made. In view of the burden which will without question be placed on the courts by this proposal and in view of the facility the proposal affords for unreasonable, dilatory and harassing requests, we would hope no change would be made in the existing statute that is not founded on a well-documented case that the existing system is being abused.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. HALABY, *Administrator.*

FEDERAL COAL MINE SAFETY BOARD OF REVIEW,
Washington, D.C., July 3, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: Reference your request for the views of this agency on S. 1666, the Board has directed that the following report be submitted thereon.

S. 1666 would amend section 3 of the Administrative Procedure Act, on matters relating to public information.

The proceedings of the Board are specifically exempt from the requirements of the Administrative Procedure Act, under section 213 of title II of the Federal Coal Mine Safety Act (66 Stat. 709). Therefore, the proposed bill is inapplicable, by its terms, to the operations of this agency.

However, even if such legislation were applicable to the Board, it would require no significant changes in the Board's current procedures. Section 205(f) of title II already requires that official acts of the Board be entered of record, and that Board hearings and records thereof be open to the public (66 Stat. 698). Moreover, under section 207(i) of title II, all findings and orders must be made by the Board in writing, showing the dates of issuance and bearing the signatures of concurring members; and such decisions must be entered on the official record, along with any supporting or dissenting opinions (66 Stat. 702).

Title II further specifies the nature of pleadings, service, and other procedures, which must be followed, or are available, in Board cases (sections 205(g), 205(i)-(k), 207(a)-(j)) (66 Stat. 698, 700-702; 74 Stat. 201). Also, under the authority of section 205(h) of title II (66 Stat. 698), the Board has supplemented the foregoing statutory provisions by publishing a statement of organization (17 F.R. 10523, as amended by 25 F.R. 6993 and 28 F.R. 1123), and comprehensive rules of procedure (30 CFR 401.1-401.38).

Without going into detail in this regard, the Board's statement of organization and rules of procedure, and the publication of changes therein, are fully consonant with the proposed requirements of S. 1666. Also in conformity with the requirements of the proposed bill, the Board already maintains, and has available for copying, a current index of final decisions and rules of this agency. Likewise, the Board distributes, without charge, its statement of organization, rules of procedure, and all final decisions and orders. Parenthetically, the Board has also issued and distributed a number of "information circulars" for the further guidance of interested parties as to Board procedures and practices.

To repeat, S. 1666 is inapplicable to the Board, because of the specific exemption of Board proceedings from the Administrative Procedure Act. Nevertheless, even if such bill applied to the Board, it would require no significant changes in the present operations of this agency.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

By direction of the Board.

Sincerely yours,

ROBERT J. FREEHLING,
General Counsel.

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON S. 1666

S. 1666 would substantially revise section 3 of the Administrative Procedure Act, in order to clarify and protect the right of the public to information concerning the operation of Government agencies.

The Commission fully agrees with the underlying purpose of S. 1666—that agencies should inform the public, as completely as practicable and consistent with the public interest, of all actions, procedures, and policies adopted. As a matter of practice, the Commission now makes fully available information concerning its activities, except in those areas where present provisions of law make it clear that it would not be in the public interest to make disclosure (e.g., matters involving national defense and security considerations, matters involving confidential economic data, etc.) Furthermore, where it is clear that there will be a continuing interest in a particular area of the Commission's operations (such as the right of candidates for public office in the use of broadcast facilities under section 315 of the Communications Act), the Commission has gone beyond the express requirements of the Administrative Procedure Act and has complied policy announcements and interpretations pertaining to such areas. Such compilations, which are designed for future guidance of the public, are published in the Federal Register and are kept current through periodic revisions. It is contemplated that similar compilations will be made regarding other aspects of the Communications Act, such as interpretation of the doctrine of fairness.

The Commission, however, is opposed to several features of S. 1666, and further believes that certain aspects regarding the scope of this bill need clarification. The reasons for our position are discussed more fully below.

SUBSECTION 3(C)

We begin with this subsection of the bill because it contains the provisions which, in our view, are most objectionable.

By changing the present language of section 3(c) from "matters of official record" to simply that of "records," by specifically listing the three exclusive categories of records or parts thereof which would be exempt from disclosure,[1] and by providing later in section 3(e) that there can be no limiting of the availability of records to the public except as specifically stated in section 3, the bill would apparently greatly expand the scope of material and records which would be open to public inspection.

Such expansion, we urge, is contrary to the public interest in several important respects.

First, we believe that as under the present law, there should be excluded from public inspection "* * * intra-agency memorandums and reports prepared by agency employees for use within the agency," "* * * intra-agency reports of investigations," and the "* * * great mass of material relating to the internal operation of an agency." (Attorney General's Manual on the Administrative Procedure Act, pp. 24–26).

For example, obviously internal memorandums dealing with agency personnel should not be open to public inspection. Subject to provisions of law governing separation of functions (sec. 5(c) of the Administrative Procedure Act; sec. 409(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 409(c)(1)), the agency should clearly be entitled to receive memorandums and working papers from the staff without the need for later disclosing such working papers. To require the agency to operate in a goldfish bowl would seriously hamper its operations and reduce its efficiency. For it is important to the effective functioning of the Commission that members of its staff who are called upon for advice and assistance, respond with candor and with full discussion of all relevant considerations. But if all staff memorandums are to be examined, almost routinely, outside the Commission at a later date, inevitably this flow of candid staff advice and suggestions will be inhibited. This exchange is, however, a very important aspect of the administrative process: to the extent it is inhibited, to that extent sound administrative process is undermined.

Revised section 3(c) contravenes the foregoing sound administrative policies. For, section 3(c)(3) exempts from public disclosure only the internal memorandums "* * * relating to the consideration of adjudicatory and rulemaking matters." This means that all internal memorandums dealing with personnel or pertaining to matters of an agency's workload would be open to public inspection. To give another example, staff memorandums discussing the agency's legislative program, or analyzing industry suggestions for legislation, would be public; so also would any working papers dealing with public notices or similar Commission actions. Further, exchanges with the executive branch (e.g., the Bureau of the Budget) or with other agencies (e.g., the Federal Trade Commission) would be subject to disclosure, unless secrecy is necessary for the national defense. Indeed, as to this last example, we point out that the bill might raise constitutional questions, since Congress would be specifying what matters within the executive branch could be withheld from public inspection (i.e., the three categories listed under sec. 3(c)(3) of the bill), thus possibly infringing upon the President's judgment as to when free access to information would be contrary to the public interest.

As a final example, we point out that the agency would have to make available for public inspection complaints received from the public and staff working papers pertaining to such complaints. The Commission has received confidential information in the past, for example, from broadcast station employees who charged that the station was being operated in violation of the law or Commission rules or policies; such information might well not be forthcoming if it cannot be supplied, at least initially, on a confidential basis. Further, a serious problem is presented if investigational reports of such complaints, prepared by the staff, must be made public, a requirement which would seriously hamper the agencies in discharging their investigatory functions.

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[1] The three categories of record not open to public inspection are records or parts thereof which are (1) specifically exempt from disclosure by statute, (2) specifically required by Executive order to be kept secret for the protection of the national defense, and (3) the internal memorandums of the members and employees of an agency relating to the consideration of adjudicatory and rulemaking matters.

Even as to the exempted category of internal memorandums "* * * relating to the consideration and disposition of adjudicatory and rulemaking matters," we think the legislative history on this bill should make it clear, by reference to the broad definitions in sections 2 (c) and (d) of the Administrative Procedure Act, that the exemption applies to all predesignation aspects of adjudication (such as memorandums relating to the processing of an application before hearing) or, in the case of rulemaking, to all "prenotice" matters (such as staff analyses and recommendations bearing on the need to institute rulemaking proceedings).

Based on our experience, we believe that the present language of section 3(c) has worked well, both from the standpoint of agency efficiency and the public access to agency records. We urge that it be retained.

Proposed subsection 3(c) also specifies a new procedure whereby one alleging that he had been wrongfully deprived of information can bring a suit in the U.S. district court to compel the production of such information. It is further provided that "* * * in such cases the court shall consider the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence." We oppose this new procedure.

First, we point out that it reverses the normal presumption that a Government agency has acted properly and in accordance with law, and assumes the contrary. Second, we suggest that a Commission refusal to make records available for public inspection should be reviewable in the same manner as any similar agency action—under section 402(a) of the Communications Act (47 U.S.C. 402(a)) and the Judicial Review Act of 1950 (5 U.S.C. 1031–1042). The latter statute contains ample provisions to insure a full and fair review of the agency's actions, and without the time-consuming and unnecessary resort to de novo trial of the entire matter.

SUBSECTION 3(b)

The introductory clause of section 3 now exempts from the whole of section 3 "* * * any matter relating solely to the internal management of an agency." This "internal management" exemption is altered in the new statute in several respects. Proposed subsection (3a) retains the exemption in its present form, proposed subsection 3(c) drops it entirely (see discussion above), while proposed subsection 3(b) substitutes for it the phrase "[matter that] relates solely to the internal employment rules and practices of any agency."

The basis for the proposed change is not apparent. It would appear that the exemption of proposed subsection 3(b)(3) is considerably narrower than the present "internal management" exemption of section 3. We urge, for the reasons discussed in connection with subsection 3(c), that the present language ("internal management") be retained.

Proposed subsection 3(b) also requires that each agency "* * * shall maintain and make available for public inspection and copying a current index providing adequate information for the public as to each final order, opinion, rules, statement of policy, and interpretation" and that "[n]o final order, opinion, rule, statement of policy, or interpretation may be relied upon, used, or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided in this subsection."

The Commission appreciates the possible value to the public of the proposed index. We have two comments regarding this index.

First, there is a question whether this indexing requirement applies retroactively, or applies only to matter adopted after enactment of this bill. Obviously, a meaningful index suggests that the whole of an agency's body of opinions, rules, statements of policy, etc., should be indexed. Equally obvious, an undertaking of such dimensions would require substantial additional appropriations. Especially would this be so with agencies which presently do not index their decisions. And assuming that an agency must index all of its opinions, etc., from the time of its inception, it seems clear (in light of the later prohibition of section 3(b) against an agency's using or relying on any unindexed material) that agencies would have to be given a reasonable period and sufficient funds to bring themselves into compliance with the new statute.

Second, as to "* * * statements of policy, and interpretations adopted by the agency and affecting the public," which would have to be made available for coping and indexed, we believe some clarification is called for. In many cases, the Commission's staff sends out letters interpreting the applicability of the Communications Act or our rules to a particular set of facts. Generally speak-

ing, such interpretations do not involve the making of new policy, but merely cite existing policies previously enunciated. It could be argued, however, that such interpretations are within proposed subsection 3(b), thus requiring indexing of the letter in which they are set out. If this interpretation were accepted, agencies would have to index a large part of their correspondence, even though much of this material would be ultimately unimportant or cumulative in nature. A point of diminishing returns would soon be reached, thus undercutting the value of an agency's index.

Therefore, the Commission believes that the indexing requirement, as it applies to interpretations or statements of policy, should be clarified, either in the body of the bill (through the use of language such as "formally adopted" or "adopted by direction of the agency") or through the legislative history.

As to the last sentence of proposed subsection 3(b), we question its usefulness. Agency rules, both procedural and substantive, must be published in the Federal Register under subsection 3(a), and the last sentence of that subsection fully protects parties in the event of any agency failure in this respect. In the case of opinions, orders, statements of policy, or interpretations, the agency need not, in any event, cite or rely upon them in any particular decision. It can always, if it wishes, simply repeat or follow reasoning embodied in such materials which is pertinent to the matter under consideration. For example, if the agency has decided a case on the same day or a few days earlier similar to one under consideration, it would not cite the decided case as a precedent, even if it were directly controlling, if, because of insufficient time, that earlier case has not been indexed. But the agency could set out, all over again, the reasoning of the earlier case, which, of course, is what an agency would have to do where the reasoning of an earlier unindexed case forms the basis of a later decision.

We do not perceive what is gained, in the example given, by requiring the agency to issue a lengthy opinion (rather than citing the controlling case as is the custom in courts) or, as an alternative, delaying a decision until an earlier case is indexed.

We think such examples could be multiplied. We suggest that if an index is required, the sanction embodied in the last sentence of subsection 3(b) is not an effective one nor is it needed. Rather, reliance should be placed upon the agency discharging its responsibility for indexing (subject to periodic review by the appropriate congressional committees).

SUBSECTION 3 (a)

We question the desirability of deleting from subsection 3(a) the language which presently makes it unnecessary to publish in the Federal Register "* * * rules addressed to and served upon named persons in accordance with law." Since such rules are not of general interest and are limited in application, publication seems to involve an unnecessary expense, especially when it is considered that the function of notice performed by publication has already been performed by the actual service on the named persons involved. We believe this provision of section 3(a) serves a useful purpose which justifies retaining it.

The last sentence of proposed subsection 3(a) provides that "* * * no person shall in any manner be required to resort to, or be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation thereof required to be published in the Federal Register and not so published."

The Commission has construed the similar language in present subsection 3(a) so that a document is effective against one with actual knowledge of it. See *In re Interim Criteria To Govern Acceptance of Standard Broadcast Applications*, Memorandum Opinion and Order, October 15, 1962, FCC 62–1052, *sub judice* in *Kessler* v. *Federal Communications Commission*, Case No. 17363 (CADC). This construction is based on section 307 of the Federal Register Act, 44 U.S.C. 307 [2] and on the legislative history of section 3(a) of the Administrative Procedure

[2] This section provides, in pertinent part, that "[n]o document required under section 305(a) of this title to be published in the Federal Register shall be valid against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title."

Act, Senate Document No. 248, 79th Congress, 2d session, page 408.[3] Since the essential purpose of subsection 3(a) is to give parties notice and actual notice is superior to the constructive notice afforded by Federal Register publication, we urge that this construction of subsection 3(a) be made clear, either in the text or legislative history of S. 1666.

Adopted: October 16, 1963.

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., July 12, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter dated June 14, 1963, requests a report on S. 1666 of the present Congress, which if enacted would amend section 3 of the Administrative Procedure Act.

The existing provisions of said section 3 state in general the extent to which the organization, procedures, and delegations of final authority (subsect. (a)), the substantive and other rules (subsects. (a) and (b)), the final opinions or orders in the adjudication of cases (subsect. (b)), and the matters of official record (subsect. (c)) of an agency of the United States must be published in the Federal Register or otherwise made available to the public.

All of those provisions are preceded by an introductory provision which qualifies them by excepting all matters to the extent that there is involved "any function of the United States requiring secrecy in the public interest."

The present bill would revise and make much broader these existing provisions and would add some new provisions. In this revision the exception as to functions "requiring secrecy in the public interest" would be retained only as to the matters in the revised subsection (a). In the case of revised subsections (b) and (c), there would be exceptions for matters specifically exempted from disclosure by statute or matters exempted therefrom by Executive order for the protection of the national defense. However, even delicate and sensitive matters relating to the condition or affairs of financial institutions would appear to be subject to the disclosure provisions of these revised subsections without regard to whether their disclosure was or was not considered to be in the public interest, and without regard to the fact that, under certain conditions, such disclosure might precipitate runs and pressures on such institutions which could threaten the entire economic structure of the country.

As the agency responsible for the Federal regulatory and supervisory functions with respect to all Federal savings and loan associations and all savings and loan associations and similar institutions whose accounts are insured by the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board cannot contemplate with equanimity the creation of such a situation.

The Board suggests, therefore, that if decision is made to proceed further with legislation of this nature, careful consideration be given to the inclusion of a provision making an exception for matters relating to the condition or affairs of financial institutions, where the agency having authority with respect to the examination, regulation, or supervision of such institutions determines that disclosure of such matters would not be in the public interest.

Informal advice has been received from the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

JOSEPH P. MCMURRAY,
Chairman.

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[3] Also, in an extension of remarks of Congressman Hobbs, it was stated (Administrative Procedure Act, Legislative History, p. 415): "Section 3(a) provides that there shall be publication in the Federal Register of rules of the various agencies of the Government. The last sentence of section 3(a) states: 'No person shall in any manner be required to resort to organization or procedure not so published.' But this does not mean that a person who has actual notice is not required to resort to agency organization or procedure if it has not been published in the Federal Register. If a person has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice. See 44 U.S.C. section 307."

THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,
Washington, July 11, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of June 14, 1963, requesting a report by the Board on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, to clarify and protect the right of the public to information and for other purposes.

The Board views favorably the stated congressional purpose underlying S. 1666. When access to information to which the public is entitled is foreclosed by agency action based upon existing provisions of law, remedial legislation appears warranted. However, as set forth hereafter in the section-by-section analysis of the bill, the Board believes that several of the proposed provisions are unduly severe in their requirements and could ultimately thwart the bill's purpose. The Board favors the provisions of proposed subsection (a) of section 3 relating to publication in the Federal Register of a description of agency organizational structure, sources of information, and of procedures or methods by which agency functions are channeled and determined, including a statement of current rules of practice and procedure and of the substantive rules adopted as authorized by law. These provisions appear to clarify and make more explicit existing requirements of section 3 of the act, to which the Board currently adheres.

Proposed subsection (b) would impose upon agencies requirements (1) for making available, for public inspection and copying, various materials specified in the subsection, and (2) for maintaining for public inspection and copying a current index of these materials. Excepted from these requirements are materials (1) exempted by statute from disclosure, or (2) specifically exempted from disclosure by Executive order in order to protect the national defense, or (3) relating solely to the agency's internal employment rules and practices. It is noted that there are not made applicable to the disclosure requirements of subsection (b) two exceptions from disclosure now provided for in section 3 of the act in respect to generally the same agency matters. First, no exception is made for cases where there is involved "any function of the United States requiring secrecy *in the public interest.* [Emphasis added.] (At present, this exception is applicable to the entire section 3 of the act.) Second, the proposed subsection (b) would deny to an agency a right to determine that for good cause found, agency materials shall be held confidential.

The Board considers unduly restrictive those provisions that would authorize withholding of information as to matters involving any function of the United States only if such matters required secrecy to protect the national defense, and then only if specifically exempted by Executive order. As concerns the Board, the limited nature of the exemption proposed would result in there being made public factual data of an extremely confidential nature such as would be involved in proceedings relating to the termination of membership of a State bank in the Federal Reserve System, the revocation of a voting permit of a holding company affiliate, or suspension of a member bank from use of the credit facilities of the Federal Reserve System. The Board believes that the public interest would not be served by an absolute requirement of public disclosure in all such cases.

The Board is also concerned over the proposed change from existing law which would rescind the right of agencies to hold information confidential "for good cause found." This right, granted by section 3(b) of the Administrative Procedure Act, has been vital to the Board's effective performance of statutory functions relating to supervision and regulation of commercial banks. Many of the Board's actions in these respects, either responsive to applications and requests or initiated by the Board, necessarily rely upon information obtained by bank examination or from other equally confidential sources. The Board's authority to exercise its judgment in regard to making public or not certain information has enabled the Board to function without concern that information bearing upon the financial condition or management of a supervised institution might be publicly disclosed and thereby injure the institution or those served by it.

The relationships that exist between banks and their customers, giving rise to the vital importance of public confidence in these banks, could, in the Board's opinion, be jeopardized by uncontrolled public access to the types of information

mentioned. The Board believes that its disclosure practices, pursuant to the present provisions of section 3 of the Administrative Procedure Act, afford reasonable and adequate public access to the Board's opinions, orders, rules, statements of policy, and interpretations.

Proposed subsection (c) requires prompt availability of agency records and provides exceptions similar, with minor variation, to those provided in subsection (b). Withheld, however, as from subsection (b), are the two exceptions to disclosure, earlier discussed, as provided by the present section 3 of the act. For the reasons earlier stated, the Board opposes the omission from the proposed subsection (c) of exceptions considered by the Board to be both necessary and equitable.

The Board has no objection to the provisions in that subsection that would enable a complainant to secure a Federal court order compelling production of agency records or information improperly withheld. However, it is believed that consideration should be given to a change in the provision that, as presently worded, would permit, without stated exception, assessment against the agency of the cost and reasonable attorney's fees of a complainant who sought a Federal court order for production of records. It would be more equitable, in the Board's view, to permit such assessment against the agency only if the agency has failed to justify its action in withholding records or information sought.

Subsection (d) would require every agency with more than one member to keep and to make available for public inspection the individual votes of each member in *every* proceeding "except to the extent required to protect the national defense." The Board presently publishes the votes of individual members in respect to many actions that fall within the act's definition of "agency proceeding," and the Board does not oppose the principle of vote disclosure underlying the proposed requirement. However, as to those proceedings of the Board in respect to which the disclosure requirements proposed in subsection (b) and (c) have herein been opposed, it is obvious that making available for public inspection a record of the individual votes of Board members would be equally objectionable, particularly in cases where public knowledge of the fact of a Board proceeding could be as damaging as knowledge of the circumstances and results thereof.

Accordingly, the Board believes that the interests of the public will be served best by a provision that would permit nondisclosure of the votes of Board members "for good cause found."

Sincerely yours,

WM. MCC. MARTIN, JR.

FEDERAL TRADE COMMISSION,
Washington, D.C., October 1, 1693.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: You have requested the views of the Federal Trade Commission on S. 1666, 88th Congress, 1st session, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes. Commissioners MacIntyre and Higginbotham are in Europe on official business at the request of the Department of State. After their return around the middle of October we will be pleased to provide the committee with the Comsion's views on the bill. In the meantime I am submitting some personal views on the proposed amendment.

The proposed amendment of the Administrative Procedure Act is intended to serve the important and laudable objective of removing, so far as practicable, secrecy from Government actions. I certainly support this objective.

The Federal Trade Commission, as the committee is well aware, is primarily an enforcement agency with the broad statutory duty to prevent unfair methods of competition and unfair or deceptive acts and practices in commerce. Certain of the statutes it administers require the Commission to issue rules and regulations and to obtain and maintain compliance with them. To a limited degree, therefore, the Commission is a regulatory agency. The Commission also has specific statutory authority to gather and compile information concerning, and to investigate the organization, business, conduct, practices and management of corporations, individuals, associations and partnerships, and from time to time

to make public such portions of the information so obtained, except trade secrets and names of customers (disclosure of which is prohibited by statute), as it deems expedient in the public interest. The Commission is empowered by statute to require corporations, partnerships and individuals, whether or not they are under investigation by the Commission, to furnish information and documents concerning their business and operations.

The Commission each year receives thousands of complaints from individuals, business firms, Members of Congress and others concerning allegedly unfair business practices. Most of the Commission's investigations are initiated as a result of complaints of this nature. In these investigations, most of which do not result in formal adjudicatory proceedings, the Commission obtains information from many sources, much of which relates to the intimate operations of business firms.

Thus, in the performance of its statutory duties and in its efforts to gain the expertise it is expected to have, the Commission obtains much information, the disclosure of which could do serious harm to those who furnish the information. The Congress itself, when it created the Commission in 1914, recognized the potential danger of under disclosure of information coming into the Commission's possession. Under section 10 of the organic act, it is a misdemeanor subject to fine and imprisonment for any officer or employee of the Commission to make public any information obtained by the Commission without its authority.

The Commission's existing policy with respect to the disclosure of information concerning its actions is described in detail in its published procedures, a copy of which is enclosed. It will be observed that the Commission now makes public, among other things, the pleadings, transcript of testimony, exhibits and all documents received in evidence or made a part of the record in adjudicative proceedings (except evidence received in camera); petitions for the issuance, amendment, or repeal of rules and regulations issued pursuant to specific statutory authority, including petitions for exemptions; records of hearings in all rulemaking proceedings; agreements containing orders to cease and desist after acceptance by the Commission; and reports of compliance. The Commission just recently announced that it will publish texts or digests of advisory opinions which have general interest, subject to statutory restrictions against disclosure of trade secrets or names of customers and to considerations of the confidentiality of facts involved and of meritorious objections made by the requesting party to such publication. In actual practice, therefore, the Commission now makes public substantially all of its records except those containing information and material furnished the Commission by complainants or obtained by the Commission in investigations and internal memorandums relating thereto, and records relating to its internal operations and management.

While I do not think it is the intent or desire of the sponsors of S. 1666 to require that information furnished the Commission by applicants or complaining parties and information obtained by it in investigations, or information relating solely to internal operations and management, be made public, the bill as now drafted might be subject to such interpretation. The committee will appreciate that the disclosure of information of this kind could result in substantial harm to those upon whom the Commission must depend to furnish the information needed to perform its statutory functions. Individuals and firms, especially small business concerns, cooperating with the Commission could be subject to reprisals by their more powerful competitors and the public would be harmed by the resulting reduced effectiveness of the Commission in enforcing laws intended to maintain and promote the competitive system.

Section 3(a) of the Administrative Procedure Act requires each agency to state and currently publish in the Federal Register delegations of final authority. The proposed amendment eliminates the word "final" and would require the publication of all delegations of authority. This could create practical difficulties for the Commission in that almost every employee who deals with the public, including hundreds of attorneys, has authority to take certain limited actions. I question whether the publication of minor delegations would serve any useful purpose.

Section 3(d) of the proposed amendment would require the Commission to keep a record of the vote of each of its members in every agency proceeding and to make such record available for public inspection.

The Commission presently keeps a record of the vote of each of its members on all matters coming before the Commission. Each Commissioner has the right to make public his vote with respect to any action by the Commission. Because

of the potential harm to the public interest from a requirement that each Commissioner's vote in every agency proceeding be made public, I believe it preferable to leave the question of whether or not to make public a particular vote up to the responsible discretion of each agency member.

If the committee should hold hearings on the proposed amendment, I respectfully request opportunity to be heard.

Sincerely,

PAUL RAND DIXON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., October 25, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your request for the views of the Federal Trade Commission on S. 1666, 88th Congress, 1st session, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes."

Chairman Dixon, in his letter of October 1, 1963, to you, expressed his personal support for the purposes and objectives of S. 1666, but pointed out that if the bill should be interpreted as requiring the Commission to make public information furnished it by applicants or complaining parties and information obtained by it in investigations, as well as internal memoranda relating thereto, and records relating to its internal operations and management, it would result in substantial harm to the business community, especially small business concerns, and seriously impede the Commission in effectively discharging its statutory duties. He also questioned whether the publication of minor delegations of authority and the publication of each agency member's vote in every agency proceeding, as the proposed amendment would require would be in the public interest.

The Commission concurs in Chairman Dixon's views on the proposed legislation.

By direction of the Commission:

PAUL RAND DIXON, *Chairman.*

N.B.—Pursuant to regulations, this report was cleared orally with the Bureau of the Budget on October 25, 1963, and on that date the Bureau of the Budget advised that there is no objection to the submission of this report from the standpoint of the administration's program.

JOSEPH W. SHEA, *Secretary.*

GENERAL SERVICES ADMINISTRATION,
Washington, D.C.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of June 14, 1963, requested the views of the General Services Administration on S. 1666, 88th Congress, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

This bill, if enacted, would revise section 3 of the Administrative Procedure Act (5 U.S.C. 1002) to (*a*) strengthen present requirements for the publishing, by agencies, in the Federal Register of organizational, procedural, and substantive matters for the guidance of the general public; (*b*) require Federal agencies to make available for public inspection and copying all final opinions, orders made in the adjudication of cases, and all rules, statements of policy, and interpretations adopted by the agency and affecting the public, unless they are promptly published and copies are offered for sale, except material exempt from disclosure by statute, requiring secrecy to protect the national defense and specifically exempted from disclosure by Executive order, or relating to internal employment practices, and to maintain current indexes of such material; and (*c*) require every agency to make its records available

except those exempt from disclosure by statute, those required by Executive order to be kept secret for the protection of the national defense, and internal memorandums relating to adjudicatory and rulemaking matters. The bill would also require every agency having more than one member to keep a record of the individual votes of each member in every agency proceeding and make such record available for public inspection except to the extent requiring to protect the national defense.

Section 3(a) of the Administrative Procedure Act presently requires that each agency publish delegations of "final" authority. The proposed amendment of the section omits the word "final." We are not clear as to whether it is intended by this omission to enlarge the scope of this requirement and thus the number of delegations which must be published or whether the word "final" was omitted as surplusage.

To enlarge the requirement for publication of delegations (if that is the purpose of omitting the word "final") would tend to clutter up the Federal Register with trivia and unnecessarily add to the cost of its publication. From the viewpoint of its responsibilities with respect to publication of the Federal Register, GSA is not in favor of this proposed change in the law.

We believe that delegations of authority to take actions which will be binding on the Government in its relations with members of the public should be required to be published in the Federal Register, but that it is desirable to confine the publication requirement to delegations of real significance to the public, omitting such matters as authority to make small purchases and authority to take action relating to internal management or intragovernmental relationships. What is needed as a practical matter is a clarification of the phrase "final authority" which would narrow rather than broaden the requirement.

It is therefore suggested that consideration be given to amending the bill as follows:

> On page 2, line 5, strike out the words "by the agency of authority" and insert in lieu thereof "of authority to take action on behalf of the agency which will be binding on the Government in matters of significance to the private party."

Further, GSA would not favor the omission of "but not rules addressed to and served upon named persons in accordance with law," which in conformance with the current provision would appear after "public" in line 16, page 2, of the bill, unless the definition of "rule" in section 2(c) of the Administrative Procedure Act (5 U.S.C. 1001(c)) were amended to delete the words "or particular applicability," as is done in the more extensive revision of the Administrative Procedure Act proposed in S. 1663, also pending before your committee. We believe that "rules" of particular applicability, which are addressed to and served upon named persons, should not be required to be published in the Federal Register in order to be effective against the persons served.

The proposed change in the last sentence of section 3(a) appears to be an attempt to put effective "teeth" in the publication requirement. Under the new language the force of every Federal agency rule, statement, or interpretation thereof which might affect any member of the general public would depend exclusively upon publication in the Federal Register. The proposed provisions would be inconsistent with section 7 of the Federal Register Act (44 U.S.C. 307) which provides that no document required to be published in the Federal Register "shall be valid as against any person who has not had actual knowledge thereof" until filing with the Division (now the Office) of the Federal Register, and would thus do away with the possibility of substituting actual notice for the constructive notice afforded by publication. In an urgent situation, it is now possible for an agency to validate a substantive rule by giving actual notice to those known to be immediately affected while the document itself is on its way to the Federal Register, while under the proposed provision the rule would not be validated until it actually appeared in the Federal Register.

GSA would have no objection if the effectiveness of material through constructive notice were made to depend upon publication rather than filing, as now provided in the Federal Register Act. Since, however, actual knowledge of a Government rule or procedure is obviously more efficacious than constructive notice by publication, we would urge that the last sentence of the proposed revision of section 3(a) be amended by inserting after the word "person" (p. 2, line 16) the language of the Federal Register Act, "who has not had actual knowledge thereof."

With respect to the proposed sections 3(b) and 3(c) of the Administrative Procedure Act, which, with certain limited exceptions, would require the making

available to public inspection and indexing of all final opinions and orders made in the adjudication of cases and all rules, statements of policy, and interpretations affecting the public, and making available agency records, the bill would radically change the existing law which provides for the publication or availability to public inspection of 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, and provides that, save as otherwise required by statute, matters of official record shall be made available to persons properly and directly concerned except information held confidential for good cause found.

In the performance of his statutory responsibilities, the Administrator of General Services is continuously making determinations in a broad field of activities affecting individual members of the general public, including the awarding, pursuant to bid offering or negotiation, of contracts for the sale of surplus property, the procurement of supplies, utilities, and other services for the Federal Government, the acquisition of sites, and the construction, maintenance, and repair of public buildings.

Notwithstanding the broad definitions of "rule" and "order" in section 2 (subsec. (c) and (d)) of the Administrative Procedure Act, we do not construe the proposed section 3(b) as requiring GSA to index and publicize all individual awards, including those involving the routine application of established policies and interpretations, but rather consider that it applies only to those awards that are based on new policy determinations or interpretations. Any broader construction of the new language would, we feel, impose an administrative burden disproportionate to any potential benefit to the public, particularly in view of the provisions of subsections (a) and (c).

With regard to the availability of agency records, we recognize that the present language of section 3(c) is not entirely satisfactory in that the exception of "information held confidential for good cause found" gives very broad scope to the exercise of agency discretion. On the other hand, there are, in our opinion, certain types of records not covered by the exceptions listed in the proposed revision of the subsection which agencies should have authority to withhold. It is therefore suggested that consideration be given to amending section 3(c) substantially as follows:

"(c) AGENCY RECORDS.—Every agency shall, in accordance with published rule stating the time, place, and procedure to be followed, make its records promptly available except those particular records or parts thereof which are (1) specifically made exempt from disclosure by statute, or by executive or agency action expressly authorized by statute, (2) specifically required by Executive order to be kept secret in the interests of national defense, (3) subject to an agreement, made by an authorized officer or employee with respect to information obtained only from, and not required to be furnished on other than a confidential basis by, the other party thereto, that such information and any record thereof would be treated as confidential and not disclosed, (4) in the nature of reports of investigations made by officers or employees in the performance of their assigned duties, (5) internal memorandums of members, officers, and employees of an agency relating to the consideration and disposition of adjudicatory or rulemaking matters or other agency business, or (6) of types specifically described in published regulations of the agency and by such regulations made exempt from disclosure for such period as may be necessary to protect the interests of the Government in pending matters."

We believe that the additional exceptions provided by the suggested language are for the most part self-explanatory. Examples of what we contemplate would be covered by clause (6) are appraisals of property made by or for the Government prior to acquisition or disposal and similar records or information acquired from sources in or outside the Government disclosure of which might tend to weaken the Government's legitimate bargaining position or subject contracts to unwarranted controversy and attacks on extraneous grounds. We believe that in such matters as the negotiation of contracts the Government should be on the same footing as a private party so far as disclosure of its position is concerned in order that it may be assured of the benefits arising from competition.

There may well be other exceptions that would be justified as proper protection of the programs and functions of other agencies. For example, it might be desirable to include under the exception provided in clause (2) of both subsections (b) and (c) matters affecting the maintenance of good relations with foreign governments and preservation of domestic order.

The proposed section 3(d) would provide that "every agency having more than one member" shall record the votes of each member in every agency proceeding and make such record available to public inspection except to the extent required to protect the national defense. Although a requirement of this nature is appropriate in connection with judicial procedures and could reasonably be imposed upon proceedings before a commission, board, or panel performing quasi-judicial or regulatory functions, a broad interpretation of the phrase "having more than one member" could make the proposed subsection applicable to staff activities of an advisory nature in every authority of Government other than Congress. If it were so applicable the result could be a deterrent to free, frank exchanges of opinion between agency officials charged with making administrative determinations and their staffs on complex or controversial matters. We assume that such a broad construction of the language is not intended.

For the foregoing reasons GSA is opposed to the enactment of S. 1666 in its present form. As indicated above, however, we recognize that a case can be made for some clarification of section 3 of the Administrative Procedure Act and for some limitations on the present broad exemptions. If the bill is favorably considered by the Congress, it is recommended that amendments along the lines suggested herein be adopted.

The financial effect of the enactment of this measure cannot be estimated by GSA.

The Bureau of the Budget has advised that, from the standpoint of the administration's program, there is no objection to the submission of this report to your committee.

Sincerely yours,

BERNARD L. BOUTIN, *Administrator.*

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., October 3, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN EASTLAND: This is in response to your letter of June 14, 1963, requesting a report on a bill, S. 1666, introduced by Senator Long of Missouri (for himself and 17 other Senators), to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes. This matter has been considered by the Commission and I am authorized to submit the following comments in its behalf:

Before commenting on the specific provisions of S. 1666, we believe it appropriate to observe that the Commission traditionally has favored disclosure of information to the public in the absence of specific and compelling reasons to the contrary. In fact, the Commission's quasi-legislative and quasi-judicial functions are conducted almost entirely through public hearings and proceedings subject to judicial review, and hence, to constant public scrutiny.

In this context, we note that although much of what is proposed in S. 1666 is now required by section 3 of the indicated act, the bill would make a number of important changes. Most of these changes would not, in our opinion, be in the public interest. Our comments will be grouped under topical headings as they appear in the bill. The term, "Legislative History," will refer to Administrative Procedure Act, Legislative History, Senate Document 248, 79th Congress, 2d session.

(a) PUBLICATION IN THE FEDERAL REGISTER

On page 2, line 5, "authority" appears in the bill minus the modifying "final" which is in the present statute. The concept "final authority" is explained in the Legislative History, page 256, as meaning: "To dispose of cases or matters." Hence repeal of "final" would raise critical questions of interpretation. Obviously some meaningful guidelines would have to be provided. Every civil servant, down to the lowest grade, has a job sheet in which his duties are defined and his "authority" set out at length. Bearing in mind the thousands upon thousands of civil servants, a printing of their aggregate "authorities" could run into a huge, unmanageable mass the cost of which could assume formidable proportions. We are unaware of any widespread public demand for

the publication of such "authorities" and are of the view that the value and utility of the Federal Register could be seriously impaired if it is permitted to become excessively voluminous. "Final" furnishes an effective guideline, and we believe it should be retained.

On page 2, beginning line 13, in retaining the present requirement for publication in the Federal Register of "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public," there would be stricken a very important exception, to wit: "but not rules addressed to and served upon named persons in accordance with law." On page 2, beginning line 16, the present law further would be amended to require publication of "every amendment, revision, or repeal" of substantive rules, and would add new matter to read as follows, new text shown by italic and deleted text by black brackets:

"No person shall in any manner be required to resort [to organization or procedure] *to, or be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation thereof required to be published in the Federal Register and* not so published."

Repeal of the clause, "but not rules addressed to and served upon named persons in accordance with law," and enactment of the revisory text above, would have a harmful effect, particularly in rate cases and would accomplish the same result as a proposal considered prior to enactment of the Administrative Procedure Act. The Commission opposed the earlier proposal as shown in the following testimony of former Commissioner Aitchison:[1]

"There is one provision of S. 674 which is regarded as completely out of harmony with sound policy. It will be recalled that by section 102(c) of that bill, 'rules' include ratemaking. Section 212 provides in part:

" 'Rulings in specific cases shall not, as a method or matter of general practice, be utilized to serve the functions of rules. Where rulings enunciate general rules or principles not otherwise published as rules or statutes, they shall be followed by the prompt formulation and promulgation of rules and statements of policy.'

" 'Rules' in the provision quoted includes ratemaking. There are not provisions in the Interstate Commerce Act for the formulation of a rule as to rates, except as to named defendants or named respondents, who have been notified and heard individually. In the light of *A. J. Phillips Co.* v. *Grand Trunk W. Ry. Co.*, (236 U.S. 662), a determination in a complaint proceeding as to the reasonableness of a given rate or body of rates inures to the benefit of all others similarly circumstanced. This construction is the only one which is consistent with the theory of the Interstate Commerce Act as a whole, and has been followed for about 27 years. In effect, the case-by-case method of rate determination is the equivalent of the establishment of a legislative rule of general application. That is pointed out in a very scholarly discussion in the *Arizona Grocery* case, by Justice Roberts (284 U.S. 370).

"To formulate a rule upon a rule as required by S. 674 in a rate case; that is, after a decision has been made against the given defendant railroad prescribing a set of rates, to require the subsequent formulation of a rule which will establish the same rates is neither necessary nor sound but would amount to an automatic rehearing as to the same carriers upon the same rates, and confusion would be the least harmful of its results."

An additional objection to the proposal in question is that stated in the Legislative History, page 284, footnote 6:

"The added language [but not rules addressed to and served upon named persons in accordance with law] is necessary in order not to fill the Federal Register with a great mass of particularized rulemaking which has always been satisfactorily handled without general publication."

Repeal of the quoted limitations ("but not rules addressed to," etc.) now appearing in section 3(a)(3) would result in this Commission being required to have published numerous orders and reports, or "rules" based thereon, which are now satisfactorily being made available to the public and served upon the parties to proceedings in mimeographed or printed form. Since more than 400 volumes of decisions of this Commission have already been printed, and since "The volume of work of the Interstate Commerce Commission considerably exceeds that of any other agency" (see final report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st sess., p. 314, hereinafter

[1] Administrative Procedure, hearings before a subcommittee of the Committee on the Judiciary, U.S. Senate, 77th Cong., 1st sess., on S. 674, S. 675, and S. 918, beginning p. 444.

referred to as the final report of the Attorney General's Committee), it may readily be seen that the proposed change would have a critical impact. Indeed, to print the indicated decisional output—"great mass of particularized rule-making"—in the Federal Register frequently would require more space for the ICC alone than now needed for the entire U.S. Government. Substantial increased costs would be incurred by the Commission for additional codification personnel and by the Federal Register Division of the National Archives and Records Service for additional printing in the Federal Register. This would be in addition to the massive prospective additional volume pertaining to "authorities," and our previous comments in that connection, and the necessity to retain the value and utility of the Federal Register, equally apply to the instant provision.

But more important is the fact that the proposed publication requirements would inject into the act an unnecessary and undesirable element of rigidity. Thus, while the facts may show that every party to a proceeding was duly served, the mere failure, through clerical inadvertence, to publish the report and order or some "rule" pertaining thereto, in the Federal Register would result in their being rendered invalid. We do not believe that the validity of a report and order, when duly served upon the parties, should depend upon a subsequent publication in the Federal Register.

(B) AGENCY OPINIONS, ORDERS, AND RULES

On page 2, beginning line 22, is new text which would require an agency "to make available for public inspection and copy" certain matters, unless they are "promptly published and copies offered for sale." The certain matters are: "all final opinions (including concurring and dissenting opinions) and orders made in the adjudication of cases and all rules, statements of policy, and interpretations adopted by the agency and affecting the public."

The new text further provides:

"Every agency also shall maintain and make available for public inspection and copying a *current index providing adequate information* for the public as to each final order, opinion, rule, statement of policy, and interpretation. No final order, opinion, rule, statement of policy, or interpretation *may be relied upon, used, or cited as precedent* by an agency against any private party *unless it has been indexed* and either made available or published as provided in this subsection." [Emphasis supplied.]

As either the indicated noncurrency or nonadequacy of the "index" could become a basis for a court challenge or defense, it is imperative that some guidelines be available respecting "current" and "adequate." Some questions requiring careful consideration are: (1) As rules of general applicability already are indicated and indexed in the Code of Federal Regulations, is some other or duplicate index contemplated by the amendment in question? (2) What is the maximum period after decision which would be permitted an agency for indexing for the index to be considered current? (3) Would the index contained at the end of each printed volume of ICC decisions be considered a "current" index? (4) Is the new text intended to have retroactive effect; that is, to require preparation of indexes covering matters decided throughout the life of the agency and not previously indexed? This question is pertinent in view of the following from House Report 1971, 81st Congress, 2d session, Committee on Expenditures in the Executive Departments:

"Since its inception the Commission has enjoyed the highest standing; its independence, reputation for impartiality and integrity, coupled with its *skill and documentation of decisions has recommended it to the public and the legal profession.*" [Emphasis supplied.]

Since its creation in 1887, the Commission's documentation of decisions (both annotating and indexing) has been accomplished on a selected basis because of the enormous volume of decisional matter and the necessity of keeping the indexes and annotations within manageable and useful limits. If the text in question were to be enacted question would arise whether past decisions, the indexing of which had been omitted because of the selective basis indicated above, would now have to be indexed. If so, it not only would be a very time consuming and costly task, but also one of dubious value when completed.

Other questions for consideration concern the construction to be placed on the expression "adequate information." The Commission has a great variety of matters on which it takes actions and the indexes in connection therewith vary considerably in the amount of separate record information which is maintained.

Some indication of the need for variation is the following excerpt from the final report of the Attorney General's Committee, page 20:

"For variety in functions means variety in the circumstances and conditions under which the activities of the various agencies impinge upon private individuals. A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another. A set of standards evoked to meet one problem may fail wholly to meet another. One need look no further than a single agency—the Interstate Commerce Commission—to be impressed by *the basic necessity of differing procedures for different types of activities, and by the varying procedural patterns which the Commission has evolved to meet this necessity.*" [Emphasis supplied.]

What is completely adequate indexing for one type of matter is unnecessary or not sufficient in another, and adjustments are made accordingly. The Commission does not, as a rule, subject index any decision or order which is not published in bound volumes. Although all decisions and orders are published and offered for sale, or distributed without charge, a large number of items, which are generally without precedential value, are not issued in bound volumes, are not indexed by subject, and should not be indexed. These are practical matters which have been worked out by trial and error through long years of experience. We submit that such practical experience should not now be thrust aside in favor of a single and inflexible statutory standard for indexing. Such a standard is particularly objectionable where, as here, it is coupled with a proposal whereby nonconformance with a wholly collateral vague and obscure "current" and "adequate" indexing standard could operate to relieve an otherwise guilty person from the consequences of his law violation.

(C) AGENCY RECORDS

Beginning on page 3, line 24, the following is completely new:

"Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make its records promptly available except those particular records or parts thereof which are (1) specifically exempt from disclosure by statute; (2) specifically required by Executive Order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the *consideration and disposition of adjudicatory and rulemaking matters.* 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 is situated shall have jurisdiction upon complaint to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of 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 by a preponderance of the evidence." [Emphasis supplied.]

This section nowhere defines "records" or "agency records," although by implication they seem to include all papers of whatever description belonging to an agency. With such a wide definition of records, the bill should include correspondingly broad exemptions. The third exemption, relating to internal memorandums on adjudicatory and rulemaking matters, should be broadened to exempt all internal memorandums and other papers, correspondence (unrelated to formal cases), and investigatory files.

Every agency with investigative functions such as those which Congress has vested in this Commission is faced, sooner or later, with the problem of how far it should go in disclosing to anyone various materials in its investigative files. Such files include statements of unsubstantiated charges of wrongdoing against private persons. Simple justice to the persons so named requires that statements from such investigative files should not be made public. Nor should there be disclosure of confidential sources of information for they are a critical factor in effective law enforcement. If tips on law violations are required to be made public, such sources of information would soon dry up, and countless law violations would go unpunished. The internal memorandums and papers relating to proposed or actual enforcement proceedings of all types are and should be maintained as confidential papers.

Under the circumstances, additional exemption text should be added to include and insure (*a*) prevention of unfairness to any person and (*b*) the preservation of confidential sources of information.

In addition, it is noted that the last two sentences of the proposed section are substantially and, in our opinion, unnecessarily broader than the present discovery rules in the Federal district courts. In effect, they would permit a litigant to disrupt and unnecessarily delay proceedings before the Commission with demands for Commission materials; and, without any showing of need or general relevance to any court or administrative proceeding, would permit a party to enforce such demands by court order.

The Federal Rules of Civil Procedure and other normal judicial processes provide litigants before the courts and the Commission sufficient protection against arbitrary refusals to produce relevant records and information. The bill would not add any further protection that is needed in the public interest.

(D) AGENCY PROCEEDINGS

On page 4, beginning at line 19, there is new text as follows:

"Every agency having more than one member shall keep a record of the individual votes of each member in every agency proceeding and except to the extent required to protect the national defense such record shall be available for public inspection."

A pertinent existing statutory provision directly related to this Commission is the following from the Interstate Commerce Act:

"SEC. 17(3). * * * Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. * * *"

In view of the provision last quoted it would not appear that further legislation on that point, so far as this Commission is concerned, is necessary. Moreover, as of July 1, 1963, the Commission makes available to the parties, the press, and the public, upon request, a tabulation of individual votes in current official Commission actions, including those of divisions and employee boards. This action broadened the availability of such information which had heretofore been limited to the parties to a particular proceeding.

Insofar as the work of this Commission is concerned, we do not believe that enactment of the bill would clarify and protect the right of the public to information since the bill would require inclusion in the Federal Register of an enormous mass of additional information of little or no true importance and thereby make it considerably more difficult for the public to find information of real significance.

Because of the several objections already stated, we do not favor enactment of S. 1666.

Sincerely yours,

LAURENCE K. WALRATH, *Chairman.*

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., January 2, 1964.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This further replies to your request for a study and report by the National Aeronautics and Space Administration on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

With stated exceptions, section 3 of the Administrative Procedure Act requires the publication of information, rules, opinions, orders, and public records of Government agencies.

The provisions of S. 1666, if enacted, would enlarge the scope of subsection 3(a) of the Administrative Procedure Act (hereinafter abbreviated APA) by adding to the class of subjects required to be published in the Federal Register agency "rules of procedure" and "descriptions of forms available," as well as any "amendment, revision, or repeal" of these or other items now identified in subsection 3(a).

The provision in subsection 3(a), which exempts from inclusion in the Federal Register rules addressed to and served upon named persons in accordance with law, would be eliminated by the legislation.

The legislation would eliminate the authority now provided by subsection 3(b) of the APA to withhold from public inspection final opinions or orders in situations where these are required "for good cause to be held confidential." In place of this exemption the provisions of S. 1666 would require instead that opinions, orders, rules, and other matter be made available for public inspection and reproduction unless specifically exempted from disclosure by statute or executive order or in situations where these relate "solely to the internal employment rules and practices of any agency." Moreover, the legislation would provide for public inspection and reproduction of "all final opinions (including concurring and dissenting opinions) and orders made in the adjudication of cases and all rules, statements of policy, and interpretations adopted by the agency affecting the public." Relief from making available for public inspection and reproduction any, or all, of the matter enumerated in the S. 1666 amendments to subsection 3(b) of the APA is afforded in those situations where "such opinions, orders, rules, statements (of policy), and interpretations are promptly published and copies offered for sale." Identifying details of opinions, orders, rules, statements, or interpretations may be deleted in the public interest; however, "in such cases justification for the deletion must be fully explained in writing."

The proposed amendment to subsection 3(b) would also require every agency to "maintain and make available for public inspection and copying a current index providing adequate information to the public as to each final order, opinion, rule, statement of policy and interpretation" and none of these "may be relied upon, used, or cited as precedent by an agency against any private party unless it has been indexed and either made available or published."

With respect to subsection 3(c) of the APA the companion amendment contained in S. 1666 would eliminate the existing authority of an agency to withhold from public inspection matters of official record required to be "held confidential for good cause found." Instead, the legislation proposed would except from disclosure only those "particular records or parts thereof which are (1) specifically exempt from disclosure by statute, (2) specifically required by Executive order to be kept secret for the protection of the national defense, and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters."

In addition to the substantive amendments to subsections 3 (a), (b), and (c) of the Administrative Procedure Act set forth above, the legislation would add two new subsections to section 3: subsection (d), which pertains to agency proceedings, and subsection (e), which involves limitation of exemption.

The inclusion of policy statements and agency interpretations "affecting the public" in the S. 1666 amendment to subsection 3(b) of the APA presents certain problems. From a plain reading of the proposed amendment it would appear that all statements of policy must be made available for public inspection and copying but that agency interpretations must be made available only to the extent that they affect the public. The term "statement of policy" is itself elusive, and it would be rather difficult to determine in categorical instances whether a given agency interpretation affects the public. The S. 1666 amendment to subsection 3(b) of the APA does not establish any clear standard whereby the requirements for disclosure could be met, and effectively administered, by the agency involved. Moreover, other provisions in the proposed amendment which require the prompt publication of agency opinions, orders, rules, statements, and interpretations establish no clear standards for meeting the test of promptness. Furthermore, it shall be noted that to the extent that the sale of public documents requires ordinarily that they be published by the Government Printing Office, the burden of promptness in publication would, of necessity, have to be shared by the Government Printing Office, as well as the agency requesting publication. It is noted also that the S. 1666 amendment to subsection 3(b), requiring written justification for the deletion of identifying details or opinions, orders, rules, statements, or interpretations, fails to specify the persons to whom such justification must be made.

The effect of the S. 1666 amendment to subsection 3(c) of the APA in eliminating the right of an agency to withhold confidential records on the basis of "good cause found" raises serious questions.

The following types of records are of particular concern:

I. Personnel records, medical reports, and raw material for investigative and security reports.

II. Advance information on proposed plans to procure, lease, or dispose of materials, real estate, and the like.

III. Confidential information received from private individuals, firms or organizations, e.g., proposals, trade secrets, and financial, technical, or scientific reports. This would include financial management price listings and reports which include such confidential information.

IV. Advance and review copies of scientific reports; tests made for private companies at their expense, such as wind tunnel engine tests.

As a minimum, it would appear that the legislation should authorize withholding for the types of records identified above in order to prevent needless personal embarrassment, sharp business practices, and other unsound results which would be facilitated by public disclosure.

Subject to the foregoing discussion, the National Aeronautics and Space Administration would not object to the enactment of the legislation. It is noted, however, that other agencies, particularly regulatory agencies, would have significant concern as to the effect of the legislation, if enacted. The National Aeronautics and Space Administration would defer to the recommendations of such agencies.

The Bureau of the Budget has advised that there is no objection, from the standpoint of the administration's program, to the submission of this report to the Congress.

Sincerely yours,

(Signed) RICHARD L. CALLAGHAN,
Assistant Administrator for Legislative Affairs.

NATIONAL MEDIATION BOARD,
Washington, November 4, 1963.

Hon. JAMES O. EASTLAND,
U.S. Senate,
Washington, D.C.

DEAR SENATOR EASTLAND: This has reference to your letter of June 14, 1963, addressed to the Chairman of the National Mediation Board, requesting comments on S. 1666, a bill to amend section 3 of the Administrative Procedure Act.

Paragraph (b), page 2, beginning on line 22, entitled "Agency Opinions, Orders, and Rules," requires that a current index providing adequate information be made available to the public as to each final order, opinion, rule, statement of policy, and interpretation. Further, such policy, etc., may not be relied upon by an agency unless it has been indexed and either made available or published.

This Board currently has indexes of such matter which is quite adequate for the Board's purposes; however, they are not in suitable form for public use or publication. The National Mediation Board, being a small agency, administers its affairs with an office staff of 13 employees. To prepare indexes of the nature contemplated by the proposed legislation would require a monumental task covering the 30 years of this Board's existence. In addition, we sometimes rely on precedents or policies of our predecessor boards, such as the U.S. Board of Mediation which functioned from 1926 to 1934, the U.S. Railroad Labor Board which operated from 1920 to 1926, and the policies of the Director General of Railroads during the period of Government control, 1917–20. To our knowledge, complete indexes of these early orders, decisions, and policies do not exist. To comply with the directory of S. 1666 would require a large research and editing staff, possibly larger than the staff we currently use to administer all the affairs of this Board, and it will have as a consequence the expenditure of Government funds for a purpose which is not presently needed for the operation of this agency.

To deny the reliance of this Board on early decisions and policies because they are not indexed in a form suitable for use by the general public, would be to deny to both the Board and the parties requesting the Board's services the benefit of years of precedent which forms a basis of the construction of our enabling statute. For example, the Railway Labor Act, 45 U.S.C. 151, requires the Board to conduct collective bargaining elections on a craft or class basis. The phrase "craft or class" is not defined by the statute. Congress left to the Board the discretion to determine what constitutes a craft or class based upon precedent

which in the railroad industry was formed prior to the passage of the Railway Labor Act.

The next exception we take is to the paragraph entitled "(c) Agency Records" beginning at line 24 on page 3 and continuing to line 18 on page 4.

Section 2, ninth, of the Railway Labor Act, 45 U.S.C. 152 ninth, makes it the duty of the National Mediation Board to investigate and certify employee representatives. As evidence of a dispute to justify a union's claim to represent employees, and therefore entitled to set the Board's machinery in motion leading up to certifications, certificates of authorizations to represent employees involved are required to be filed with the Board. These authorizations become a vital part of the evidence, and of course, an integral portion of the file.

Employee authorizations are considered confidential solely for the protection of the employees. To open such a record to public inspection could subject the employees to reprisals from their employers or competing unions. Further, employees knowing their union authorizations would no longer be confidential may be afraid to exercise their right to organize and bargain collectively through the peaceful means provided by law, and look to other less tranquil ways of settling such affairs.

We are mindful of the exceptions contained in section 2 of S. 1666. However, those exceptions refer to "arbitration and mediation functions" which are completely different from representation functions which this Board is entrusted to perform; therefore, those exceptions do not afford relief to the problems raised above.

Very truly yours,

E. C. THOMPSON, *Executive Secretary.*

OFFICE OF THE POSTMASTER GENERAL,
Washington, D.C., October 15, 1963.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for a report on the bill S. 1666 which proposes to amend section 3 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002) so as to clarify and protect the right of the public to information.

The bill would amend section 3(a) of the act to require that each Federal agency publish in the Federal Register (unless the public interest requires secrecy or the matter relates solely to internal management): (1) descriptions of its organization; (2) methods by which its functions are channeled and formal or informal procedures; (3) substantive rules; and (4) amendments, revisions or repeal of its rules.

Also, the bill would amend section 3(b) of the act to require that (1) all agency opinions, orders and rules be made available for public inspection and copying; and (2) a current index be maintained to provide adequate information for the public of such orders and rules, statements of policy, and interpretations.

Further, the bill would amend sections 3(c) and 3(d) of the act to provide for the production of agency records and require that each agency having more than one member shall keep a record of the individual votes of each member in every agency proceeding.

This Department is opposed to enactment of the bill for reasons hereinafter set out.

The significant change in the proposed section 3(a) of the act is the repeal of the exemption relating to rules served on named persons. Since it may be debatable as to whether a particular proceeding is a rulemaking or an adjudicating proceeding the exemption is a desirable one. In our view, personal service is a more adequate method of giving notice than Federal Register publication.

The requirement in proposed section 3(b) of the act that a current index be maintained to provide "adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation" appears admirably suited as a basis for litigation concerning the details of indexing. It would appear that opinions, rules, etc., published in the Federal Register should be sufficient since they are indexed in that publication.

From the standpoint of the postal service the proposed section 3(c) of the act is totally objectionable. In our view, any proposal which would require a dis-

closure of the confidential and privileged records or reports of the criminal investigative branches of every Federal agency is not in the interest of the Government. If enacted, this provision would have a serious adverse effect on the work and responsibilities of the postal inspection service.

Records of the postal inspection service and reports of postal inspectors are regarded as privileged matter, and are so set forth in title 39, section 4.3, Code of Federal Regulations. To disclose the contents of such records and reports would seriously prejudice the work of the postal inspection service. Much of the information obtained in postal investigations is given in confidence, and can only be obtained upon a pledge not to disclose its source. To violate such a pledge would embarrass informants, sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of continued future efficiency.

The methods of operation of the postal inspection service are rarely publicized. To a very large degree the efficiency of the postal inspection service depends on continued secrecy regarding its method of operation. Disclosure of inspectors' reports would necessarily impair the effectiveness with which inspectors carry out their duties.

The information obtained by postal inspectors and the material contained in records of the postal inspection service are for the use of the Department officials in the performance of their duties, and normally are of no value to the public. Postal inspectors' reports are concerned with possible and actual violations of law, and the specific problems arising in the daily performance of the business of the Post Office Department.

We have been advised by the Bureau of the Budget that from the standpoint of the administration's program, there is no objection to the submission of this report to the committee.

Sincerely yours,

SIDNEY W. BISHOP,
Acting Postmaster General.

U.S. RAILROAD RETIREMENT BOARD,
Chicago, Ill., July 3, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is a report that has been requested on S. 1666, which was introduced on June 4, 1963, by Senator Long of Missouri for himself and others and referred to your committee for consideration.

The bill would amend section 3 of the Administrative Procedure Act to which the Railroad Retirement Board is subject although it is excluded by provisions of section 2 from the operation of other sections of the act. Section 3 relates to the publication and availability for public inspection of matters respecting agency functions. Subsection (b) would be expanded to require among other things that every agency maintain and make available for public inspection and copying a current index providing adequate information for the public as to each final order, opinion, rule, statement of policy, and interpretation. No final order, opinion, rule, statement of policy, or interpretation could be relied upon, used or cited as precedent unless it has been indexed and either made available or published as provided.

Subsection (c) would be revised to require each agency, in accordance with published rules stating the time, place, and procedure to follow, to make its records promptly available except those records or parts thereof, which are specifically exempt from disclosure by statute and those in certain other categories.

The Board is charged by law with the administration of both the Railroad Retirement and Railroad Unemployment Insurance Acts. Sections 12 (d) and (n) of the Railroad Unemployment Insurance Act specifically preclude, with certain exceptions, the disclosure of information obtained in the administration of that act. Section 12(n) provides an absolute mandate against the disclosure of medical records except in court proceedings relative to a claim for benefits under the act. The Railroad Retirement Act contains no comparable provision. The Board has, however, taken the view that these provisions apply as well to records obtained in the administration of the Railroad Retirement Act since

information, particularly that of a medical nature secured primarily for purposes of the Railroad Retirement Act, may be used, and is often used, for the purposes of the Railroad Unemployment Insurance Act. We assume that the bill is not intended to affect our position in this regard. To clarify this point we suggest that after the word "statute" in the proposed revision of subsection (c) (in line 3 on p. 4 of the bill) there be inserted the phrase ", whether such exemption is expressed in the statute under which the records are primarily secured or in a related statute, administered by the same agency."

The bill would add subsection (d) to require every agency having more than one member to keep a record of the individual votes of each member in every agency proceeding and except to the extent required to protect the national defense such record would be available for public inspection.

Subsection (e) provides that nothing in the section authorizes withholding of information or limiting the availability of records except as specifically stated and that the section shall not be authority to withhold information from Congress.

With the exception noted above the Board has no comments respecting the bill.

As you requested that the report be submitted within 20 days from June 14, 1963, we have not had time to obtain clearance from the Bureau of the Budget, and consequently no determination has been made as to the relationship of this report to the program of the President. The Bureau of the Budget is being furnished copies of the report and you will be informed of the views of that Bureau as soon as they are received.

Sincerely yours,

HOWARD W. HABERMEYER, *Chairman.*

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION TO THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, ON S. 1666, 88TH CONGRESS

S. 1666 is a bill intended to "clarify and protect the right of the public to information * * *" by amending section 3 of the Administrative Procedure Act. To accomplish its purposes, the bill would expand the categories of materials that must be published by agencies, add provisions relating to the effect of failure to publish, require agencies to maintain an index of agency orders, opinions, rules, interpretations, and statements of policy, and require, with certain very limited exceptions, that agency files be available for inspection by any person. While we understand from the staff of the committee that certain changes will be made in the bill that will obviate some of the problems discussed infra, the committee staff has suggested that we nevertheless provide our comments on the bill in its present form.

This Commission agrees that unnecessary secrecy in the operation of the Government should be eliminated and that Government agencies should attempt to facilitate the securing of information by members of the public having a legitimate interest therein. Indeed, the enactment of the statutes administered by this Commission was in large part motivated by the desirability of making information available to members of the public which might be pertinent to their investment decisions.

Accordingly, the vast bulk of material contained in this Commission's files is public, and the Commission makes every effort to have it readily available to the press and to individual members of the public.[1] With respect to section 3 of the Administrative Procedure Act, we attempt to comply, and have, in the past attempted to comply, with the spirit as well as the letter of its provisions. Pursuant to the provisions of that section the Commission publishes in the Federal Register all the information enumerated therein. In addition, the Commission's Rules of Practice, informal and other procedures, required forms, interpretative releases,[2] and the substantive rules and regulations which implement the statutes which we administer are codified in the Code of Federal Regulations. Except where confidential treatment is directed for good cause, final opinions and orders entered by the Commission and all its rules are released for general publication in accordance with rule 25(c) of our Rules of Practice. To assure wide dissemination of its rules and opinions, the Commission furnishes copies of this

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[1] The breadth of the material available to the public is demonstrated by the list which the Commission has prepared and issued to the public entitled "Compilation of Documentary Materials Available in the SEC," a copy of which is attached.

[2] See e.g., 11 Federal Register, p. 10912, fn. 1 (1946).

material to the press, make it available for public inspection at the Commission's offices, and sends copies to various persons on mailing lists which the Commission maintains. These mailing lists are composed of persons who have requested such material from the Commission, and those who directly are subject to regulation by the statutes we administer. The opinions of the Commission are also printed and published by the Government Printing Office in bound volumes entitled "Securities and Exchange Commission's Decisions and Reports."

In compliance with the broad outline in section 3(c) of the Administrative Procedure Act for categorizing agencies' official records as public or nonpublic, rule 25(a) of the Commission's Rules of Practice provides that all information contained in documents filed with the Commission is public unless otherwise provided by statute or rule or directed by the Commission. On the other hand, information or documents obtained by the Commission in any examination or investigation conducted in accord with statutory provisions is deemed confidential by rule 26(c) unless made a matter of public record.

The major difficulties that would be created for this Commission by enactment of the bill would flow from the proposed amendments to section 3(c). These would require all agency records to be available for public inspection unless specifically exempted by statute or executive order. Only internal memorandums relating to adjudicatory and rulemaking matters are exempted by this proposed statute.

We are of the view that there are important considerations why certain material in the Commission's files should not be subject to general public scrutiny, as where the disclosure of the material would unfairly injure members of the public, where it would interfere with investigations into possible violations of the statutes we administer, where it would impair the advice and assistance we render to persons seeking to comply with those statutes, or where it would interfere with free communication between Government officials with respect to the most efficacious manner of administering the law. Certain of these considerations are recognized in the legislative history of the Administrative Procedure Act, which points to the problem of publicity which might "reflect adversely upon any person, organization, product or commodity" prior to "actual and final adjudication" by an agency. (H. Rept. No. 1980, 79th Cong., 2d sess. (1946) p. 40.) The importance of these considerations may vary in different situations. Thus, information sought in a congressional investigation or pertinent to the determination of a lawsuit might properly be made available despite countervailing considerations which would be sufficient to refuse to make the information available to casual inquirers.

We would emphasize that, as to a large part of the material in the Commission's files which is not made public, the primary reason for privacy is to protect the rights and interests of private persons having business before the Commission. The statutes administered by the Commission have an impact on a wide variety and great number of business transactions and arrangements; consequently, businessmen very often must determine the effect of these statutes upon proposed transactions and arrangements and the steps necessary to be taken in planning and executing them so that there will be no delays resulting from questions that might otherwise be raised as to full compliance with the securities laws. To enable these matters to be resolved properly, full details of proposed transactions such as mergers, acquisitions and financing plans are given to and discussed with the Commission's staff, often substantially in advance of the consumation of the transactions. Businessmen expect, and we believe have a right to expect, that their confidence in disclosing these matters will be respected; otherwise the administration of the Federal securities laws would be greatly complicated and the ability of American and international business organizations to plan and execute important transactions within time schedules by economic circumstances would be impaired. These transactions may be of international importance and sometimes directly involve foreign governments. Without these informal discussions by which business problems are resolved in a businesslike way, administration of the securities laws would be greatly impaired and, indeed, it is doubtful that these laws could be effectively administered. The Commission has repeatedly been commended for evolving such informal procedures for advising persons seeking to comply with the law. Professor Loss has stated:[3]

[3] 3 Loss, Securities Regulation (1961), p. 1895.

"This practice—which a task force of the second Hoover Commission reported as having been 'most effectively used' by the SEC [4]—is an essential and popular service with the bar and the securities industry. Thousands of such opinions are given each year."

Privacy is essential to this process. Businessmen should not be compelled to give premature publicity to proposed business transactions which they would otherwise keep strictly confidential for the protection of their business, simply because, as a practical matter, it is necessary that they consult the Commission in advance. Moreover, premature and unplanned disclosure of contemplated business transactions which are discussed with the Commission could affect the markets for the securities of the companies involved [5] and afford an opportunity to overreach the investing public to those persons who first gained access to the information.

Similarly it would be impossible as a practical matter for the Commission to enforce its proxy rules if it were unable to keep preliminary proxy material nonpublic. The Commission's proxy rules, which relate to corporate elections and corporate actions requiring the vote of security holders of all corporations listed on national securities exchanges as well as certain other companies, provide that material to be sent to stockholders shall be filed first in preliminary form with this Commission. The examining staff make certain suggestions so that the material will not be in any way misleading and it is only after the participants have had an opportunity to make the changes suggested by the staff that the definitive material is sent out to shareholders. By reason of the nonpublic nature of the preliminary material we have been able with a minimum of litigation to see to it that American investors have had fairly presented to them the matters upon which they must vote. Were the preliminary material public and susceptible to being reprinted in the press, there would be no opportunity for staff processing of the material and the Commission's only remedy would be to seek injunctive relief in the courts. That alternative, besides being time consuming and expensive, can rarely provide full relief and may require postponement of corporate meetings and generally disrupt the affairs of the business community.

Other material in the Commission's files is nonpublic primarily to protect persons against the possibility of adverse publicity if it should ultimately be determined that charges against them have not been substantiated. With respect to proceedings for the revocation or denial of registration of brokers and dealers in securities, section 22 of the Securities Exchange Act of 1934 has been interpreted to permit private proceedings for it says that hearings ordered by the Commission therein "may be public." Whether the Commission makes these revocation or denial proceedings public depends upon considerations present in the particular situations. Thus, such proceedings may be made public where they are based upon facts established in public records, as for example, where proceedings are based upon an injunction, a criminal conviction, or a prior determination by the Commission in an order or decision which has become public that violations were committed by a particular person. If the Commission has previously determined in a revocation or denial proceeding that a particular individual wilfully violated the Securities Act or the Securities Exchange Act, a subsequent proceeding arising out of an application for registration by that person or a proceeding involving a registrant controlled by or controlling such person and based upon the prior finding as to that person would normally be public. The proceedings may be made public because substantial charges of fraud are involved or it otherwise appears that the investing public should be alerted to the situation prior to the completion of the proceedings. Another reason for ordering public proceedings may be to alert injured investors to the possibility of a civil remedy prior to the running of the statute of limitations. Likewise, proceedings may be made public to alert the securities industry to the fact that the Commission has taken action with respect to the particular practices to be involved in the proceedings.

Where the Commission institutes proceedings pursuant to rule 2(e) of its rules of practice to disqualify a practitioner before it, the proceedings are nonpublic.

If, in a private proceeding involving brokers and dealers or practitioners before the Commission, the charges should not be proved, the Commission would not

[4] Commission on Organization of the Executive Branch of the Government, Task Force Report on Local Services and Procedure (1955), 189.

[5] See "Report of Special Study of the Securities Markets of the Securities and Exchange Commission," H. Doc. No. 95, pt. 3, 88th Cong., 1st sess. (1963), pp. 70–93.

make its opinion public. It should be noted that in these types of cases the privacy can of course be waived by the subject of the proceeding.

The amendments to section 3(c) necessarily encompass also the investigatory functions of the Commission. These investigations are conducted to determine whether persons have or are about to violate the acts we administer or the rules thereunder and to determine whether the Commission should initiate enforcement activities, i.e., administrative proceedings, injunctive actions in the courts, or referral of evidence to the Attorney General for the institution of criminal prosecution. Clearly, law enforcement cannot be effective if the investigation files of the agency are open to all members of the public, including the suspected violators. The same reasoning which demands that grand jury activities be conducted in secrecy is applicable to the Commission's investigatory duties. Indeed, our investigations have been referred to by the courts as similar in nature to the activities of a grand jury.[6] In addition, communications between the Commission and the Department of Justice with respect to the problems in a criminal case would be available to the defendant who would thus be an auditor of the discussions of the prosecution, and tampering with prospective witnesses would be greatly facilitated.

Adequate law enforcement precludes browsing through an agency's files by violators or potential extortionists. Where parties to litigation have a bona fide reason for access to the material, the courts and Congress have afforded them adequate opportunity to have available pertinent data. See "The Jencks Statute," 18 U.S.C. 3500; *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314, 327-328 (C.A.D.C. 1958); *N.L.R.B.* v. *Adhesive Products Corp.*, 258 F. 2d 403, 408 (C.A. 2, 1958)

Moreover, the proposed amendment might result in making available to the public unsubstantiated and uncorroborated charges in the Commission files and testimony which might be harmful to innocent persons and would also dry up sources of information. The Commission files also contain, among other things, inquiries and complaints from investors and others who might be reluctant to write to the Commission if they felt that their correspondence might be available for public inspection.

We are especially disturbed by the prospect that these amendments would convert the work product of the professional staff of the Commission, and of the Commissioners themselves, into pubilic documents. We do not see the purpose to be served by giving the general public access to such material or to such other memorandums as those recording conferences among the Commissioners, between the Commission and the staff, or between representatives of this and those of other agencies, such as the Department of Justice. And we see no reason why memorandums exchanged between Commissioners and the staff should be treated differently from those between Federal judges and their assistants. We do not appreciate the justification for treating as public documents material that at present probably could not even be obtained by discovery by litigants in the Federal courts. Such disclosure would act as a serious deterrent to the full and free presentation of views and exploration of ideas by personnel of the Commission. If the proposals, memorandums, and other writings of individual Commissioners which precede agency determinations were made available to the public, for example, this could interfere significantly with the formation of collective judgments that was presumably the very reason for establishment of this Commission as a five-member agency.

The amendments to section 3(c) also would authorize district courts to order the production of information improperly withheld from any person. We assume no change is intended in the normal requirement of exhaustion of administrative remedies, for surely a refusal by the staff where Commission review is available but not invoked should not support interference by a district court.

The bill would authorize the district courts to assess costs and attorneys' fees against an agency which "improperly" withholds information. If, as is suggested by the term "improperly," an agency could under the provisions of the bill refuse access to its records to those who fail to show some legitimate interest in them, we suggest the bill be amended to make this clear. If such is not intended we nevertheless would assume that an agency would not have acted "improperly" where a court subsequently disagreed with an agency's

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[6] See *Wooley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9, 1938); *In re S.E.C.*, 84 F. 2d 316, 318 (C.A. 2, 1936).

reasonable determination that requested information was required by Executive order to be kept secret or was otherwise specifically exempted from disclosure. In any event, we do not feel that this is an area where imposition of costs and fees is appropriate. Payment by the Commission of costs and fees would reduce its operating funds and consequently would restrict the Commission's enforcement activities for the protection of public investors. The Commission should not be inhibited, out of concern that a court might disagree with it, from keeping confidential material that Congress may have intended should not be disclosed. In this connection, each of the Federal securities laws provides that in any action brought by or against this Commission no costs shall be assessed either for or against this Commission.[7] See also *United States* v. *Barker*, 15 U.S. 394 (1817), wherein the entire opinion consisted of Chief Justice Marshall's statement "The United States never pay costs."

We assume that the provision entitling a person to a district court trial de novo of the propriety of an agency's withholding of requested material is not to be construed to defeat confidential treatment where properly given. Thus, we would suppose that any review of the information sought would consist of an in camera inspection by the judge.

Section 3(b) of the Administrative Procedure Act now requires publication of all rules and all final opinions and orders in the adjudication of cases, except those required for good cause to be held confidential and not cited as precedent. As proposed to be amended section 3(b) would delete the present exception from the publication requirement and such material would be required to be published or made available for public inspection and copying unless it were specifically exempted by statute or Executive order or related to internal employment practices.

The Commission is authorized by statute to grant confidential treatment to certain types of material filed with it. Under schedule A, paragraph 30, of the Securities Act of 1933, section 24(b) of the Securities Exchange Act of 1934, section 22(b) of the Holding Company Act of 1935, section 45(a) of the Investment Company Act of 1940, and section 210 of the Investment Advisers Act of 1940, persons filing certain material with the Commission such as "trade secrets," or contracts where disclosure would impair their value, may object to public disclosure thereof and the Commission is specifically authorized to direct that such material not be revealed. Hearings that the Commission conducts pursuant to these provisions are of course nonpublic as is any opinion and order therein determining that the material should not be disclosed. (See rule 26(b) of the Commission's rules of practice.) Persons seeking to obtain information to which these statutory provisions relate might argue that they are not sufficiently specific to exempt such information from the public disclosure provisions of section 3(b) and section 3(c). We assume that if a general provision in a general bill such as this were adopted, it would not be construed to require public disclosure in areas where Congress has clearly determined confidential treatment to be appropriate. We suggest, however, that this be made clear.

Section 3(b) as proposed to be amended would permit deletion of identifying details in opinions, orders, and rules, and in all statements and interpretations made public but only to the extent required to protect the *public interest*. But the very reason for the private proceedings sometimes conducted by this Commission is that *private* interests might unjustifiably be injured by public knowledge of their nature. If it were made clear that it is in the overall public interest to protect private persons against such an unjustifiable injury, we would have no objection to this restriction. We assume, moreover, that the inconsistencies between the proposed amendments to sections 3(b) and 3(c) will be cured so that agency records containing the deleted information would not be open to public inspection.

The bill would amend section 3(a) of the Administrative Procedure Act to provide that no person would be bound or adversely affected by any organization, procedure, or other rule, statement, or interpretation thereof required to be published in the Federal Register and not so published, and would amend section 3(b) of the Administrative Procedure Act to provide that no final order, opinion, rule, statement of policy, or interpretation may be relied on, used, or cited against any private party unless it has been indexed and either made available

[7] Sec. 22(a), Securities Act of 1933; sec. 27, Securities Exchange Act of 1934; sec. 25, Holding Company Act of 1935; sec. 322(b), Trust Indenture Act of 1939; sec. 44, Investment Company Act of 1940; sec. 214, Investment Advisers Act of 1940.

or published. We assume, and understand from discussions with the committee's staff, that these provisions are not intended to apply as to persons having actual notice of a determination. We suggest that intention be explicitly stated so that it will not be urged that a person who has actual knowledge of a rule, for example, can be excused from complying simply because of an oversight on the part of either the agency or the Federal Register.[8]

With respect to the indexing requirement, we understand from discussion with the committee's staff that an agency could use the index of the Federal Register and those of commercial publishers, such as Commerce Clearing House, in complying with the index requirement of this section. As this does not clearly appear from the language of the bill, we suggest that at least an appropriate explanation be made in the background reports. It also should be made clear that an agency would not be responsible for inadequacies in such indexes. To the extent that additional indexes would be necessary for compliance, we assume that Congress will authorize the additional funds needed.

With respect to the statements of policy or interpretations, we believe the bill is not intended to interfere with our present practice of permitting the staff to give advice, but we are concerned that certain changes in the present language would be the basis for an argument that expressions of the staff's views given to individuals should be made available to any member of the public. As mentioned above, it is often essential for businessmen to gain promptly and informally the views of the Commission or its staff and the Commission has gone to great lengths to provide advice and assistance to interested persons to aid them in complying with the statutes administered by the Commission and the rules and regulations thereunder. It has been our experience that where time is of the essence, as it generally is in the securities field, prompt advice respecting particular fact situations is normally desirable.

Accordingly, the Commission has authorized responsible officials to provide this service in individual situations on a liberal basis and within general guidelines as established by the Commission. The advice given frequently reflects policy determinations in factual situations which present close questions of law where no real public interest appears to the staff to be involved. Although under our present practice the advice provided by the staff normally meets with the Commission's approval should the problem be subsequently presented to it for official determination, it would be unfortunate if the staff advice could be construed generally as a precedent, since in that event it should be subjected to as great a degree of care and consideration by the Commission as is applied in the issuance of the Commission's formal opinions. Our concern here is with the proposed amendment to section 3(b) of the Administrative Procedure Act. The bill would retain the present provision of section 3(a)(3) of the act requiring publication in the Federal Register of "* * * statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public. * * *" But the bill would amend section 3(b) so as to provide that "* * * statements of policy, and interpretations adopted by the agency and affecting the public * * *" must either be made available for public inspection and copying or be published. We do not know what this intends to add beyond the present provision of section 3(a)(3) and we believe it should be made clear that omission of the word "general" before "policy" and of the word "formulated" before "by the agency" is not to be interpreted to change the present nonpublic nature of our informal advice.

In this connection, while we have no objection to clarifying amendments, we believe we should point out that amendments which seek only to clarify may often have an effect other than that intended since they necessarily unsettle previous judicial determinations. See, e.g., *Universial Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 487 (1951).

Finally, there are a number of other provisions of lesser significance which might give rise to arguments over interpretations and should be clarified. The bill would amend section 3(a) of the Administrative Procedure Act to require agencies to publish descriptions of all delegations of authority, final and other-

[8] We note that, with some exceptions, the courts have recognized that publication is not necessary as to persons having actual notice. See *United States* v. *Aarons*, 310 F. 2d 341 (C.A. 2, 1962); but see *Hotch* v. *United States*, 212 F. 2d 280 (C.A. 9, 1954). Under the proposed language in the bill, similar differences in judicial construction might result concerning whether persons having actual notice would be subject to the precedent of an opinion, order, or rule that had not been both indexed and published or made available to the general public. An attorney emphasizing form rather than substance might even urge that an order could not be relied upon or used in any manner against a party to the adjudication in which it was entered until it had been both indexed and made available.

wise. We assume that this would not require that every activity of every employee must be described by published statement in order to be valid. This Commission has published in the Federal Register descriptions of all major activities of its divisions and offices and major delegations of authority to its officials. We believe that at present private persons can readily determine which of the Commission's offices and divisions performs any particular function.

The requirement in the proposed section 3(d) of the Administrative Procedure Act that every agency make available to the public the voting record of each member "in every agency proceeding" is not clear. We assume it would not be intended that the public have access to records of votes in those private proceedings where the final decisions are nonpublic to protect the private parties from unfair publicity. We also assume that the definition of "proceeding" is not to be construed to include such agency determinations as a decision to commence an injunctive action in court. While Congress might properly be interested in whether any Commissioners dissented from the institution of a particular suit, it would not be appropriate for the defendant in such suits to be able to make use of such information.

For the reasons heretofore stated, the Commission opposes S. 1666 in its present form.

COMPILATION OF DOCUMENTARY MATERIALS AVAILABLE IN THE SEC

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., January 23, 1962.

The Securities and Exchange Commission, in its administration of several statutes in the general field of securities and finance, enacted by Congress for the protection of the interests of the public, receives for filing and issues in connection with such filings, a large amount of financial information which is of interest to the investing public and others, and which, under the statutes, is available to the public for its guidance and information.

The statutes administered are the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The Commission also serves as adviser to the Federal courts in corporate reorganization proceedings under chapter X of the National Bankruptcy Act. The materials available are listed below by the various acts and the sections of the acts under which they are required to be submitted.

Matters of public record may be inspected in the public reference room at the principal office of the Commission. Some matters of public record are also available at the regional offices of the Commission. These may be inspected during regular business hours.

Requests for information should be directed to the Securities and Exchange Commission, Washington, D.C. Reproductions of matters of public record may be purchased. The Commission has a yearly contract with a firm which reproduces copies of requested material at prices as provided in the current contract.

A list of releases for which mailing lists are maintained by the Commission and a list of selected Commission publications available for purchase from the Superintendent of Documents, Government Printing Office, Washington, D.C., may be obtained by writing to the Securities and Exchange Commission, Office of Records and Services, Washington, D.C.

SECURITIES ACT OF 1933—PUBLIC MATERIALS

Description	*Pursuant to section—*
Registration statement providing financial and other information concerning securities offered for public sale, filed under regulation C	6
Prospectuses (selling circulars) in connection with registration statement	10
Periodic reports (annual, semiannual, and current) to keep reasonably current the information in registration statement	(1)
Preliminary data (prospectus, circular letters, etc.) to oil offering (regulation B)	3(b)

Footnotes at end of table, p. 318.

Offering sheets for oil or gas rights and royalties under regulation B for exemption from registration provisions	3(b)
Notifications of exemption from registration filed under regulation A, E, and F	3(b)
Offering circulars and written advertisements or other communications under regulations A, E, and F	3(b)
Report of sales and use of proceeds (regulations A and E)	3(b)
Consent by nonresident to service of process (regulation A)	3(b)
Application for relief from disability under regulation F	3(b)

SECURITIES EXCHANGE ACT OF 1934—PUBLIC MATERIALS

Application for registration of securities on a national securities exchange	12(b)
Certification of exchange approving securities for listing and registration	12(d)
Periodic reports (annual, semiannual, and current) to keep current the information in above application for registration of securities	13(a)
Notices of suspension of trading	12(d)
Application to withdraw or strike a security from listing and registration on a national securities exchange	12(d)
Notification by an exchange of the admission to trading of a substituted or additional class of security	12(a)
Definitive proxy soliciting material filed under regulation 14	14(b)
Initial statement of beneficial ownership of equity securities by officers, directors, and principal stockholders of issuers having listed equity securities; and changes in such ownership	16(a)
Application for permission to extend unlisted trading privileges, notification of changes, and notification of termination or suspension	12(f)
Application for registration as a broker and dealer, and amendments or supplements to such application	15(b)
Reports of financial condition of registered and nonregistered brokers and dealers	17
Irrevocable appointment of agent for service of process, pleadings, and other papers	23(a)
Notice by nonresident broker or dealer specifying address of place in the United States where copies of books and records are located and undertaking to furnish to Commission, upon demand, copies of books and records he is required to maintain	17
Application by an exchange for registration or exemption from registration as a national securities exchange	6(a)
Annual amendments and supplemental material filed to keep reasonably current the information contained in applications for registration or exemption	6(e)
Record disposal plans of national securities exchange	17
Application for listing securities on an exempted exchange	12(b)
Periodic reports to keep reasonably current the information contained in application for listing securities on exempted exchange	13
Certification of exempted exchange approving securities for listing	12(d)
Application for registration as a national securities association or affiliated securities association	15A
Annual supplement consolidated to keep reasonably current the information in the above application	15A
Application by a national securities association or a broker or dealer for admission or continuance of broker or dealer as member of a national securities association, notwithstanding a disqualification under sec. 15A(b)(4)	15A(b)(4)
Application for review of disciplinary action or denial of membership by registered securities association	15A(g)

Reports on stabilizing activities pertaining to a fixed price offering of securities registered or to be registered under the Securities Act of 1933, or offered or to be offered pursuant to an exemption under regulation A, or being or to be otherwise offered if aggregate offering price exceeds $300,000	17
Plans by exchanges authorizing payment of special commission in connection with a distribution of securities on exchanges	10

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935—PUBLIC MATERIALS

Notification of registration and registration statement by public utility holding companies providing financial and other information concerning the issue and sale of securities	5(a), 5(b)
Annual reports by registered holding companies to keep reasonably current information in the registration statement	14
Application for an order of the Commission declaring registrant has ceased to be a holding company	5(d)
Statement by a person employed or retained by a registered holding company or subsidiary thereof, of subject matter in respect of which retained or employed; and annual statement thereafter	12(i)
Application for exemption from provisions of the act and applications for declaratory orders regarding status of company under act by holding companies, susidiaries, and other companies	2(a)(3), 2(a)(4), 2(a)(7)(B), 2(a)(8)(B), 3(a), (b)
12-month statement by bank claiming general exemption under the act	3(a), (d)
Application for approval of mutual service company or declaration with respect to organization and conduct of business of subsidiary service company	13(b)
Statement executed by financial institution authorizing representative to serve as officer or director of holding company or subsidiary, filed by representative	17(c)
Initial statement of beneficial ownership of securities filed by officers and directors of registered public utility holding companies, and changes in such ownership	17(a)
Annual reports by mutual and subsidiary service companies	13
Application by interested persons for approval of reorganization plans required in court proceedings for reorganization of registered holding companies and subsidiaries	11(f)
Application by or on behalf of persons requesting approval of payment of fees, expenses, or remuneration for services rendered in connection with a proceeding in reorganization in a U.S. court involving registered holding companies or subsidiaries	11(f)
Application by registered holding companies and subsidiaries for approval of voluntary plans of reorganization to enable companies to conform with provisions of sec. 11(b), and applications or affidavits in support of requests for fees and expenses by participants	11(e)
Report by an affiliate service company or by a person principally engaged in performance of services for public utilities proposing to take any step in performance of service, construction, or sale of goods	13(e), 13(f)
Application by registered holding company for approval of amount at which to enter investments pursuant to par. 8C of Uniform System of Accounts	15
Declaration with respect to solicitation of proxies or consents regarding reorganization and security transactions of registered holding company or subsidiary	11(g), 12(c)
Proxy soliciting material (except above)	[2] 12(e)
Annual statement claiming exemption for a holding company system which is intrastate or predominantly an operating company	3(a)(1), 3(a)(1), 3(a)(2)

Footnotes at end of table, p. 318.

Applications and declarations thereto regarding sale and acquisition of assets and securities by registered holding companies, subsidiaries, and certain persons---------- 6(b), 7, 9(a)(2), 9(c)(3), 10, 12(b), (c), (d), (f)
Certificate of notification for short-term borrowings not requiring Commission approval---------- 6(b), 7, 9(c)(3), 10, 11, 12(b), (c), (d), (f)
Notices of intention regarding proposed sales of securities and other assets not requiring filing of application or declaration- 11, 12(d), 12(f)
Statements in justification of fees and expenses proposed to be companies---------- 6(b), 7, 9, 10, 12(d)
Reports to stockholders by registered holding company or subsidiary thereof and annual reports submitted by registered holding company or subsidiary thereof to a State commission covering operations not reported to Federal Power Commission- 14, 15

TRUST INDENTURE ACT OF 1939—PUBLIC MATERIALS

Statement of eligibility and qualification of corporations or individuals as trustees under qualified indenture under which debt security has been or is to be issued---------- 305, 307
Application for qualification of indenture under which security (bonds, debentures, notes, and similar debt securities) has been or is to be issued---------- 307
Application for exemption from provisions of the act in certain statement---------- 304(c), (d)
Application re conflict of interest of trustees---------- 310(b)(1)
Reports by indenture trustee to indenture security holders with respect to eligibility and qualification under sec. 310---------- 313
Application relative to affiliations between trustees and underwriters---------- 310(b)(3), 310(b)(6)

INVESTMENT ADVISERS ACT OF 1940—PUBLIC MATERIALS

Application for registration as investment adviser or to amend or supplement such an application---------- 203(c) or 203(f), 204
Irrevocable appointment of agent for service of process, pleadings, and other papers---------- 211(a)
Application by person who does not deem himself to be an investment adviser---------- 202(a)(11)(F)

INVESTMENT COMPANY ACT OF 1940—PUBLIC MATERIALS

Notification of registration of investment company, and registration statement covering an offering of securities of investment company evidencing an interest in a portfolio of securities in which the investment company invests---------- 8(a), 8(b)
Periodic reports (annual, semiannual, and quarterly) to keep reasonably current the information in above registration cases---------- 30(a), 30(b)(1)
Annual, semiannual, and other periodic reports to security holders of registered investment companies---------- 30(b)(2)
Application for order of the Commission determining registrant has ceased to be an investment company---------- 8(f)
Fidelity bond, resolution of board of directors notice of cancellation, or termination of bond for officers and employees of investment companies who have access to its securities or funds---- 17(g)

Waiver of indemnification of officer and directors of investment paid	17(h), 17(i)
Report of independent auditors examining records of investment companies	17(f)
Application by other than registrant for order of Commission declaring corporate name of registrant is misleading or deceptive	35(d)
Request by company for certificate to be issued to Secretary of Treasury	([3])
Proxy soliciting material	[4] 20(a)
Initial statement of beneficial ownership of securites by officers, directors ,and other specified insiders of registered closed end investment companies, and changes in such ownership	
Application ofr exemption from provisions of the act and other relief	2(a)(9), 3(b)(2), 6(b), (c), (d), 7(d), 10(e), (f), 11(a), (c), 12(d)(1), (d)(2), 14(a), 15(a), 16(a), 17(a), (b), (d), (e), 18(i), 22(d), 23(b), (5), (c)(3), 24(d), 26(a)(2)(C), 28(c), 35(d), and others.
Statement of transaction—exemption from provisions of sec. 10(f)	10(f)
Application for an ineligible person to serve as officer, director, etc., of a registered investment company	9(b)
Request for advisory report of the Commission relating to the reorganization of registered investment company	25(b)
Report of repurchase of its own securities by a closed end company	23(c)
Sales literature regarding securites of certain investment companies	24(b)
Statement of the Federal Savings and Loan Corporation relating to the exemption of certain issuers	6(a)(4)
Reports submitted pursuant to an order of the Commission	

[1] Sec. 15(d), Securities Exchange Act of 1934.
[2] Regulation 14 under the Securities Exchange Act of 1934 applicable.
[3] Sec. 851(e)(1) of the Internal Revenue Code of 1954 is applicable.
[4] Regulation 14 under the Securities Exchange Act of 1934 is applicable.

MISCELLANEOUS

PUBLIC MATERIALS

Transcripts of proceedings in public hearings including testimony, exhibits received in evidence, intermediate decisions, oral argument, motions, briefs, and exceptions.

Commission findings, opinions, orders, rulings, and notices issued for public release.

Hearings and comments on proposed rules or statements of policy, etc., except where the writer requests that his comments not be made public.

Periodic reports filed by the International Bank for Reconstruction and Development under regulation BW, rules 1 to 4, section 15(a) of the Bretton Woods Agreement Act.

Copies of papers filed in court, and papers and documents received from courts, are primarily for the use of the Commission attorneys and other members of the staff. These may not always be complete and accurate and may contain nonpublic staff notations. However, in appropriate situations, with the approval of the Office of the General Counsel, examination of such material may be made or copies obtained as a matter of courtesy.

Reports by the Commission to the Congress as a whole.

NONPUBLIC MATERIALS

Certain materials other than those specified above, which if disclosed might adversely affect the public interest, are generally not available to the public and are designated as nonpublic or treated as confidential. Such documents include, but are not limited to—

Documents, papers, data, or evidence obtained in the course of any nonpublic examination or investigation including statements by witnesses or other persons.

Staff working papers or drafts.

Transcripts of testimony in any nonpublic hearing or investigation.

Correspondence; intra-agency and internal memorandums.

Personnel files and documents relating to internal matters.

Material classified for purposes of national security.

Letters or reports to Members of Congress, committees of Congress, and other Government agencies or officials, unless and until such documents are made public by such recipients.

Preliminary copies of proxy material.

Minutes of Commission meetings and deliberations.

Documents afforded confidential treatment pursuant to schedule A, paragraph 30, of the Securities Act of 1933, section 24(b) of the Securities Exchange Act of 1934, section 22 of the Public Utility Holding Company Act of 1935, and section 45(a) of the Investment Company Act of 1940, and the rules and regulations promulgated under these acts.

NATIONAL HEADQUARTERS, SELECTIVE SERVICE SYSTEM,
Washington, D.C., November 6, 1963.

HON. EDWARD V. LONG,
Chairman, Subcommittee on Administrative Practice and Procedure of the Judiciary Committee, U.S. Senate.

DEAR MR. CHAIRMAN: I appreciate this opportunity to submit to your committee these comments on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

I fully subscribe to the principle of public access to Government information so far as the national interest permits. The Selective Service System, in order to retain the public confidence necessary to its successful operation, must conduct its business openly. Selective service regulations make available for public inspection the names and classifications of registrants. Information about the System is readily available at any local board office of which more than 4,000 are in operation in virtually every community in the Nation.

However, information submitted by registrants on which classifications are based never has been considered to be public information.

Section 3(c) of S. 1666 would make available for public inspection this personal information submitted by registrants to the local boards. The material submitted by registrants and maintained in these files, which now number about 28 million, is indispensable to the proper classification of the registrant with respect to his availability for service. In many cases, the file contains peculiarly personal information concerning an individual's health, dependency, and financial status, his court record, if any, and other matters. Much of this information is submitted only because the registrant knows that it is kept confidential. The classification questionnaire (SSS Form 100) provides the basic information on which classification of the registrant is determined. The registrant is required by law and regulation to complete and return the questionnaire. He is informed on the face of the 8-page form that his statements therein are confidential as prescribed by selective service regulations. Without such information, the local boards could not properly determine whether the national interest required the deferment or exemption of a registrant or whether he should be found available for service.

The confidential nature of these files, now declared by regulations, has been recognized in selective service legislation and has been adhered to over many years in selective service procedures familiar to the Congress.

In World War I, World War II, and in the present operation which began in 1948, selective service regulations have provided confidential treatment of the information in registrant files.

The 80th Congress, in Public Law No. 26, which established the Office of Selective Service Records, in section 7 authorized the Director of the Office of Selective Service Records to prescribe the rules and regulations necessary to preserve the confidential nature of the individual records previously obtained under the Selective Training and Service Act of 1940, as amended.

There seems to be better reason to treat as confidential the files being used in a current operation than those accumulated during a past operation. While the Universal Military Training and Service Act, as amended, under which we are

currently operating, like its World War I and World War II predecessor laws, is silent on the confidentiality of information in registrant files, the policies of selective service in this respect have been well known to the Congress and have not been questioned.

In its further consideration of S. 1666, I know your committee will give serious thought to the necessity of preserving the confidential nature of registrant files in order to insure the continued successful operation of selective service, a program essential to our national defense.

The Bureau of the Budget has advised that it has no objection to the submission of this report to your committee.

If I may be of further service please call on me at any time.

Sincerely yours,

LEWIS B. HERSHEY, *Director.*

TENNESSEE VALLEY AUTHORITY,
OFFICE OF THE BOARD OF DIRECTORS,
Knoxville, Tenn., July 2, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is in response to your letter of June 14, requesting a report on S. 1666, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

In general, the bill would amend section 3 of the Administrative Procedure Act to require that, except as otherwise provided by law or in matters relating solely to the internal workings of an agency or where secrecy is vital to the national defense, all opinions, orders, statements of policy, and interpretations adopted by an agency affecting the public shall either be published or made available to anyone for inspection and copying upon request. It would also require agencies to maintain and make available for inspection a current index of such opinions, orders, statements, and interpretations. Where an agency has more than one member, it would be required to keep and make available for public inspection the record of the individual votes of each member in every agency proceeding. TVA would have no objection to the enactment of such legislation.

The Bureau of the Budget advises that it has no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

AUBREY J. WAGNER, *Chairman.*

VETERANS' ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR OF VETERANS' AFFAIRS,
Washington, D.C., October 16, 1963.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your request for a report by the Veterans' Administration on S. 1666, 88th Congress, a bill to amend section 3 of the Administrative Procedure Act, chapter 324, of the act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information and for other purposes.

The apparent purpose of this bill is to make information in Government agencies more readily available, and to delineate more clearly the areas in which, and the purposes for which, information may be withheld.

In summary, the bill, subject to limited exceptions, would—

First: Require each agency to publish in the Federal Register (*a*) descriptions of its organization and the established places where the public may secure information, (*b*) statements of the general course and procedures by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available, rules of procedure, descriptions of forms available, and instructions as to the scope and contents of all papers, reports, or examinations, (*c*) substantive rules and statements of general policy, and (*d*) all amendments or revisions of the foregoing.

Second: Make available for public inspection and copying all final agency opinions, statements of policy and interpretations, unless this material is promptly published and offered for sale.

Third: Require an index of opinions, rules, and orders; and deny agencies the right to use an order, opinion, or rule as a precedent unless it has been made available to the party in issue.

Fourth: Require agencies to specify times, places, and procedures for the inspection of their records, with an additional provision giving the Federal district court, within the proper jurisdiction, authority to enforce such requirement.

The bill provides for three main exceptions: (*a*) where there is a statutory authority for exemption; (*b*) where a matter relates solely to the internal workings of an agency; and (*c*) where secrecy is vital to the national defense.

The sweep of these provisions, particularly subsections (b) and (c) of the amended section of the Administrative Procedure Act impels the belief that he draftsman of this bill did not envision the impact they would have on a large service agency, such as the Veterans' Administration.

The vast operations of the Veterans' Administration, in its statutory obligation to provide medical treatment, hospital and domiciliary care, compensation and pensions, vocational rehabilitation and education, and many other similar benefits to ex-servicemen and their dependents, constitute a prime example of governmental activity on a huge scale. More than 2 million decisions are made each year in individual veterans' claims cases. These are largely factual determinations and for the most part are not precedential.

Veterans' claims matters are specifically exempt from disclosure because of section 3301 of title 38, United States Code, which provides in part:

"All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration shall be confidential and privileged, and no disclosure thereof shall be made except as follows:"

Following the quoted language, certain specific exemptions are made under which material otherwise confidential may be released. In general, these permit disclosures to the claimant or his duly authorized agent or representative as to matters concerning himself alone, or when the information is required by process of the U.S. court or by any department or other agency of the U.S. Government. One exemption is the requirement that the amount of pension, compensation, or dependency and indemnity compensation of any beneficiary shall be made known to any person who applies for such information.

However, except for material relating to an actual veteran's claim, the bill would require that all papers in connection with the formulation of agency policy be promptly made available to the public and all administrative and operational material, decisions, and interpretations (including but not limited to General Counsel's opinions) which do not relate solely to internal management. As an example, it would require that our reports to Congress on legislation be immediately made available to the public, notwithstanding the fact that most committees have requested that such reports be regarded as confidential unless such committee chooses to make them public.

We believe that such a result is unsound and would have a disruptive effect upon the agency's formulation of policy.

Purely as a matter of good business management and efficiency, it would be undesirable to create a situation under which agency officials would be under pressure not to reduce anything to writing unless it was so innocuous that it could be made available, presently or at any time in the future, to private counsel, Government contractors, speculators, the press, or anyone else. It would be hard for a contracting officer to negotiate a favorable contract if all of his instructions, including his instruction as to the maximum price the Government was willing to pay, were to be available to the public. Development of policy and instructions regarding settlement of claims would become difficult. (We note that internal memorandums of members and employees of an agency are exempt from the disclosure requirements of subsection 3(c) only when they relate to consideration and disposition of adjudicatory and rulemaking matters.)

The Veterans' Administration is not opposed to the principle of furnishing to the public as complete information, concerning our operations, as is feasible. To the contrary, at present we take great pains to see that information of interest to the public, or specific sections thereof, is made available by public information media or other appropriate means. Section 405.01 of chapter 4 (Principles of

Operation), Veterans' Administration manual MP–1, dated June 30, 1961, sets forth our specific policy on this subject as follows:

"Both the veteran and the public are entitled to full information about VA. The Administrator's policy is that VA will release all available information about its activities, freely and frankly, to all information media. This policy must be carried out."

Descriptions of our organization and station lists are now printed in the Federal Register. Substantive rules, including delegations of authority, are published both in the Register and in the Code of Federal Regulations. To the extent that there are Veterans' Administration requirements of procedure or statements of policy to be followed by persons who deal with this agency, they are generally contained in these regulations.

In general, detailed requirements of internal procedure and administration are published in manuals and other agency issues. Those which are pertinent are made available to service and welfare organizations representing veteran-claimants, and to others who regularly do business with us. From time to time we supplement these issues with press releases, fact sheets, question and answer columns, and scripts and spot announcements for radio and television.

Publication in the Register of material now printed in manuals and other issues of the Veterans' Administration would cause a large and costly increase in administrative costs and would cause unnecessary delays in placing it in effect. Moreover, it is questionable whether the Register would be more readily available to interested persons, than these administrative issues of the Veterans' Administration.

It is our view that any public information requirement must preserve to the agency's discretion the right to determine the extent to which it is feasible, or in the public interest, to make its records available for random public inspection by persons who have no direct concern. Consequently, we cannot recommend favorable consideration of S. 1666 by your committee.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the presentation of this report to your committee.

Sincerely,

W. J. DRIVER, *Deputy Administrator.*

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