by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

"(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

"(e) No funds shall be made available under any applicable program unless the recipent of of such funds informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

"(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

"(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating processing, reviewing, and adjudicating violations of the provisions of this section and complaints whch may be filed concerning alleged violations of this section, according to the procedures contained in section 434 and 437 of this Act.".

(b)(1)(1) The provisions of this section shall become effective ninety days after the date of enactment of section 438 of the General Education Provisions Act.

(2)(1) This section may be cited as the "Family Educational Rights and Privacy Act of 1974".

CONFERENCE REPORT EXPLANATION OF ACTION ON BUCKLEY AMENDMENT TO H.R. 69

Protection of the rights and privacy of parents and pupils.—The House bill provides that the moral or legal rights of parents shall not be usurped. In addition, the House bill provides that no child shall participate in a research or experimentation program if his parents object. The Senate amendment denies funds to institutions which deny parents the right to inspect their children's files and gives parents the right to a hearing to contest their child's school records. The Senate amendment also denies funds to institutions with policies of releasing records, without parental consent, to other than educational officials. Release of records is allowed only upon written parental consent. The Secretary is directed to adopt regulations to protect students' rights of privacy and shall enforce them through an office and review board in the Department of Health, Education, and Welfare to investigate and adjudicate violations.

The conference substitute adopts the provisions of the Senate amendment, including in the list of persons who should have the right to inspect student records those students who attend postsecondary institutions.

An exception under the conference substitute occurs in connection with a student's application for, or receipt of, financial aid. The conferees intend that this exception should allow the use of social security numbers in connection with a student's application for, or receipt of, financial aid.

The conference substitute adds that nothing in these provisions of the Senate amendment shall preclude official audits of federally supported education programs, but that data so collected shall not be personally identifiable. The conference substitute also provides that the consent and rights of the parents of a student transfer to the student at age 18 or whenever he is attending a post-secondary education institution. No action to terminate assistance for violation of these provisions of the Senate amendment shall be taken unless the Secretary finds failure to comply, and that compliance cannot be secured by voluntary means.

The conference substitute also adopts the provisions of the House bill relating to protection of parental and pupil rights, with amendments. The conference substitute provides that all instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by parents or guardians.

In approving this provision concerning the privacy of information about students, the conferees are very concerned to assure that requests for information associated with evaluations of Federal education programs do not invade the privacy of students or pose any threat of psychological damage to them. At the same time, the amendment is not meant to deny the Federal government the information it needs to carry out the evaluations, as is clear from the sections of the amendment which give the Comptroller General and the Secretary of HEW access to otherwise private information about students. The need to protect students' rights must be balanced against legitimate Federal needs for information.

Under the amendment, an educational agency would have to administer a Federal test or project unless the anticipated invasion of privacy or potential harm was determined to be real and significant, as corroborated by a generally accepted body of opinion within the psychological and mental health professions. In short, the amendment is intended to protect the legitimate rights of students to be free from unwarranted intrusions; it is not intended to provide a blanket and automatic justification for a school system's refusal to administer achievement tests and related instruments necessary to the evaluation of an applicable program.

VETO REVEALS WATERGATE BLIND SPOT

Mr. CRANSTON. Mr. President, President Ford's veto of new amendments to strengthen the Freedom of Information Act reveals a second blind spot in his failure to learn the basic lessons of Watergate.

President Ford seemed to have missed the point of the Watergate trials when he pardoned former President Nixon before the legal process was allowed to run its full course.

That was an unpardonable pardon. Our laws must apply equally to each and all of us, including Presidents and former Presidents.

President Ford's ill-advised veto of the Freedom of Information Act amendments is further evidence that he has not grasped still another lesson of Watergate—the dangers of undue secrecy in Government.

The Watergate disclosure showed how public officials and Government bureaucrats try to cover up mistakes, misjudgments and even illegal acts under the cloak of "national security."

Those people were more interested in job security than in national security. They were more concerned about saving their own necks than about safeguarding the Nation.

The President's veto threatens to perpetuate the Nixon style of letting Government bureaucrats manipulate the public by deceiving the press.

We are all aware of recent efforts by administration officials—especially those at the Pentagon, the State Department, the Treasury, and the Office of Management and Budget—to clamp down on so-called "premature" information to the press.

The Freedom of Information Act amendments, which Congress passed earlier this year are designed to broaden public access to Government documents.

We want to speed up the process of getting the Government to respond to legitimate requests for information by members of the public and the press.

Under present procedures, for example, it took 13 months before the Tax Reform Research Group was able to get released to the public earlier this week 41 documents showing how the Internal Revenue Service's Special Services Staff investigated dissident groups.

The amendments also provide for judicial review of disputes over what information could be made public.

This is in keeping with the American tradition of having disagreements settled by a third party—the courts.

I supported the new legislation because I believe in the freest possible flow of information to the people about what their government is doing, and why. The people must have access to the truth if they are to govern themselves intelligently and to prevent people in power from abusing the power.

The legislation has built-in safeguards against the disclosure of classified information that might endanger national security.

The way the President wants the bill to read, a judge would have to assume that a classified document was, and remains, properly classified. If the Government gives the judge a "reasonable" explanation why the document should not be made public, the judge must accept the explanation without looking at the document himself and forming his own opinion.

Only if the Government fails to give this "reasonable" explanation, could the court decide whether the document should be made public.

Under the amendments in the vetoed bill, our courts, not our bureaucrats, will have the final say as to what information can legitimately be kept secret without violating the basic right of a democratic people to know what is going on in their Government.

Arguments over declassifying materials could be conducted privately in the judge's chambers, and if the Government did not like a judge's ruling, it could always of course appeal to a higher court.

ANALYSIS OF THE PRESIDENT'S JUSTIFICATION OF HIS VETO OF THE FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. CHILES. Mr. President, at the request of the Subcommittee on Administrative Practice and Procedure, U.S. Senate, the Center for Governmental Responsibility at the Holland Law Center, University of Florida, has provided the subcommittee with an analysis of the President's justification of his veto of H.R. 12471, the Freedom of Information Act amendments.

It is the center's conclusion based on their research that neither the constitutional nor the administrative reasons—the only ones given in the President's veto message, can be sustained.

I ask unanimous consent that this analysis be printed in full in the RECORD and that the enclosed editorials which support an override, from Florida newspapers, be printed in full in the RECORD.

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

ANALYSIS OF PRESIDENT FORD'S VETO OF H.R. 12471

H.R. 12471, a bill to amend Section 552 of of title 5, United States Code, known as the Freedom of Information Act, is designed to narrow the gap between the Act's original objectives and realities of current practices. However, finding the proposed changes "unconstitutional and unworkable," President Ford has vetoed the bill. The President's opposition to the bill is not, by his own implications, founded on philosophical disagreement with the substance of the Freedom of Information Act but disapproval of the procedures selected to further those objectives.

The President's objections to H.R. 12471 principally stem from provisions in the bill dealing with three areas: 1) judicial review of classification, 2) time limits for review of FOIA requests and costs for obtaining information, and 3) investigatory files.

I. REVIEW OF CLASSIFIED DOCUMENTS

A. Practices under the current legislation

The present language of exemption (b)(1) states that the provisions of the FOIA do not apply to matters that are "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." The FOIA grants jurisdiction to district courts of the United States to order the production of agency records improperly held. According to the Act, "the court shall determine the matter de novo and the burden is on the agency to sustain its action."

The import of the term *de novo* has been the focal point of concern over the application of exemption (b)(1) since the passage of the Act in 1966. The plain meaning of the term *de novo* would seem to be a grant of authority for a court to consider a claim made under the FOIA "from the beginning" and in its entirety. This plain meaning interpretation, however, encountered difficulty when an attempt was made to apply it to a situation where the Government was claiming exemption from disclosure pursuant to exemption (b)(1). The question which arose was whether the *de novo* provision, as applied to materials claimed to have been classified pursuant to an Executive order, permitted a court to review the documents in question *in camera* to determine if they did in fact come within the scope of the alleged classification. The Supreme Court found *in camera* inspection was not allowed. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). The substance of the Court's consideration of the language of the Act and its legislative history was that Congress did not intend for the Act to subject the executive security classification decision to judicial review.

This restriction on the review procedures applicable to exemption (b)(1) has been one of the principal subjects of criticism and suggested reform. In essence, the objection to the restricted judicial review of (b)(1) exemption claims is that such restricted review amounts to no review at all. According to *EPA v. Mink* the Government sustains its withholding of requested materials by merely offering affidavits that the materials sought have been classified pursuant to an Executive order. There is no further check on either the sincerity, or, assuming a good-faith effort, the accuracy of the classifications itself.

There is good reason for concern over the lack of review afforded these two factors. Classification abuse, chiefly through *over-classification*, is known to be common. To quote former Defense Secretary Laird,

> Let me emphasize my conviction that the American people have a "right to know even more than has been available in the past about matters which affect their safety and security. There has been too much classification in this country. *As cited in* H.R. Rep. No. 221, 93rd Cong., 1st Sess. 40 (1973)."

Former United Nations Ambassador and Supreme Court Justice Arthur Goldberg, reflecting on the basis of his personal experience of reading and preparing thousands of classified documents, concluded that—

> "75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time. *Id.* at 41."

Justice Douglas, in his dissenting opinion in *EPA*, noted the present day realities of overclassification in this light:

> "Anyone who has ever been in the Executive branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive."

It is Justice Douglas' opinion that the secrecy stamp is used to withhold information which in 99% of the cases would present no danger to national security. *Gravel v. United States*, 408 U.S. 606 (1972) dissenting opinion).

The significance of the abuse of classification procedures is intensified when no effective review of the procedures is available. The lack of any realistic review of classification procedures other than that provided by the body responsible for the initial classification results in a giant loophole by which the Act's disclosure requirements may be avoided.

B. What H.R. 12471 would do

The provisions of H.R. 12471 relating to review applicable to exemption (b)(1) are designed to tighten the presently existing loopholes created by *EPA v. Mink*. H.R. 12471 would alter two provisions of the Act in order to reach this goal. Section (a)(3), the provision dealing with judicial review, would be amended to specifically grant the court discretionary authority to "examine the contents of . . . agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions . . ." Exemption (b)(1) would be amended so as to create a two-prong test. As it stands, exemption (b)(1) exempts matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." H.R. 12471 would include the phrase "and are in fact properly classified pursuant to such Executive order" so as to demand adherence to procedural as well as substantive requirements of the order. The combined effect of these changes is to bring discretionary *in camera* review of classified materials within the ambit of the court's *de novo* determination.

C. The President's objections

The President voices two major objections to H.R. 12471's provisions for dealing with review of classified documents. According to the veto message of October 17, 1974, it is the President's opinion that the bill's procedures would jeopardize military and intelligence secrets and diplomatic relations, and violate constitutional principles as well. The concern for the bill's effects on diplomatic relations and military secrets is evidently founded in a skepticism regarding the capability of courts to deal with such matters, matters for which, in the President's words, the courts "have no particular expertise." The nature of the President's constitutional objection is not as easily pinpointed. The veto message makes no reference to the exact nature of the constitutional infraction. Presumably, the constitutional principle referred to is the separation of powers doctrine.

Subsequent to his veto, the President forwarded his own amendments to H.R. 12471 to Congress. His proposals, aimed at curing the deficiencies he believes to exist in the bill as presently written, would allow *in camera* review only where a court finds, after first considering all attendant material, no reasonable basis to support the classification. In effect, the President's procedures would make the affidavit the first and final test of the validity of the government's claim of nondisclosure.

Court expertise

The President evidenced, in his veto message, a skepticism of the capability of courts to deal with such matters as military affairs and diplomatic relations stating the courts "have no particular expertise" in these fields.[1] The courts have, however, in other difficult and sensitive areas, managed to dispose of cases involving a thorough analysis of cases which require special expertise; for example in certain tax cases, the district courts have delved into such difficult tax issues as sections 1311–14, Mitigation of Limitations, and have been affirmed by the circuit courts.[2] The courts have also demonstrated

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[1] "In my opinion, citizens urgently need relief from the tyranny of classification secrecy as practiced by the executive branch. The judiciary could give us that relief. I am confident that a Federal court would exercise good judgment about our national defense requirements in any given case. I would assume that the judge could handle any foreign policy case quite satisfactorily." *Hearings on Executive Privilege, Secrecy in Government, Freedom of Information Before the Subcomm. on Intergovernmental Relations of the Comm. of Government Operations*, 93rd Cong., 1st Sess., pt. 1, at 290 (1973). Testimony of William G. Florence, Air Force Security Analyst (Retired).

[2] The district court in *Oklahoma Gas and Electric Co.* v. *United States*, 289 F. Supp. 98 (W.D. Okla. 1968), *affd.* 464 F. 2d 1188 (10th Cir. 1972), stated that "the purpose of the mitigation sections is to correct tax inequities where the statute of limitations, if controlling, would serve to create a double taxation or double escape from taxation to the unjust hardship of benefit of either taxpayer or the government." These sections of the Internal Revenue Code usually only apply under unusual circumstances, and only after several threshold requirements have been met. *See Yagoda v. Commissioner of Internal Revenue*, 331 F. 2d 485, 488 (2nd Cir.); *cert. denied*, 379 U.S. 842 (1964); 2 *Mertens, Law of Federal Income Taxation* § 14.01 (Zimet & Stanley ed. 1967). The Second Circuit in *Benenson v. United States*, 385 F. 2d 26 (1967), approved the disposition regarding

the ability to deal with complex issues in the delicate area of patents and copyrights. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 94 S. Ct. 1879 (1974), and the highly technical area of antitrust law. *See, e.g., Telex v. IBM*, 367 F. Supp. 258 (N.D. Okla. 1973). Perhaps the most salient example of courts dealing with sensitive issues and materials is the Watergate case and the handling of the White House tapes. The President's hesitancy is misplaced in this situation since federal judges, on the district court level, have demonstrated competence in handling complex and sensitive issues. They are appointed by the President himself with the advice and consent of the Senate and as such are worthy of the trust of the executive.

E. The doctrine of separation of powers

The President makes no direct identification of the constitutional principle he claims to be violated by the procedures outlined in H.R. 12471, but it is apparently the separation of powers doctrine. The President does, however, offer a hypothetical example illustrating that he believes to be the unconstitutional arrangement. The President's hypothetical involves a situation where the Secretary of Defense has reasonably determined that disclosure of a certain document would endanger our national security. As the President interprets the bill, a district judge who, upon contemplation under the FOIA, found a plaintiff's position just as reasonable, would have to order disclosure of the document. "Such a provision," according to the President, "would violate constitutional principles." 10 *Presidential Documents* 1318, Oct. 17, 1974.

The President's concern with the scope of review to be applied under H.R. 12471 is founded upon the presumption or weight to be afforded the executive's findings. Evidently, the President's opinion is that failure to proceed under a standard of review granting some presumption in favor of the executive is unconstitutional. Presumably, the rationale behind this opinion is that absent a presumption in favor of a prior determination by the executive branch, similar to the presumption of validity given to an agency under traditional principles of administrative law, the court is forced to undertake a totally independent evaluation of the validity of a certain classification. For the court to perform this function would be tantamount to substituting its judgment for that of the executive official making the initial classification—a nonjudicial function. Assuming this is indeed the reasoning behind the President's objection, the constitutional principle which requires examination is the doctrine of separation of powers.

The underlying objective of the doctrine of separation of powers is the desire to avoid autocracy. *Myers v. United States*, 272 U.S. 52, 293 (1926). To this end the doctrine serves to safeguard that degree of independence which a certain branch of the government needs in order to carry out its responsibilities. The doctrine is a necessary corollary of the specific constitutional designation of the three branches of the government. Nearly a century ago the Supreme Court observed the following necessary restraints of the Constitution:

"[It is] essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . . *Kilburn v. Thompson*, 103 U.S. 168, 191 (1881)."

It has been recognized that the principle of separation of powers "was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437 (1965). As applied to the Judiciary, it serves to interpret Article III of the Constitution as both "a grant of exclusive authority over certain areas and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by courts." *Id.*

The issue, therefore, is whether the courts are being compelled to perform a function which is properly left to another branch of the government. H.R. 12471 requires courts to perform a *de novo* review. A court undertaking such review is authorized "to examine the contents of such agency records *in camera* to determine whether such agency records or any part thereof shall be withheld under any of the exemptions set forth . . ." in the Act. Taken in context, these provisions confer to the courts the right to review an executive decision to determine its propriety—a traditionally judicial function.

The President's objection is presumably based on the argument that the courts' review function is equivalent to the initial classification decision. The crucial point is that the specific task assigned the courts under H.R. 12471 is to establish whether agents of the Executive branch have followed the standards which the Executive branch itself has promulgated for classifying confidential materials. It is not the intention of the bill, nor does it allow, the courts to make an independent determination of whether materials should or should not be classified in the interest of national security. The fundamental task before the court is one of review, a judicial function which the Constitution has assigned exclusively to the courts.

The President attaches great significance to what he considers a lack of presumption in favor of the government's findings. It is likely that the President attributes this lack of presumption to the Act's requirements which call for *de novo* review and place the burden on the agency to sustain its action. The fact is the provisions do not necessarily remove an effective presumption in favor of the government's findings. In reality, such a presumption will most likely be the rule in the majority of cases. The courts have traditionally shown great deference to Executive determinations in matters of national defense and foreign affairs and there is nothing in H.R. 12471 which would require a change of procedure in that regard. *United States v. Curtiss-Wright*, 299 U.S. 304 (1936). The bill permits *in camera* inspection at the discretion of the court; it is not automatic. The clear legislative intent is that *in camera* inspection will occur only after the court has considered all attendant evidence and found it insufficient to sustain the government's position. To quote the conferees:

"Before the court orders *in camera* inspection, the government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure."

Thus a judge might very well determine that an affidavit, asserting that requested materials have been classified pursuant to an Executive order, does itself establish the government's position. The objective of H.R. 12471 appears to be that the weight to be given evidence such as an affidavit is to be left with the court. The bill does not prevent a judge from attaching considerable weight to the fact that the government feels certain materials are within the ambit of a classification. For reasons which will be discussed presently, H.R. 12471 seeks merely to avoid a hard and fast rule which makes an affidavit conclusive evidence of the validity of the government's position.

The hypothetical proposed by the President in his veto message suggests a misconstruction of the scope of review called for under H.R. 12471. The hypothetical involves a situation where the court is comparing its own independent determination of the potential danger of a certain document to the national security with the government's determination on the matter. The procedure called for in H.R. 12471 is a process wherein the court would consider the government's determination in light of requirements outlined in an Executive order. In deciding the question the court would inevitably attach considerable significance to the government's prior determination on the matter. Such a review procedure is not inconsistent with the Act's *de novo* and burden of proof requirements. The *de novo* requirement that the court is to consider the issue in its entirety does not preclude a court from attaching whatever significance to the government's actions it finds appropriate. The burden of proof stipulation means only that the government must come forth with the evidence necessary to convince the court that the materials do indeed escape the Act's disclosure requirements. To return to the President's hypothetical, it would seem to be somewhat of an impossibility for a court to find that a classification was at the same time both reasonable and unreasonable. Were the government to show that a particular classification was made pursuant to the substantive and procedural requirements of an Executive order the court's only option under H.R. 12471 is to refuse to compel disclosure. Thus in the President's hypothetical a finding by the court that a classification made by the Secretary of Defense was indeed reasonable, as judged by the specifications in the Executive order under which the classification was made, would preclude a simultaneous conclusion that the material in question could be disclosed. If there exists a reasonable basis to classify, disclosure is unreasonable.

The scope of review which the President would apply is the equivalent of the substantial evidence rule which the courts frequently apply in reviewing agency actions. The President's procedure would permit disclosure only where a court could find no reasonable basis to support the government's classification. This procedure would also make a government affidavit attesting to the validity of a classification the equivalent of *prima facie* evidence that the government had indeed made a legitimate classification. Under this procedure, an affidavit would provide the court with a reasonable basis to support the government's classification such as to make *in camera* inspection unnecessary and inappropriate. Congress, however, had good reason for selecting a *de novo* scope of review instead of a substantial evidence approach. The lack of any record by which the court could determine whether the government had acted according to the provisions of the Executive order authorizing and prescribing the conduct of the individual involved renders the application of a substantial evidence rule difficult.

As the Supreme Court observed in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1970).

"Review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing. *Id.* at 414."

To apply the substantial evidence rule to exemption (b)(1) of the FOIA would be inconsistent with the Act's objectives. In effect, such a standard would do nothing to change the present status of the exemption, and therefore would be undesirable since as we have already seen the current limitations

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relationship between the mitigation provisions of sections 1311–15 and the doctrine of equitable recoupment, made by the district judge "in his exhaustive opinion." *Id.* at 28. *See Benensen v. United States*, 257 F. Supp. 101 (S.D. NY 1966).

on review of exemption (b) (1) provides a loophole for avoiding the Act's disclosure requirements. The substantial evidence approach that the President prescribes prohibits any valid independent review and thus allows the abuses of overclassification to continue.

This lack of any meaningful check on administrative action places the Executive rather than Congress in jeopardy of violating the separation of powers doctrine. Total preclusion of judicial review makes the Executive the sole judge of its actions. This is particularly inappropriate in the immediate case since the constitutional authorization for the power which the executive is here exercising stems from the Executive and Congress.

While the Constitution designates the President as Commander in Chief of the Army and Navy, and grants him certain powers in regard to treaty making, it likewise bestows the Legislative branch with the power to declare war and raise and support armies to regulate commerce with foreign nations and to ratify treaties. The Constitution thus grants to both the Executive and Legislative branches the authority to deal in matters pertaining to military and foreign affairs. Moreover, the history of the present system of classification shows a conspicuous absence of any constitutional authority for withholding information through classification. Indeed, what is shown is the legitimacy of Congress' authority to act in this area. The onset of the present system for withholding information relevant to the national defense or foreign policy can be traced back to World War I. *See* Executive Classification of Information—Security Classification Problems Involving Exemption (b) (1) of the Freedom of Information Act (5 U.S.C. 552). H.R. Rep. No. 221, 93rd Cong., 1st Sess. (1973). The first Executive order establishing a classification system became effective in 1940 and relied upon the authority of a congressional enactment giving the President power to establish as vital certain military installations and to make unlawful the conveying of information or physical representation of these designated installations. Ex. Order No. 8381, 3 C.F.R. 634.

Since this time various orders have extended the scope of the classification system in the area of non-military affairs. Currently, classification procedures are established by Executive Order No. 11652 (37 C.F.R. 5209, 1972) and apply to "official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States" or, to use the collective term adopted in the order, "national security." It is interesting to note that the only authority for the classification system cited in the order is section (b) (1) of the Freedom of Information Act. It is clear therefore that the objectives of a classification system properly reside within the domain of both the Congress and the Executive. For one branch to completely usurp the administration of such responsibilities through the preclusion of any meaningful procedure for review run contrary to the separation of powers doctrine.

A thorough consideration of the provisions of H.R. 12471 reveals that the separation of powers doctrine is not threatened by the proposed legislation. Indeed it is the constitutionality of the procedures outlined by the President which appear suspect.

One area of possible confusion which deserves consideration is the claim of executive privilege. This claim has no application to the matter under consideration here. As has been shown, it is not the purpose of H.R. 12471 to compel disclosure of materials which in the interest of national security should properly remain classified. H.R. 12471 seeks to exercise Congress' legitimate interest in insuring that the integrity of the classification system is not destroyed through the abuse of overclassification. Additionally, Congress has the legitimate concern of maintaining to the fullest extent possible an open flow of all information pertinent to the decisions which citizens of a democracy are called upon to make. H.R. 12471 does not seek to deprive the Executive of the legitimate use of a privilege against disclosure since exemption (b) (1) is an express recognition of the possible propriety of such a privilege. H.R. 12471 aligns the privilege with principles underlying the separation of powers doctrine. The alignment procedure outlined in H.R. 12471 is the rejection, consistent with the holding of the Supreme Court, of any claim of absolute privilege. Whether or not the Executive has a legitimate privilege granting it immunity from compliance with the demands of the other branches of Government is something that only the courts can determine. What is called for is a decision whether, and to what degree, a matter has been committed by the Constitution to another branch of government. This decision "is itself a delicate exercise in constitutional interpretation, and is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 211 (1961). "Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 94 S. Ct. 3090, 3106 (1974).

Consistent with the concept of separation of powers, the provisions of H.R. 12471 place the determination of the propriety of the Executive's privilege against disclosure where it properly resides—with the courts. The United States Court of Appeals for the District of Columbia has articulated the essence of the issue with particular clarity and perception:

"If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine or separation of powers. *Nixon v. Sirica*, 487 F.2d 700, 715 (1973)."

II. TIME LIMITS AND COSTS

President Ford's second objection to the FOIA amendment relates to the limitations placed on an agency's time to respond to initial requests for information and administrative appeals from initial denials. The President suggests substitution of the initial 10 day period by a 30 day limitation, and a substitution of the 10-day administrative extension period for unusual circumstances by a 15 day period. Along with these substitutions the President suggests that an agency be allowed to petition the U.S. District Court for the District of Columbia for an even further extension of these time periods if compliance is essentially impossible. This application to the court must occur prior to the expiration of the periods specified in his substitution.

Obviously, the President recognizes the need for specific guidelines on periods for agency responses—the need for which is born out by past experience. Perhaps the greatest abuse of the Freedom of Information Act has been the low priority accorded by agencies on information requests. Hearings on H.R. 5425 and 4960 Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations, 93rd Cong., 1st Sess., 334 (1973). One study has shown that six month delays in processing are not uncommon and mentioned one request that remained undetermined after more than one year. Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Freedom of Information Act Source Book, S. Doc. No. 82, 93rd Cong., 2nd Sess. 223 (1974).

Such delays, whether intentional or not, can often amount to a de facto denial of a request. Specific, enforceable time limitations would significantly alleviate this problem, especially in light of section c(6)C of the amendment. This amendment permits a requester to treat his administrative remedies as exhausted if the time limitations are not complied with, allowing suit to be filed if desired.

President Ford's modifications of the time limits do not present so substantial an improvement over the amendment as to warrant sustaining a veto. It is true that if one totals the time periods mentioned in the two proposals, the President presents a total of 65 working days as compared to 40 working days. A measurement of percentage increment is not possible because this total does not reflect the varying times involved in the requester framing an administrative appeal, a period during which the agency presumably continues to analyze the exempt nature of the requested materials. But simply referring to the difference in time limits fails to recognize that the amendment as it now stands provides an agency with an opportunity to request still more time within which to analyze a request if it is presented with exceptional circumstances.

If it is indeed impossible for an agency to comply with the time periods, once a complaint is filed by the requester, a district court may allot extra time to the agency and retain jurisdiction. Thus, as regards particularly sensitive, complex, or extraordinarily voluminous materials, such as the President is specifically concerned with in the case of investigatory files, an agency will not have to make a hasty or ill considered judgment.

It should be further noted here that the Congressional proposal substantially follows the guidelines suggested by the Administrative Conference in Recommendation No. 24 wherein the 10 and 20 day basic time periods were first suggested. This recommendation was made after a thorough and precise study of agency procedures in relation to the FOIA.

It is not clear that the President's proposal would result in less time, effort, or money expended by an agency, vis-a-vis the Congressional proposal. As the FOAI now stands, the U.S. District Court in the district where the complainant resides has jurisdiction over an FOAI case and would normally be the site of an original proceeding. It is true that if the complaint were filed, under the procedures of the amendment an agency would have to file its request for a time extension in that district. Under the President's procedures the agency would merely have to file its affidavits in the District of Columbia, and it would be the prospective complainant who would have to defray the costs of traveling to Washington to challenge the adequacy of the affidavits. However, under the President's proposal the agency involved would always have to draft such affidavits before the expiration of the initial time periods, whereas under the amendment's procedures the agency could inform the requester of the difficulty of the determination and suggest that he withhold suit for a period of time, save the time and effort of drafting a complaint, as well as the filing fees. If such a procedure is followed in good faith, it saves the complainant from the possibility of unnecessary suit; it saves the agency the time, effort and money of filing affidavits for extension—as it would *always* have to do under the President's proposal; and as a practical matter the whole apparatus operates in a much less cumbersome, inexpensive manner.

Ultimately the point of disagreement on time limits is one of degree. Both the President's proposal and the suggested amendment contain some time limit. Because of unnecessary extended delays, the shorter

time limit seems justified and an extension does not warrant the veto.

III. INVESTIGATORY FILES

The Presidential objections identify investigatory files as a separate problem from purported constitutional and time limit infirmities. His complaints focus on the necessity of reviewing large files on a paragraph by paragraph basis to sever the disclosable from the non-disclosable portions.

The President's message singles out investigatory files which he believes should not be subject to the amendment's command that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." The Presidential substitute allows the agency to classify a file as a unit without close analysis because the time limits are too stringent to allow such intensive analysis.

If investigatory files are so unique in terms of length and complexity, an agency's logistical difficulty in conducting a thorough analysis would certainly strongly influence a court to extend the time for agency analysis as is authorized by the bill. Therefore, a procedure is already available to provide for accurate and thorough analysis without empowering agencies to make conclusory opinions that would result in no disclosure of information in an investigatory file, no matter how much of it would be proper to disclose. Also, it is precisely this opportunity to exempt whole files that would give an agency incentive to commingle various information into one enormous investigatory file and then claim it to be too difficult to sift through and effectively classify all of that information.

This objection, as was the objection to the time limits, is one of degree. In light of the fact that "[t]he FOIA was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest," *Wellford v. Hardin*, 444 F.2d 21,24 (1971), disclosure of severable portions of investigatory documents does not create an unreasonable burden.

CONCLUSION

None of the objections issued by the President's veto message appear to establish either that H.R. 12471 is unconstitutional or unworkable. The provision of the amendment which allows *in camera* inspection of classification determinations is not unconstitutional under the separation of powers doctrine but does provide a check on possible executive abuses of the classification system. Objections as to difficulty in culling public information properly classified in investigative files is an administrative matter similar in nature to the objection as to lengths of times for review of requests. We conclude that the administrative problems do not constitute insurmountable barriers. Time limits in the amendment accord some flexibility if needed. If those responsible for culling information from investigative files cannot reasonably meet the deadline, extensions can be granted.

The basic philosophy underlying the FOIA is consistent with the President's proclaimed support for open government. Yet experts on the current implementation agree to the need for changes to better implement that philosophy.

Our analysis also suggests that the Constitution does not demand a veto of this bill since it does not violate the separation of powers. And finally the amendments, while requiring some additional effort from officials, are not administratively unworkable.

[From the Miami News, Oct. 21, 1974]

MOST SECRECY NEEDLESS

The public should be distressed that President Ford has vetoed important amendments to the Freedom of Information Act after Congress had overwhelmingly recognized the need to further pry unwarranted secrets out of government agencies.

Mr. Ford apparently had been fed a lot of bad advice by the Justice Department and the Pentagon chiefs that the amendments would give the citizens and the news media carte blanche to invade confidential FBI and military files. But the federal courts long have given ample protection to the necessary secrets of government and there is no reason to think this would not be the case in the future.

The Freedom of Information Act, passed by Congress in 1966, says the public should have the broadest access to information about the workings of government. But the important agencies have done their best to escape compliance. Deliberately long delays in responding to requests for data have defeated the purpose of the act.

The amendments would shorten the amount of time or an agency's response, would impose penalties on officials who arbitrarily refuse to cooperate, and would require annual reports to Congress on performance.

The President promised an open administration when he assumed office last August. But if he yields to the desires of the FBI and the Defense generals for excessive secrecy, he will revert to one of the insidious traits that wrecked the Nixon administration.

Congress ought to override the veto. Learning how government conducts its business is the business of all Americans.

[From the Miami Herald, Oct. 27, 1974]

AN OVERRIDING CONCERN ON SECRECY

President Ford's proposed substitute for the amendments to the Freedom of Information Act which he vetoed Oct. 17 is, if anything, worse than no bill at all.

As J. Arthur Heise suggests in an adjoining column, the existing information act is "largely a toothless baby" which really encourages bureaucrats to clam up when it suits their fancy. It created a situation, he goes on, "akin to allowing a drunken driver to administer his own sobriety test."

Mr. Ford's substitute for the amended act, which passed the Senate 64 to 17 and the House 366 to 8, grants wide latitude and lots of lead time to those who may wish to prevent the public from learning about its own business.

For instance, the vetoed bill would give government agencies 10 days to respond to a request to furnish documents believed to be improperly classified. The Ford version would give agencies 30 days to comply plus another 15 days in some cases and the right to seek a longer delay from the courts in exceptional circumstances. In other words, plenty of time to bury the bones or forget all about it.

U.S. government files are crammed with tons of material affecting and perhaps covering up decisions made in the name of the public but without its knowledge. Some of this material goes back half a century and more.

Washington is an echo chamber for petty politics and social gossip but many of its halls are tightly shut to public information, much of which has no title to official secrecy. At the very least Congress should pass the amended Freedom of Information Act over President Ford's veto, which we fear was derived from bad advice.

[From the Miami Herald, Oct. 29, 1974]

TO LET THE SUNSHINE OUT

In a joke making the rounds a few years back, a picketer at the White House waves a sign reading "The President is a Fool" and is promptly arrested for revealing top secret information.

The anecdote makes a point. Although governmental secrecy has some legitimate uses, it is as often the refuge of fools and scoundrels who cover up their indiscretions by denying the public access to vital information.

It does not have to be that way. In Florida a tough law to bring about "government in the sunshine" is a model for other states.

At the federal level, Florida's Sen. Lawton Chiles, the citizen lobby Common Cause and several prominent persons in government and the media have been pushing for a national version of the "sunshine law" with a few changes to take into account military secrecy and foreign affairs that are not a problem at the state level.

After months of work, congressmen thought they had hammered out an acceptable compromise to guarantee public access to public records and the public's business.

The measure, watered down somewhat to meet President Ford's stated objections, passed the House 336–8 and the Senate 64–17. The chief author of the compromise, Rep. William Moorehead of Pennsylvania, noted that the bill would "provide the openness in government that President Ford has promised us" and predicted it would be signed into law.

But Gerald Ford had a secret. He vetoed the compromise measure in an ill-advised action that Washington observers blamed on the President's listening to the Pentagon's views on secrecy.

Mr. Ford's stated reasons for his veto were totally unconvincing. We trust that when Congress returns following its election recess, it will act promptly to enact the Freedom of Information Act to start letting a little sunshine illuminate the activities of the federal government.

[From the Jacksonville (Fla.) Times-Union, Oct. 24, 1974]

READDRESS SECRECY BILL SOON

It took the Congress three agonizing years to produce a government anti-secrecy act designed to let the American people know what is going on in the federal government.

It took President Ford one week to veto the measure, an amendment to the Freedom of Information Act.

The President's action is distressing unless the justification cited for it is adequate. First, it is distressing because of the acknowledged fact that there has been to much abuse by policymaking bureaucrats of the "secret" and "confidential" stamps placed on government documents.

It is distressing also because one of the foremost pledges of President Ford when he assumed the presidency was for more openness at the White House, an example that should then filter down through the rest of the Executive Branch.

The bill as it worked its way through the Congress was opposed by the Defense Department and by the State Department. They argued that diplomatic secrets and vital military secrets would be revealed as a result of the act.

Congress took these arguments into consideration and, notwithstanding, overwhelmingly adopted the bill. The vote in the House was 366–8 and the Senate vote was 64–17. Congress must have felt that the bill contained sufficient safeguards of national secrets—real secrets—as opposed to cover-ups—to produce those overwhelming votes for the measure.

We hailed the passage of the anti-secrecy bill with muted praise because Congress failed to act more positively with regard to openness concerning its own activities, although some progress is being made in this direction.

In his veto message, President Ford cited the diplomatic-military secrets angle and also said it was his view that the new crack-in-the-door policy enunciated by Congress for the Executive Branch was "unconstitutional and unworkable." The President prom-