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## The Public's Right to Know

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## THE PUBLIC'S RIGHT TO KNOW\*

HON. FRANK HORTON†

The recent publication of the Pentagon papers, detailing U.S. (United States) involvement in Vietnam, and the dispute over the editing of the Columbia Broadcasting System (CBS) program, "The Selling of the Pentagon," have focused national attention on the inevitable conflict in a democracy: the government's need for secrecy to protect the national interest, the public's right to know about the workings of its government and the media's responsibility to report the news.

The basis of our form of government rests on an informed citizenry, participating in decision-making. This principle assumes that the people must have available as much information as possible in order to make wise choices.

Yet, there is an undeniable need for government to withhold some information from the public if such information would be advantageous to hostile nations or seriously damaging to the national interest.

The media have a duty and a responsibility to inform the public in a fair and accurate way about the workings of the government.

Because of the nature of the responsibilities and obligations of the public, government and media in the democratic process, conflicts inevitably occur—the publication of the Pentagon Papers and the CBS program, "The Selling of the Pentagon," are the most recent examples.

Propelled by these concerns, the Foreign Operations and Government Information Subcommittee of which I am a member, has held hearings on the entire question of the "public's right to know." It is this area that the Subcommittee was authorized to investigate and protect when it was created in 1955.

As a result of my years as a member of this Subcommittee, and because the question of the "public's right to know" is vital to the survival of our democracy, I have undertaken a major study of this entire area.

The findings of this study are included in this article.

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This article examines the entire question of secrecy, security and the classification and declassification of government information. This includes an analysis of Executive Order 10501, which outlines the conditions under which information may be classified and declassified, as well as Executive Privilege, which circumscribes the kind of executive branch data that may properly be withheld from Congress.

The Freedom of Information Act of 1967, which was passed in 1966 to provide the public with as complete access as possible to public records and to prevent government agencies from unjustifiably withholding information, is also examined as a key element of the public's right to know.

The question of truth in media news reporting will also be looked at. The media are protected from Congressional restraints by the First Amendment, which says "Congress shall make no law abridging freedom of speech or of the press."

#### EXECUTIVE ORDER 10501—

##### AUTHORITY FOR FEDERAL SECRECY?

Presidential Order 10501 sets out the rules and regulations determining which government agencies may classify information as secret, which officials may decide that information must be withheld from public view, how material is to be classified, for how long it may be kept secret, and what procedures must be used to declassify material which no longer is sensitive and which is no longer properly hidden from the public.

This far-reaching Presidential Order was first issued in November, 1953, and has been amended at least six times since then. The Order is entitled "Safeguarding Official Information in the Interest of the Defense of the United States." As presently written, it authorized the heads of thirty-four (34) different Federal agencies, departments, commissions and offices to delegate to their subordinates the power to classify material but are not authorized to delegate classification powers to others in their agencies.

Executive Order 10501, which occupies fourteen (14) printed pages, begins as follows:

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

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WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows . . .

The Executive Order goes into great detail about what kinds of material may be classified, and what procedures for distribution, protection and declassification of such material should be used. For example, in setting out the appropriate use of the Top Secret classification the Order states:

. . . The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

The Order is replete with warnings and statements to the effect that overclassification of material should be avoided, but it goes into even more detail as to the need to avoid underclassifying material, particularly material which, while not Top Secret or Secret in and of itself, is connected with information or material which is legitimately Top Secret or Secret.

Also, the Order specifies a procedure, to operate within each agency, as well as among several agencies, for declassification of material. But it is clear that the authority to declassify is far more restricted in several ways than the authority to classify. On balance, more emphasis is given in Executive Order 10501 to protection of classified material than to declassification of information that is no longer sensitive.

This has resulted in much overclassification of information and a tremendous backlog, numbering in millions of documents, of material which, while properly kept secret initially, should have been declassified years ago.

### 20 MILLION SECRETS

The main point that emerged from the hearings of my Subcommittee on Foreign Operations and Government Information on the Pentagon

Papers and on this Executive Order was that there were as many as 20 million classified documents within the Federal structure.

One witness before the Subcommittee, William G. Florence, a recently retired Air Force civilian security classification official, told us that he felt 99½ per cent of the 20 million documents could now be made public without compromising national defense.

While experts disagree as to the exact number, it is safe to say that at least two-thirds of these Top Secret, Secret or Confidential documents should have been made public long ago, since their sensitivity to national security has expired. These documents range from an absurd "Secret" classification of already-published newspaper articles, to proper "Top Secret" stamps on current troop deployment plans.

Despite several amendments to Executive Order 10501 since it was issued in 1953, which have been designed to avoid over-classification of information, the situation is still serious, and the public's right to know is being ignored in too many instances. One amendment properly reduced the number of Federal agencies empowered to classify material.

Until January, 1961, such agencies as the Migratory Bird Conservation Commission and the Indian Arts and Crafts Board had authority to classify documents as military secrets. Other amendments reduced the number of classification categories from four to three and stipulated time limits for "downgrading" of classified material from "Top Secret," to "Secret," to "Confidential" and finally, to "Public Information."

Despite these efforts, the classification system remains jammed with overclassified material. Witnesses before our Subcommittee said the problem was that there appears to be an unlimited number of people within the government with the power to classify, but a lower priority and fewer people are assigned to the declassification of outdated documents.

In some ways, this is understandable. With limited staff and resources, an agency would put a higher priority on protecting current material that is truly sensitive, than on digging into its files to make public outdated troop plans for World War II or the Korean War.

The weight of the Executive Order, and the stiff penalties provided under the Espionage Act for disclosure of classified material serve to impede unwarranted disclosure of classified material. But the same factors also impede legitimate declassification of non-sensitive material. Government workers, while they have little cause to hesitate in classifying or even over-classifying a document, are reluctant to take responsibility for declassifying information about which they have even the slightest doubt.

President Nixon has recently asked Congress to fund 100 additional people whose job it will be to declassify thousands of World War II documents which have remained secret only because no one wanted to spend the time or money needed to declassify them. This is an important step forward, and it is the first time in many years that the public's right to know has received this kind of Presidential priority. However, the addition of 100 people does not solve the overall problem.

To help insure the public's right to know and to untangle the web of secrecy which has grown up behind Executive Order 10501, I am proposing several steps to help guarantee that the people and the Congress have access to information that is not truly sensitive.

#### PROPOSALS TO UNTANGLE THE SECRECY BACKLOG

My analysis is that there has been no government plot to delude, or deceive the public. On the contrary, the lack of attention to declassifying outdated documents, including much of the contents of the Pentagon Papers, has been a result of low or no priority placed on carrying out the tedious job of reviewing each document and clearing it for public release.

To untangle this web of secrecy, I am proposing several steps to guarantee that the people can get access to information as soon as it is prudent and possible to release it without compromising our security of our defense posture.

I propose the following changes in Federal procedures and priorities both within and outside the scope of Executive Order 10501:

1. Each agency empowered under 10501 to classify information should be asked to include in its budget requests to Congress for fiscal 1973 funds sufficient to properly staff, within the office of the agency head, an Office of Information Declassification. This staff should be sufficient to complete the task of sifting through classified documents and declassifying outdated documents so that the declassification process is brought completely up to date by the end of fiscal year 1974. Of course, priority information of public interest that is no longer sensitive should be declassified first, leaving more routine documents for processing toward the end of this two-year period. The Offices of Information Declassification in each agency should remain sufficiently staffed after July 1, 1974 to maintain a current declassification program. Some agencies may require only one or two people to complete this task, while agencies which have extensive classification of material may require substantially more.

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The Office of Management and Budget should be under Presidential directive to give priority treatment to these budget requests in their annual review of individual agency budgets.

2. Executive Order 10501 should be amended to provide that each classified document, in addition to being stamped with its appropriate level of secrecy, should also be marked to show:

- a. the office and official responsible for classifying the document;
- b. the earliest time the document would be eligible for "downgrading" to a lower level of secrecy, and for declassification; and
- c. the offices or officials authorized to review the classification of the document and to declassify it.

3. That each Office of Information Declassification established under the first proposal report annually to the House and Senate Committees on Government Operations, and that these reports shall include:

- a. the number of documents currently in the possession of the Federal agency which are classified Top Secret, Secret and Confidential;
- b. the number and general description; of documents declassified or downgraded in the past twelve months;
- c. the estimated "classification backlog" of the agency, that is, the number of classified documents which have not been reviewed for declassification, but which have passed the date of eligibility for review;
- d. an estimate as to what steps or funds may be required for the agency to bring its declassification procedures up to date.

I believe that these steps which I have recommended to the President and the Government Operations Committees, will insure that the public's right to access to government information will not, either deliberately or inadvertently, be relegated to last priority (as has been the case under Executive Order 10501) in the Federal government's effort to protect information that is truly sensitive to national security.

#### EXECUTIVE PRIVILEGE

There is no question that there is a current crisis of confidence and of information existing among many segments of American society. You can say that we are today beset with several "credibility gaps" in America.

The first of these credibility gaps is between government and the pub-

lic at large. "Are we getting the straight story from Washington?" "Everything worth knowing is secret!" These are typical comments of American citizens concerned about the truthfulness and reliability of government.

In addition to the serious secrecy backlog, there are other gaps of credibility.

A lesser-known, but equally serious informational gap has developed within the Federal government itself, in the very delicate but important relationship between Congress and the President. Under the doctrine of separation of powers, among the three branches of the Federal government, the President is not responsible to the Congress and the Congress is not responsible to the President. Both are co-equal branches of government. However, in order for the government to function, it is necessary that a high degree of trust and cooperation be developed between Congress and the President, and it is also necessary that neither branch act to obstruct the proper functioning of the other.

Recently, the information gap between Congress and the President reached the proportions of a small public crisis. This was highlighted when it was learned that the Senate Foreign Relations Committee, which normally has full access to classified material, had requested a copy of the "Pentagon Papers" three times from the Administration, and each time the Administration refused, citing the doctrine of Executive Privilege. The Papers were finally released only after parts of them were published in the press.

The term "executive privilege" is most commonly used to refer to a situation where the Executive Branch of the government refuses to divulge information requested by the Congress. Others, including Senator Sam J. Ervin, Chairman of the Senate Judiciary Subcommittee on Separation of Powers, use the term to mean "the withholding of information of any kind by the Executive Branch from any persons, be they Members of Congress, or members of the taxpaying public."

At issue in the question of Executive Privilege and its use to keep information from Congress and the people are conflicting principles. First is the power of the President to withhold information, the disclosure of which he feels would impede the performance of his constitutional responsibilities. Second is the power of the legislative branch to obtain information in order to legislate wisely and effectively; and third is the basic right of the taxpaying public to know what its government is doing.

The dispute over the use of Executive Privilege is just one aspect of



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the overall debate going on in our government over the increasing concentration of power in the Executive, and the lessening of power of the Congress. In foreign policy, I have addressed the problem of Congress abandoning its constitutional powers over war and peace to the Executive—to the point where Congress has all but lost its role in the decision to wage war, or to engage American troops abroad. Part of this erosion of legislative power is a direct result of the fact that the Executive has more information at its disposal than the legislature.

Where the Congress is uninformed, it obviously cannot be expected to act in a timely and responsive manner. Where certain kinds of information are held exclusively by the Executive, that branch of government is in a strong position to determine, by itself, how that information will be used. This is why the question of Executive Privilege, and its use and abuse, is crucial to the effective and constitutional operation of our government.

#### CONGRESS HAS A RIGHT TO KNOW

Since the Administration of President George Washington, the desire of the President to keep certain information from Congress because he feels it would compromise his office and his responsibility, and the desire of Congress to be told all have resulted in conflict. When asked by the House of Representatives to produce information on the St. Clair expedition, President Washington replied that:

. . . The House . . . might call for papers generally . . . The Executive might communicate such papers as the public good would permit and ought to refuse those, the disclosure of which would injure the public, . . . Neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.

Despite George Washington's contentions above, all of the requested documents were subsequently turned over to the Congress. However, his words began the idea that inherent in the President's authority was the power to withhold information if, in his discretion, it would compromise his duty, under Article 2, Section 3 of the Constitution to see that the "laws are faithfully executed." Because courts have held that the "President alone and unaided could not execute the laws," but requires, "the assistance of subordinates" the alleged authority to withhold infor-

mation, or to exercise this "Executive Privilege" has thereby been extended to the entire Executive branch.

While there is no express language in the Constitution permitting Executive Privilege, its development has come about partly because the Congress has failed to assert its own power in the face of Presidential claims of the inherent power to withhold information.

Thus, each succeeding President has set the policy for his Administration by telling the Congress how he will interpret and follow the doctrine of Executive Privilege, instead of the Congress laying down guidelines for how the doctrine should be used, if at all.

President Kennedy was the first President to seek to end the practice of delegating Executive Privilege to other officials within his Administration. Each recent President, at the start of his term, has written a letter to the Chairman of the Government Information Subcommittee of the Government Operations Committee stating his policy with regard to Executive Privilege. President Kennedy's letter stated:

. . . this Administration has gone to great lengths to achieve full operation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*

Thus, in the Kennedy Administration, no Cabinet officer or other official could withhold the personal and express consent of the President regarding that information. President Johnson and President Nixon have followed this laudable precedent.

In addition, President Nixon has set up an elaborate procedure which Executive branch officials must follow before the doctrine can be invoked. The agency or department head concerned must consult with the Attorney General as to his desire to withhold information from Congress. If the Attorney General refuses, the information must be supplied. If the Attorney General agrees, he just then refers the matter to the Counsel to the President, who must then consult with the President and obtain his final judgment as to whether Executive Privilege should be invoked.

Despite these limitations in the use of the doctrine, there are many who feel that any refusal of information is inconsistent with the Freedom of Information Act of 1966, which prohibits the withholding of any information from the Congress by the Executive. Current controversy

over foreign policy issues has prompted suggestions that Congress finally take the initiative and clearly define by statutes how Executive Privilege may or may not be used.

#### MILITARY ASSISTANCE PLANS

Presidents, over the years, have felt it necessary to protect "staff papers" and internal information which is exchanged during the decision-making process from public and Congressional scrutiny. The contention is that the Executive Branch, while it must be made to defend and justify its decisions once they are formulated, should not be required to have Congress looking over its shoulder in conference room discussions, where differing views and where decisions are reached.

Under this contention, Presidents have historically refused requests for members of their personal staff to appear to testify before Congressional Committees, on the theory that this would be inordinate interference with the inner workings of the President's personal office and staff. I do not disagree with the need to protect the policymaking process and the staff discussions and memoranda which make up this process. There is increasing concern, however, that so much of the power of government is becoming concentrated in the Executive, and particularly in the White House staff itself, that there is a greater need for Congress to be informed of the attitudes and decisions of officials who are close to the President.

This concern is particularly strong in the field of foreign affairs. Under this Administration and in the past few, a great deal of foreign policy power has been lodged in the White House, in addition to the State Department. Despite the great influence of Henry Kissinger and his staff in foreign policy decisions, however, the Congress and its Committees have been denied the right to question Dr. Kissinger even in closed sessions, because he is a member of the White House staff.

Concern over refusal to provide Congress with access to certain information erupted into a confrontation recently when the Senate Foreign Relations Committee threatened to cut off funds for the Foreign Military Assistance programs unless the Defense Department produced its tentative five-year plan for military assistance to countries abroad or, in the alternative, unless the President himself asserted the right of Executive Privilege over this information. The contention of this Committee was that it could not be expected to legislate wisely unless it had access to the Administration's plans for these programs over the next five years.

The crisis was averted when the President, for the first time in his Administration, formally asserted the right of Executive Privilege, stating that release of this information to the Committee would infringe on the proper exercise of executive powers. Because of the importance of military assistance policies, especially in light of the Vietnam experience, where a military assistance program grew into a major, decade-long war, I feel strongly that Congress should have access to information which reflects the Administration's best judgment and plans for future assistance. Without this kind of information, Congress cannot exercise its best judgment, and if Congress does act without it, we take yet another step toward giving up Congressional war powers to the Executive.

#### LEGISLATIVE STEPS TO LIMIT EXECUTIVE PRIVILEGE

A number of proposals have been made for dealing with the question of Executive Privilege through permanent legislation. The strongest bill has been proposed by Senator Fulbright. His measure, S-1125, would require that any administration official called to appear before a Committee of Congress must, in fact, personally appear, even if he intends to assert that the information sought by that Committee is covered under executive privilege. If the witness does assert executive privilege over all or part of the information sought from him, he would be required by S-1125 to present a letter personally signed by the President which asserts the privilege of withholding the information.

There are others who feel that executive privilege, since it is not specifically covered anywhere in law or in the Constitution, should be thrown out altogether, and that the Executive should never be permitted to withhold information from Congress, no matter how tentatively misleading the documents sought may be.

While this sounds like maximum protection of the public's right to know, I think before such a drastic step were (sic) was taken, Congress would have to show responsibility in the protection of information which, if disclosed publicly, could severely endanger our national interests or security.

My view is that the separation of powers, and the relationship between Congress and the President does justify a very carefully limited doctrine of executive privilege. In the past, the decision as to how to use and interpret the doctrine has been left to each President. I feel that the current practice of limiting executive privilege to the President

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alone, and prohibiting lower level executive branch officials from asserting it without specific Presidential approval should be written into the law.

Also, I feel that since greater and greater power has evolved to the White House staff in recent administrations, executive privilege should not be automatically applied in every request by Congress to interrogate members of the President's staff. Congress as the elected representatives must have access to all information held by the Executive which has a true and direct bearing on the ability of Congress to wisely and fully exercise its Constitutional powers.

Thus, I would support legislation to limit the exercise of executive privilege by law to accomplish these safeguards of the public's right to know, and the Congress' right to be fully informed of what the Executive is doing and thinking.

THE FREEDOM OF INFORMATION ACT

On July 4, 1966, President Lyndon B. Johnson signed Public Law 89-487, the Freedom of Information Act.

This new law, developed after twelve years of work by the House Subcommittee on Foreign Operations and Government Information, was passed to provide the public with as complete access as possible to public records and proceedings, and to prevent government agencies from unjustifiably withholding information. While Executive Order 10501, discussed earlier, concerns the withholding of information which is classified, or essential to national security, the Freedom of Information Act deals with non-classified information which should rightly be open to public scrutiny. The Act covers agency decisions and proceedings, records, staff manuals, regulations and documents leading to the issuance of regulations and a host of other material.

The Freedom of Information Act was adopted to revise and improve the public information section (section 3) of the Administrative Procedure Act of 1946. Government agencies, it was found, were using this section of law to withhold, rather than to make public, information under their control.

The intent of the new law is that disclosure be the rule, not the exception; that all individuals have equal rights of access to government information; that the burden be on the government agency to show why it should be disclosed. The old procedure, as set forth in Section 3 of the Administrative Procedure Act, had placed the burden on the public rather than on the government.

A very crucial provision in the Freedom of Information Act gives individuals who are refused information the right to seek injunctive relief in the Federal Courts.

The Act provides for nine exceptions to automatic disclosure, and included under the exceptions are those documents required by Executive Order to be kept secret in the interest of national defense or foreign policy. Additional exceptions are: matters related solely to the internal personnel rules and practices of an agency; interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; reports on financial institutions regulated or supervised by the Federal government; and geological and geophysical data, including maps, concerning wells.

Periodic reviews of the Freedom of Information Act since 1967 by Congress and the media have found that while the law is working better than its predecessor, there are still serious deficiencies which existed under Section 3 of the Administrative Procedure Act.

The Act is not self-enforcing. It needs strong executive support and initiative to carry out its full intent, and it requires the willingness and ability of the media and the public to seek court decisions to enforce freedom of information in specific cases.

#### PROBLEMS UNDER THE NEW LAW

On July 20th of this year, four years after the effective date of the Freedom of Information Act, the *Washington Post* carried an article by Morton Mintz which pointed up some very serious problems with the Freedom of Information Act, problems which bar the public from viewing much of the workings of its government.

According to Mintz' article, a graduate student complained to his Senator (Lee Metcalf of Montana): "At the National Archives I was advised that I could not use anything that was stamped 'Bureau of Investigation.'" The student, who is working on a Ph.D. thesis in history, stated he was interested in information covering the first decade of the twentieth century and that he felt "ridiculous even suggesting that the nation's security could be threatened by information seventy years past,

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but apparently somebody does." The files to which this man sought access concerned *pollution* in the United States in the early 1900's.

Mintz also reported the hopeful side of government information. In a court case where the Department of Labor cited the Freedom of Information Act as authorization to keep secret certain information about job safety inspections and violations, a Federal District Judge ruled that the Secretary must provide the information to the public. In a similar case, the Agriculture Department was routinely preventing public access to records it kept on meat and poultry products which it suspected of being adulterated or unwholesome. It cited the Freedom of Information Act as exempting the material from public disclosure as an "investigatory file." Both the Federal District Court and the Court of Appeals ruled against the Department and for public disclosure.

These are two important examples in which the 1967 law has been effective in freeing access to information to the public which was withheld by the government before Congress gave individual citizens the right to challenge Federal agency secrecy in the courts.

There are other examples, however, which point up serious deficiencies in the Freedom of Information Act. The Food and Drug Administration has frequently refused to make available transcripts or other public access: to proceedings where firms are told to show cause why they should not be prosecuted for Food and Drug Act violations. Several Federal Advisory Committees and Advisory Councils have also sought to keep their deliberations and meetings closeted from public view.

The law also has flaws in the other direction. Some of the exemptions from disclosure provided for in the Act are too narrow and too ambiguous, in addition to those which are too broad. One well-known example is the inadequate protection in the law for legitimate individual rights of privacy.

Last year, I learned from a constituent who was required to register with the Treasury Department as a gun collector under the Gun Control Act of 1968, that his name, and 140,000 other names of gun collectors and dealers were being sold indiscriminately. The computerized mailing lists, sold by the Treasury, were being used by commercial firms seeking to sell firearms to persons on the list, to political candidates seeking support for their legislative stands against gun control, and to anyone else who could produce \$140.00, or one tenth of a cent per name, to buy the list. I surveyed over 50 Federal agencies to learn what policy they fol-

lowed under the Freedom of Information Act where mailing lists were concerned.

The results were astounding. Some said the Act forced them to make all mailing lists available to everyone; others cited provisions of the same law which they interpreted as prohibiting the distribution of any mailing lists; others had no policy at all. As a result of my survey and the confusion over construction of the Act, I introduced a bill, H.R. 8903, to protect individual privacy from indiscriminate use and sale of Federal mailing lists. There are over 65 cosponsors of my bill, which has been referred to the Foreign Operations and Government Information Subcommittee, on which I serve. The chairman of the Subcommittee has assured me thorough hearings will be held. Hopefully, this aspect of the Act can be clarified and individual rights of privacy protected.

Congress, because it is the national legislature, is not subject to the Freedom of Information Act. No federal agency may cite the provisions of the act as justification for withholding any information from Congress. It is important that Congress have completely free access to federally-held information, except for that which is withheld under a carefully defined and applied doctrine of Executive Privilege.

Recently, an attempt, was made on the floor of Congress to distort this Congressional exemption from the act, and to, by reference, extend this exemption to a new Consumer Protection Agency, which would be created under a bill which has been passed by the House of Representatives. Congressman Chet Holifield, Chairman of the House Committee on Government Operations, and I handled the Consumer Protection Act, H.R. 10835, on the House floor. Both the Chairman and I opposed an amendment which would have permitted the new agency to probe into the files of other federal agencies containing information covered by the Freedom of Information Act. The amendment, known as the Moorhead amendment, sought to accomplish this by directing the new agency to conduct these investigations for the purpose of reporting the results to the Congress. Since the information would not be classified, by including it in a report to Congress, it would, therefore, become a part of a public document. By this vote, legitimate trade secrets and other information protected under the Act would be made public. The amendment was soundly defeated 160 to 218, but it serves as an illustration of the need to protect the concept of the Freedom of Information Act both from the public, and those who seek to eliminate any and all informational con-



trols, even those which protect security information, individual privacy, trade-secrets of private industry and the like.

#### AMENDMENTS NEEDED NOW

There is clearly a need to take a fresh look at the Freedom of Information Act, and to comb through its detailed provisions in light of four years of experience with this new law.

The Freedom of Information Act is a major attempt by Congress to create an enforceable right for the public to see the records of government agencies. It is an important step towards this goal, but experience under the Act has shown that the present language falls short of fully attaining public access to government information.

The basic approach of the Act is very sound. It makes all records presumptively available for public inspection, with the Federal agencies bearing the full burden of justifying any withholding of information. This is certainly better than forcing the individual to show some special hardship in order to rebut a statutory presumption of secrecy or non-availability. The Act creates nine specific areas of exception from public disclosure. This is a better way of dealing with the necessity for keeping some information secret than trying to provide for blanket areas where secrecy is justified.

Still, administrative and judicial experience with this law have shown that its nine provisions exempting disclosure of certain kinds of information are in need of significant redrafting and improvement. In order for the Freedom of Information Act to be meaningful, any exemptions must be very sharply drawn. The current nine exemptions are an improvement over the two which were provided in the law before 1967, but they are still too vague to guarantee any real "right to know."

For example, the Act uses general terms like "confidential" and makes no attempt to define them. It contains two provisions for protecting privacy without pointing out any relationship between the two. The exemption covering "trade secrets and financial information" is poorly written and can be interpreted far too broadly. The last two exemptions in the present law seem somewhat superfluous, since their subject matter is covered under other exemptions.

Of course, some ambiguity in any new statute is understandable, and it is probable that four years ago, many of the problems that have developed under this law were not foreseeable. Now, however, the problems have been sharply focused over four years of experience.

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The vagueness of parts of the statute has enabled many agencies to issue regulations permitting secrecy which take full advantage of a number of serious loopholes. While there is frequently some justification in the history of the law to support these strained interpretations, some of these agency regulations clearly go against the spirit of the law—the presumption in favor of public disclosure and against secrecy in government.

It is true that some agency regulations providing for the withholding of information cite the wrong exemption under the Freedom of Information Act, and that at least some of the information could rightly be withheld under one of the other exemptions—but some agencies use this technique to insure nondisclosure by placing their records under as many of the nine exemptions as possible.

I certainly will support efforts to redraft parts of the bill, to tighten up the language of its nine exemptions to bring them closer to the realities of disclosure and secrecy which four years of experience under the present law have opposed.

I also will work to provide more meaningful protection of legitimate individual privacy under the law, at the same time that we seek to breathe new life and new meaning into its protection of the public's "right to know."

*THE NEWS MEDIA*

No matter how successful we are at eliminating needless government secrecy and untrue or misleading official pronouncements, the public must, in the final analysis, depend upon the vast news media as the only source of all information about what is happening both in and out of government.

Any discussion of the quality or reliability of the news media, including newspapers, magazines, radio, television and other news sources, must begin with the very strongest endorsement of the Constitutional guarantee of freedom of the press. It is often tempting and justifiable to criticize those who report and comment on the news.

Charges of inaccurate and biased reporting are rampant, and, considering the vast number of pages of newsprint and hours of broadcast news that are presented to the American public each day, these charges are inevitable. It would be highly dangerous, however, to suggest that the way to improve news reporting in America is to subject the media to public or government regulation.

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I would dismiss any and all suggestions that the Federal government seek to improve news accuracy or eliminate the bias of certain media by placing them under regulatory rules and policies. Any such regulation probably would be a violation of the First Amendment in any event.

Once the necessity of preserving a free press is established, however, it must be emphasized that in any democratic society, it is crucial that the media be both free and *responsible*. Earlier this year, a Committee of Congress cited the CBS television network for contempt of Congress for its refusal to produce edited films and interviews used in preparation of the controversial documentary, "Selling of the Pentagon."

It is charged that the network, or at least those responsible for this production, had deliberately failed to report facts which would have cast legitimate doubt about the conclusions reached in the broadcast. Similar charges of inaccurate and incomplete reporting were raised against another documentary about the slaughtering of polar bears and other arctic mammals.

I voted against citing CBS for contempt of Congress, because I thought it would set a dangerous precedent of government reprisals against the free press.

Newspapers and magazines and other printed media are, of course, subject to no federal regulation, other than taxes, labor standards, postage rates and other federal laws which do not affect the content or policies of these publications. The broadcast media, while it is subject to licensing by the Federal Communications Commission for use of the airways, which are in the public domain, is not subject to censorship or other regulation which would place news broadcasts and editorials under any federal control. Because the media in this country should never be made subject to censorship or strict regulation of the content of presentation, it is vitally important that the media accept the responsibility which accompanies freedom of expression.

The news media have a tremendous and immediate impact on public opinion in America. This gives newspapers and radio and television stations and networks a major say in the decisions and operations of government. If their power is responsibly exercised, it can provide a very necessary and beneficial safeguard for the people of this democracy. If the facts which they present to the American people are accurate and complete, and fairly presented, the result will be a well-informed public—a public which is well-equipped to make the right choices, and to form intelligent opinions about government decisions and government leaders.

If, on the other hand, the media use this tremendous power over public opinion in an irresponsible way, the results can be disastrous. If news representations are incomplete or inaccurate, or if they are continually presented in a way that is clearly biased and opinionated, the public will not only be poorly informed, it will be misinformed. A misinformed public, or a public which is needlessly aroused by misinformation is alien to the principles of democratic government—where the judgment of the people must be the final reservoir of political power. If that judgment is poor judgment based on misinformation, the democracy will flounder.

A simple example, stated from the standpoint of a member of Congress, may be useful to illustrate this point. Often, the television networks present documentaries on troubling public problems. Immediately after a television or magazine exposé on a major problem like hunger, the military, inhumane treatment of animals or other emotionally-charged subjects, a Congressman's mailbox is filled with constituents' letters and telegrams, inquiring about the need for federal actions or legislation to correct the problem. This is the way a representative democracy should work. But if the media program or article contained inaccurate or slanted information, and if it confused opinion with fact, either inadvertently or deliberately, there is virtually no way to repair the damage of misinformation. It is impossible for government or anyone else to compete with the media in terms of getting facts across to the public. Of course, it should not be necessary to compete with the media, if they do their job as responsible and reliable sources of information on all subjects.

In order for the media to accept this serious responsibility, it must police itself. It must set internal policies to assure that every possible effort is made to present the truth—the whole truth—to the American public. It must, where necessary, bend over backwards to assure that the listening, viewing and reading public can distinguish between reported facts about current events and the personal opinions of reporters and broadcasters.

Some Congressmen have offered a bill to require that broadcast media clearly label those portions of news programs and documentaries which are really commentary or fiction, so they can be more easily separated from actual facts.

My inclination is to oppose doing this by federal legislation, but I would strongly favor greater attention by media organizations to assure that all news presentations are responsible, accurate, fair and full reports to the public about the events of our complex world.

CONCLUSION

Our founding fathers recognized the need for a free and uncensored press, a press free to communicate and comment on the affairs of government. They incorporated this principle into the First Amendment when they wrote, "Congress shall make no law abridging freedom of press . . ."

It is imperative that government, the press and the public work to uphold this Amendment and to maintain the free flow of information, for this is the very foundation of our democratic form of government.

The criticisms I have offered here of Executive Order 10501, which governs official secrecy, of the currently applied doctrine of Executive Privilege, of the Freedom of Information Act of 1966, and of media reporting, are offered in this spirit. Support from the legal community for the proposals I have made for improving all of these aspects of the flow of information to the people, would contribute greatly to the stimulation of public concern of these issues—concern which must be evident before Congress, the Executive and the media will take the necessary steps to insure and protect the public's right to know.