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Comments on Proposed Amendments To Section 3 Of The Administrative Procedure Act: The Freedom of Information Bill

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

—James Madison, letter to W. T. Barry, August 4, 1822.

I. Introduction

One of the indispensable ingredients of a successful representative government is an informed electorate. Our form of government proceeds upon the assumption that the individual has a right to select his representatives and to know what they are doing while in office. A necessary corollary to the individual's right to participate in governmental affairs is the public's right to know what its government is doing. Without such information, it cannot make intelligent selections on election day, nor can it be assured that government is acting within its proper sphere. However, there are certain types of information which, if publicly disclosed, would make it difficult, if not impossible, for government to function efficiently and successfully. In such situations, the right of the individual to have access to information concerning governmental activities may conflict with the right of governmental officials to function without unnecessary and improper interference from the public.

This problem with the conflicts it engenders becomes increasingly complex as government expands and diversifies. Today we have reached the point where there are hundreds of departments, agencies, and branches in our government which are not directly responsible to the people. In such a setting, the public's demand for access to information concerning government operations has been greatly accelerated. At the same time, as the government moves into new fields, it has encountered additional areas in which it legitimately feels public disclosure would be injurious to the continued success and efficiency of the operation involved.

The first attempt to cope with this problem and to guarantee the public's access to information came in 1946 with passage of the Administrative Procedure Act[1] which is still in effect. Section 3 of the Act,[2] which deals with the public's right

1 60 Stat. 237, 5 U.S.C. § 1001-11 (1958).

2 60 Stat. 238, 5 U.S.C. § 1002(a)-(c) (1958). Section 3 reads as follows:

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

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and Orders.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for

to information, applies with equal force to all governmental agencies, regardless of their function or purpose.[3] Its aim was "to assist the public in dealing with administrative agencies by requiring agencies to make their administrative materials available in precise and current form."[4] However, after the Act took effect, it became readily apparent that section 3 was too narrow in its requirements and that agencies could and would successfully evade compliance with its provisions.[5] As a result, beginning in 1955, a series of bills have been introduced in Congress purporting to give section 3 added scope and effectiveness.[6] Until 1963, none of these bills had received serious consideration in either house of Congress.

In 1963, the movement to amend section 3 began in earnest. On June 4, 1963, two bills were introduced in the Senate. The first of these was Senate Bill 1663[7] which, if passed, would have replaced the entire Administrative Procedure Act. The second, Senate Bill 1666,[8] was identical to section 3 of S. 1663, and aimed at amending only section 3 of the Administrative Procedure Act. Senator Long of Missouri, when introducing S. 1666, pointed out that the reason for simultaneously introducing two bills which would amend section 3 was that it was in "urgent need of revision."[9] It was hoped that even if the complete revision of the Administrative Procedure Act could not be achieved immediately, at least section 3 could be revised by quick passage of S. 1666.

In October of 1963, the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary conducted hearings on S. 1666 and section 3 of S. 1663.[10] The Judiciary Committee Report concluded that section 3

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good cause to be held confidential and not cited as precedents) and all rules.

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

3 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 17 (1947).

4 *Ibid.*

5 See Newman, *Government and Ignorance — A Progress Report on Publications of Federal Regulations,* 63 HARV. L. REV. 929 (1950).

6 S. 2504, 84th Cong., 1st Sess. (1955) introduced by Senator Wiley; S. 2541, 84th Cong., 1st Sess. (1955) introduced by Senator McCarthy; S. 2148, 85th Cong., 1st Sess. (1957) introduced by Senator Hennings; S. 4094, 85th Cong., 2d Sess. (1958) introduced by Senators Ervin and Butler; S. 186, 86th Cong., 1st Sess. (1959) introduced by Senator Hennings (this bill was actually S. 4094, *supra*); S. 1070, 86th Cong., 1st Sess. (1959) introduced by Senators Ervin and Butler; S. 2780, 86th Cong., 2d Sess. (1960) introduced by Senator Hennings (a revised version of S. 186, *supra*); S. 1887, 87th Cong., 1st Sess. (1961) introduced by Senator Ervin; H.R. 9926, 87th Cong., 1st Sess. (1961), a companion bill to that introduced by Senator Ervin; S. 1567, 87th Cong., 1st Sess. (1961) introduced by Senators Hart, Long, and Proxmire; S. 1907, 87th Cong., 1st Sess. (1961) introduced by Senator Proxmire; and S. 3410, 87th Cong., 2d Sess. (1962) introduced by Senators Dirksen and Carroll. Although hearings were conducted on the bills introduced by Senator Hennings, no legislation resulted from any of these proposed amendments. It should be noted that the federal "housekeeping" statute, which provides that the head of each department may prescribe regulations not inconsistent with law for governing his department, was successfully amended in 1958. The amendment provided that the statute does not authorize withholding information or records from the public. 72 Stat. 547, 5 U. S. C. § 22 (1958).

7 S. 1663, 88th Cong., 1st Sess. (1963) introduced by Senators Dirksen and Long [hereinafter cited as Senate Bill 1663].

8 S. 1666, 88th Cong., 1st Sess. (1963) introduced by Senator Long and co-sponsored by Senators Bartlett, Bayh, Boggs, Case, Dirksen, Ervin, Fong, Gruening, Hart, Keating, Kefauver, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, Symington, and Walthers [hereinafter cited as Senate Bill 1666]. It should be noted that Senator Ervin also introduced the proposed bill of the American Bar Association in this session: S. 2335, 88th Cong., 1st Sess. (1963). This bill received only informal treatment by the subcommittee during the hearings but was again introduced in the 89th Congress. S. 1336, 89th Cong., 1st Sess. (1965).

9 109 CONG. REC. 9958 (1963) (remarks of Senator Long).

10 *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 88th Cong., 1st Sess. (1963) [hereinafter cited as *1963 Hearings*].

of the Administrative Procedure Act was unsatisfactory. The Report stated that deficiencies fell into four categories:

> (1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest. . . ." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of interpretations of this phrase by Federal officials who wish to withhold information.
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> (2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it negates this command by adding the following limitation: ". . . except those required for good cause to be held confidential. . . ."
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> (3) As to the public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."
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> (4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.[11]

The Judiciary Committee Report concluded that "the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Precisely the opposite has been true: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose."[12]

To remedy these weaknesses, S. 1666 proposed to convert section 3 of the Administrative Procedure Act into an effective disclosure statute through the following major changes:

> (1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld. It also provides a different set of standards in the three different subsections that deal with different types of information.
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> (2) It eliminates the test of *who* shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain right to privacy and a need for confidentiality in some aspects of Government operations and these are protected as specifically as possible; but outside these limited areas, all citizens have a right to know.
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> (3) The revised section 3 gives to any aggrieved citizen a remedy in court.[13]

Following the 1963 hearings, several revisions were made in S. 1666. After additional hearings were conducted in July of 1964, the bill underwent further modification.[14] This revised version of S. 1666 then passed the Senate on July 31, 1964[15] but no action was taken on it by the House before adjournment.

On February 17, 1965, S. 1160,[16] a further modified form of S. 1666, was re-introduced in both houses of Congress.[17] It is expected that this bill will receive early consideration in this session of the 89th Congress.[18]

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11 S. Rep. No. 1219, 88th Cong., 2d Sess. 10 (1964) [hereinafter cited as *Judiciary Committee Report*].

12 *Ibid.*

13 *Id.* at 11.

14 *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 88th Cong., 2d Sess. (1964) [hereinafter cited as *1964 Hearings*].

15 See 110 CONG. REC. 17080 (daily ed. July 31, 1964).

16 S. 1160, 89th Cong., 1st Sess. (1965) introduced by Senator Long and co-sponsored by Senators Bartlett, Bayh, Boggs, Case, Dirksen, Ervin, Fong, Hart, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, and Symington [hereinafter cited as Senate Bill 1160].

17 The companion bill to Senate Bill 1160 is H.R. 5012, 89th Cong., 1st Sess. (1965) introduced by Rep. Moss.

18 See remarks of Senator Long, 111 CONG. REC. 2719 (daily ed. Feb. 17, 1965). In in-

The purpose of this paper is to trace the development of S. 1160 to its present form, to contrast and evaluate its requirements with those found in the present section 3 of the Administrative Procedure Act, and to suggest changes aimed at strengthening its provisions. In so doing, we recognize that:

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[19]

II. Section (a): Publication in the Federal Register

The present subsection 3(a) of the Administrative Procedure Act reads as follows:

> Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency —
>
> (a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organizations including all delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.[20]

This subsection, dealing solely with publication in the Federal Register, is intended to inform the public of the general organization and procedure of the federal administrative and investigative agencies. In general, compliance with its requirements has been satisfactory.[21] In fact, those complaining about this subsection often allege that too much is being published rather than too little.[22] Therefore, it will be less affected by the proposed revisions than those subsections which have been frequently violated by the agencies. The subsection has been revised and re-worded primarily to more specifically define and clarify what is required to be published in the Federal Register.

Section (a) of S. 1160 reads as follows:

> (a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and the instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or

troducing the bill, he commented: "This measure successfully passed the Senate without a dissenting vote during the last Congress on July 31, 1964. Both houses are expected to begin early consideration of this important legislation during this session."

19 *Judiciary Committee Report* 8.

20 60 Stat. 238, 5 U.S.C. § 1002(a) (1958).

21 See remarks of Senator Dirksen, 109 CONG. REC. 9957 (1963). In introducing Senate Bill 1663, he stated: "So far as the subcommittee has been informed there are relatively few complaints about information not being published in the Federal Register if the present law requires it." See generally 1 DAVIS, ADMINISTRATIVE LAW § 6.09, at 391 (1958).

22 *Judiciary Committee Report* 11.

> interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.[23]

In the amended version of S. 1666 passed by the Senate in July of 1964, section (a) contained two exemptions. The first of these concerned matters requiring secrecy. In the Administrative Procedure Act, this exemption extended to *any function of the United States requiring secrecy in the public interest.* The inherent weaknesses of this phrasing are enumerated in the Judiciary Committee's Report:

> The phrase "public interest" in section 3(a) of the Administrative Procedure Act (and in S. 1666 as it was introduced) has been subject to conflicting interpretations, ofted colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended — the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion.[24]

Accordingly, this exemption was reworded after the 1964 hearings to read: *any function of the United States requiring secrecy for the protection of national security.* The committee stated the change was intended "both to delimit more narrowly the exception and to give it a more precise definition."[25] Admittedly, the words *national security* would have clearly limited the scope of the exemption. However, as pointed out in the hearings, *national security* can also become a vague and confusing standard.[26] An administrator could conceivably interpret *national security* so as to frustrate the purpose of this exemption as he has done with *in the public interest.* Consequently, in S. 1160, the exemption has now been further narrowed to extend to matters *specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.*[27]

The second exemption to the Federal Register requirement in S. 1666 extends to *any matter relating solely to the internal management of an agency.*[28] No changes have been made in this exemption as it has not been the source of much difficulty or litigation. However, S. 1160 has limited its scope by restricting coverage to only those matters *related solely to the personnel rules and practices of any agency.*[29]

In general, the agencies had little objection to the exemptions as they related to the Federal Register publication requirements of section (a). Perhaps the strongest dissenting voice in the hearings was that of Professor Davis of the University of Chicago Law School. He feels the test for excluding matters from Federal

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23 Senate Bill 1160(a).

24 *Judiciary Committee Report* 3.

25 *Ibid.*

26 See Detailed Analysis of S. 1663 and the Subcommittee Revision Thereof and Comments of the U.S. Department of Agriculture Regarding the Impact of the Proposed Revisions of the Administrative Procedure Act Contained Therein Upon the Programs and Activities of the Department, [*1964 Hearings* 140, 143 hereinafter cited as Department of Agriculture Report]; statement of Milton M. Carrow, *Attorney,* representing the American Civil Liberties Union, *1964 Hearings* 75, 79. The A.C.L.U. proposed that the exception be changed to read, "any matter specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy."

27 For a full discussion of this phrasing, see Section III, *infra,* dealing with section (b) of S. 1160.

28 Although S. 1160 has placed all exemptions in section (e), it does not seem likely that any of the other exemptions found therein will be applicable to section (a) Federal Register requirements.

29 For a full discussion of the scope of this exemption, see Section III, *infra,* dealing with section (b) of S. 1160.

Register publication should be based on whether or not private parties are affected, regardless of whether the matters deal with national security or internal agency matters.[30] The problem with this approach is that it overlooks the legitimate necessity for exemptions in these areas based on the nature of the material regardless of whether or not private parties are affected. Accordingly, this suggestion was not implemented by the committee.

The Administrative Procedure Act requires the agencies to publish descriptions of their central and field organizations, *including delegations by the agency of final authority.* S. 1666, as introduced, retained this requirement, but deleted the qualifying adjective *final* from the sentence. This deletion brought a wave of protest from the agencies. The committee stated the reason for the deletion was that "very little *final* authority is normally delegated," and "there have been very few publications by agencies of delegations of authority."[31] The deletion sought to alleviate this weakness in the present Act. However, the agencies protested, pointing out that they were left with no guideline as to what delegations of authority had to be published, concluding that *all* such delegations might now have to be included in the Federal Register.[32] They predicted this would substantially increase the quantity and cost of Federal Register publication. The Interstate Commerce Commission, for example, commented: "Every civil servant down to the lowest grade, has a job sheet in which his duties are defined and his 'authority' set out at length. Bearing in mind the thousands upon thousands of civil servants, a printing of their aggregate 'authorities' could run into a huge, unmanageable mass the cost of which could assume formidable proportions."[33] The Judiciary Committee recognized the validity of these criticisms by deleting the entire sentence. Their explanation was:

> [A]s has been pointed out in agency comments to the committee, inclusion in the Federal Register of *all* delegations would result in the publication of a mass of unwarranted and unwanted material in the Register assuming that agencies could and would comply with the requirements. Therefore, it is believed that it would be preferable to return to the original Senate version of the Administrative Procedure Act which did not contain a specific provision with respect to delegations. It is believed that proper descriptions of central and field organizations should include a description of those delegations of authority which are of interest to the public.[34]

Evidently, the agencies will have only an implied duty to publish such delegations of authority under S. 1160.

Both the 1946 Act, and S. 1160 as introduced, require the agencies to publish in the Federal Register, *interpretations formulated and adopted by the agency.* In the 1946 Act, this requirement was limited by the phrase, *for the guidance of the public* which has been replaced in S. 1160 by the phrase *of general applicability.* The committee stated that this change was made because:

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30 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 245. Professor Davis stated:

> The exceptions at the beginning of this subsection are a misfit; the test for publication of organization, procedure, and substantive rules should not relate to national security or internal management. The test should be whether private parties are affected. This is especially clear with respect to substantive rules.

31 *Judiciary Committee Report* 4.

32 See Department of Agriculture Report, *1964 Hearings* 140, 143; Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 94; Department of Health, Education and Welfare comments on revisions in Senate Bill 1663, *1964 Hearings* 320, 321; Letter from Nicholas Katzenbach, *Deputy Attorney General,* U.S. Dept. of Justice, to Hon. James O. Eastland, Mar. 3, 1964, *1964 Hearings* 352, 359; Statement of Paul R. Dixon, *Chairman,* Federal Trade Commission, *1963 Hearings* 161, 163.

33 Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 94.

34 *Judiciary Committee Report* 4.

> In section 2 of the Administrative Procedure Act, rules are defined in such a way that there is no distinction between those of particular applicability (such as rates) and those of general applicability. It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability or legion in number have no place in the Federal Register and are presently excepted but by more cumbersome language.[35]

This should eliminate the objection raised in the hearings by various agencies[36] and by Professor Davis[37] that the requirement was far too broad and would result in publication of much unnecessary material.

The addition of the language, *of general applicability,* to modify *rules* in S. 1160 should also satisfy another major agency objection to this section. The agencies noted that S. 1666, as introduced, deleted from the present section 3 of the Administrative Procedure Act the exemption from required publication in the Federal Register of *rules addressed to and served upon named persons in accordance with law.* Such a deletion, in light of the 1946 Act's definition of *rule,*[38] would require publication of an enormous mass of particularized rules despite the fact that in such situations the persons involved are aware of them and no apparent purpose would be served by their publication. If this section were passed as part of S. 1663, rather than by itself, this problem would be nonexistent since S. 1663 changed the definition of *rule* so as to exempt particularized rules and placed them in the category of orders.[39] Addition of the words, *of general applicability,* in S. 1160 should satisfy agency objections[40] and calm their fears that particularized rules will have to be published if S. 1160 is separately passed without the benefit of S. 1663's definition of *rule.*

The most controversial provision of section (a) of S. 1160 states: *Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by*

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35 *Ibid.*

36 See Letter from Laurence K. Walrath to Senator Eastland, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 95; Letter from Robert T. Murphy, *Vice Chairman,* Civil Aeronautics Board, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 299, 300; Comments by Office of the Comptroller of the Currency on Certain Changes in the Administrative Procedure Act Contained in S. 1663, *1964 Hearings* 189, 190.

37 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 245-46.

38 The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001(c) (1958) defines "rule" as:

> [T]he whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

39 S. 1663 defines "rule" as:

> [T]he whole or any part of any agency statement *of general applicability and future effect* designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes rules or principles *of general applicability* to govern the approval or prescription for the future of specific rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. [Emphasis added.]

40 See Letter from Laurence K. Walrath to Senator Eastland, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 94-95; Letter from Robert T. Murphy, *Vice Chairman,* Civil Aeronautics Board, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 299, 300; Letter from John T. McNaughton, *General Counsel of the Department of Defense,* to Hon. James O. Eastland, Oct. 4, 1963, *1964 Hearings* 317, 318.

any matter required to be published in the Federal Register and not so published.[41] This enlarges and clarifies the present sanction provision of the Administrative Procedure Act which merely states: *No person shall in any manner be required to resort to organization or procedure not so published.* This modified provision was included by the committee for several reasons. "The old sanction was inadequate and unclear. The new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights. This gives added incentive to the agencies to publish the required material."[42]

This added scope given the sanction provision of section (a) evoked strong protest from the agencies. The Interstate Commerce Commission complained that it would inject "unnecessary and undesirable" rigidity into the Act and that the validity of a duly served report or order ought not "depend upon a subsequent publication in the Federal Register."[43] The Federal Aviation Agency predicted the revised provision would force the agencies to publish every document about which there could be the slightest doubt as to whether it came within the requirements of section (a). This, of course, would result in an increase in the quantity and expense of Federal Register publication.[44] The Department of Justice predicted the sanction would subject agencies to "frivolous claims" by persons resisting agency action which was only tangentially related to unpublished documents.[45] The Office of the Comptroller General added that this would open the door to "collateral attacks on agency action based on minute variations from published procedures."[46] Their point was illustrated by the following examples:

> Thus if a published procedure stated that an application should go through officials A, B, and C before final decision is rendered by official D, and through inadvertence or other reason, the application only went through A, B, and D, a disappointed party could argue that he was not bound by the decision even though no substantive provision of statute or Constitution required that the application be seen by anyone but official D who has the full responsibility and discretion to decide the case. The punishment thus hardly fits the crime in the case of violations of new section 3(a).[47]

Another difficulty with the sanction provision lies in the meaning of the phrase *adversely affected.* This raises a question of the degree to which a person must be *affected* to come within the reach of the provision. For example, the Department of Agriculture queried: "Might a member of the public, with no more interest than that of a consumer, be 'adversely affected' by an interpretation of this Department's food additive regulations? If so, is it intended that such a person would have standing to seek nullification of such an interpretation in the courts?"[48]

Admittedly, the sanction imposed is bitter medicine for the agencies to swallow. In a situation where the omission is actually due to inadvertence or pure clerical error or oversight, it would seem a harsh penalty to impose on the agency involved, if all other steps in the proceedings are proper. On the other hand, there must be some effective sanction imposed on the agencies for failure to comply with section (a) or they will continue to evade its requirements as they have done

41 Senate Bill 1160(a).
42 *Judiciary Committee Report* 12.
43 Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 95.
44 Letter from N.E. Halaby, *Administrator,* Federal Aviation Agency, to Hon. James O. Eastland, Dec. 7, 1963, *1964 Hearings* 414, 415.
45 Letter from Nicholas Katzenbach, *Deputy Attorney General,* U.S. Dept. of Justice, to Hon. James O. Eastland, Mar. 3, 1964, *1964 Hearings* 352, 359.
46 Comments by Office of the Comptroller of the Currency on Certain Changes in the Administrative Procedure Act Contained in S. 1663, *1964 Hearings* 189, 190-91.
47 *Ibid.*
48 Department of Health, Education and Welfare Staff Memorandum on S. 1663 as Revised by the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, *1964 Hearings* 498, 499.

under the present act. The sanction provision seeks to balance the need to make the section effective with the right of the agencies to operate without undue interference. And, even though the scales seemed tipped against the agencies, this sanction seems to be the only efficacious method of insuring that Federal Register requirements are satisfied. Undoubtedly, the provision will spawn litigation and it will be up to the courts to insure that application of the sanction provision does not get out of hand. Perhaps some workable distinction could be made between trivial and substantial omissions or deviations. In the last analysis, the courts will have to determine the efficacy of invoking the sanction in light of the inherent fairness to all parties involved in a particular case as they have been inclined to do with the present sanction provision.[49] This would seem to be the most reasonable solution.

The phrase in S. 1160, *except to the extent that a person has actual and timely notice of the terms thereof,* should clear up an interesting problem which has arisen regarding the sanction provision of the present act, *i.e.,* whether a person having actual notice of an unpublished regulation required to be published in the Federal Register may be guilty of violating that regulation.[50] The United States Supreme Court has held that publication in the Federal Register constitutes constructive notice to all persons who may be thereby affected.[51] However, the situation becomes more complex when a person has actual notice of an unpublished regulation and tries to take advantage of this lack of publication as a defense when charged with its violation. Although one circuit has adopted a contrary rule,[52] the majority feeling on this issue is that failure to file or publish as required by the present subsection 3(a) of the Administrative Procedure Act is without consequence as against a person having actual knowledge of the regulation.[53] It would seem this provision of S. 1160 accepts and codifies the present majority thinking on this point. What constitutes "actual notice" will have to be decided in view of the facts of each individual case.

The last sentence of section (a) of S. 1160 provides: *For the purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.* The authorization of publication by reference in the Federal Register is aimed at reducing the present bulky size of the Register.[54] This wording has been changed

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49 See United States v. Reid, 110 F. Supp. 253, 257 (D. Md. 1953). In this case an I.C.C. order required drivers to prepare their "logs" in a certain form. Defendant sought to evade liability for noncompliance with the order on the grounds that the order had been published in compliance with Section 3(a), but a specimen copy of the form had not been so published. The court dismissed the noncompliance argument saying: "It seems a quite too meticulous technicality. . . ."

50 See generally, 1 DAVIS, ADMINISTRATIVE LAW § 6.10 (1958).

51 See Fed. Crop Ins. Corp. v. Merril, 332 U.S. 380 (1947). Justice Jackson in dissent stated:

> To my mind it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. 332 U.S. at 387.

Subsequent cases following this decision include: United States v. Comstock Extension Mining Co., 214 F.2d 400 (9th Cir. 1954); and Benolken v. United States, 99 F. Supp. 723 (D. Neb. 1951).

52 See Hotch v. United States, 212 F.2d 280 (9th Cir. 1954).

53 See United States v. Aarons, 310 F.2d 341 (2d Cir. 1962); Owensboro on the Air v. United States, 262 F.2d 702 (D.C. Cir.), *cert. denied,* 360 U.S. 911 (1959); Florida Citrus Comm'n v. United States, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd,* 352 U.S. 1021 (1957).

54 *Judiciary Committee Report* 11.

from that found in the revised form of S. 1666[55] which was criticized by the American Bar Association on the grounds that: "If incorporation by reference should be permitted at all, certainly there should be some clear statutory definition or some outside control of how and where this may be done."[56] The revision should satisfy their criticism.

Section (a) of S. 1160 is a carefully re-worded clarification of the present subsection 3(a) of the Administrative Procedure Act. If the agencies comply with its requirements, the public should be adequately informed of the general organization and procedure of the various federal agencies. The Senate Judiciary Committee has wisely adopted several helpful suggestions made in the hearings and has produced a commendable final version of the Federal Register publication requirements. It is submitted that this section of S. 1160 should be adopted in its present form.

III. Section (b): The Agency Index and Availability Requirement

The present section 3(b) of the Administrative Procedure Act reads as follows: *Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.*[57]

Although this section requires agencies to make available for inspection all final orders or opinions in the adjudication of cases, the requirement was effectively nullified by adding the limitation, *except those required for good cause to be held confidential.* Manifestly, such a vague criterion is particularly susceptible to abuse and unwarranted application. It requires very little ingenuity for an agency official to invent some *good cause* for withholding information. Since the section contains no sanction for an unjustified refusal to disclose, the citizen met with such a refusal has no remedy at his command to compel the agency to make such information available to him.

Consequently, this section has been replaced by a detailed specification of those orders and opinions which must be made available to the public. Section (b) of S. 1160 reads as follows:

> (b) AGENCY OPINIONS AND ORDERS.—Every Agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided,* That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed

55 This provision of S. 1666, as revised, stated: "Except to the extent that he has actual notice of the terms thereof, no person shall in any manner be required to resort to, or be bound or adversely affected by any matter required to be published in the Federal Register and not published therein or in a publication incorporated by reference in the Federal Register."

56 Statement of Robert M. Benjamin, *Chairman,* American Bar Association's Special Committee on Code of Administrative Procedure, *1964 Hearings* 57, 59.

57 60 Stat. 238, 5 U.S.C. § 1002(b) (1958).

> and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.[58]

In the original version of S. 1666, this section contained three exemptions to its availability and indexing requirements. The first of these extended to matter *specifically exempted from disclosure by statute.*[59] The second exemption included matter which *involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order.* This exemption was reworded in the final version of S. 1666, which passed the Senate, to read: *is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy.* For material to fall within this exemption, two requirements must be met. First, the subject matter must be such that its secrecy is required to protect national defense or foreign policy. Second, there must be an express determination by the President, in the form of an executive order, that there is such a need for secrecy to protect national defense or foreign policy. Thus, responsibility for determining whether or not given material falls within this exemption lies with the President, not with the agency involved as it does under the present act.

The provision requiring an executive order from the President as a condition precedent to nondisclosure of materials by an agency on the grounds that the documents require secrecy for the protection of *national defense or foreign policy* imposes an unnecessary burden on the President and should be deleted from the bill. As Professors Frankel and Gellhorn of Columbia University Law School pointed out:

> This forces Presidential attention to essentially petty problems of document classification. It suggests a sweeping distrust of governmental officers such as the Secretary of State or the Secretary of Defense and their responsible subordinates. Unless the President were indeed to issue innumerable Executive orders (a task that would assuredly prevent attention to other matters of larger moment), he would probably be forced to formulate an extremely broad definition of what should be kept secret; and thus the purpose of this subsection might remain unfulfilled.[60]

Unquestionably, such a requirement will place an unjustified and time-consuming burden upon the President and his staff.[61] Deciding whether secrecy is "dictated by the public interest is under the present law made by the agency concerned which is in a better position to make the necessary ad hoc decisions. . . ."[62] To require the Department of State, for example, to send every report from a foreign country to the President for his approval before it could be withheld would be a wasteful and inefficient procedure.

Even were the executive order requirement to be deleted from the bill, this exemption is still open to serious objections. The agency most affected, the Department of State, expressed grave concern in the hearings that the exemption would be too narrow to protect information which must remain confidential for the successful and efficient conduct of foreign affairs. The Department feels that there are many matters which do not vitally affect *foreign policy* or *national defense* such as documents discussing our differences with our allies and economic or political reports from our Foreign Service posts which, if disclosed, might embarrass the countries involved and impair our relations with them.[63] Even granting that the State Department is exaggerating the danger, there is much truth in

58 Senate Bill 1160(b).

59 For a full discussion of this exemption, see section VI, *infra.*

60 Comments of Marvin E. Frankel and Walter Gellhorn, Columbia University Law School, on Subcommittee Revision of S. 1663, *1964 Hearings* 677, 678.

61 See Letter from John L. Fitzgerald, *Professor of Law,* Southern Methodist University School of Law, to Senator Edward V. Long, June 29, 1964, *1964 Hearings* 665; Department of Health, Education and Welfare comments on revisions in Senate Bill 1663, *1964 Hearings* 320, 322.

62 Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 385.

63 *Ibid.*

their assertions and they have reason for being concerned. The peculiar problems which this exemption poses for the Department of State, which will not affect other agencies in the same manner, illustrates the inherent difficulties encountered by attempting to draft one all-inclusive bill to cover many and varied agencies.[64]

The third exemption from the availability and indexing requirements of section (b) extends to matter that *relates solely to the internal personnel rules and practices of any agency.* This exception, unlike that found in the original version of section (a) in S. 1666, does not extend to all matters relating solely to internal management of an agency, but includes matters relating *solely* to its *internal personnel rules and practices.*[65] All other internal functions or materials of the agencies will have to be indexed and made available to the public.[66]

S. 1160 has taken these three exemptions found in the final version of S. 1666 which passed the Senate and included them in the new section (e) which also contains five other exemptions applicable to all sections of the bill.[67] However, it would seem that only the three exemptions discussed above will be applicable to section (b).[68] The other exemptions, by their very nature, are primarily aimed at disclosure of agency records under section (c).

Under section (b) of S. 1666, unless materials fell within one of the aforementioned exemptions, the agencies would have been required to:

> [I]n accordance with published rules, make available for public inspection and copying all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, and those rules, statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register. . . .[69]

In addition, each agency would have been required to maintain and have available for the public *a current index providing identifying information for the public as to each final order, opinion, rule, statement of policy, and interpretation of general applicability.*

In S. 1160, the indexing and availability requirements have undergone substantial revision. Under its provisions, the agencies must make available for public inspection and maintain an index of:

> . . . (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale.[70]

The significant change in section (b), wrought by S. 1160, is that it deletes *rules* from its requirements. In other words, under S. 1666, the agencies would have had to make available and index all *orders, opinions and rules,* while under S. 1160 they are only required to index and make available their *orders and opinions.* Undoubtedly, this deletion came in response to the deluge of agency objections to the provisions of section (b) of S. 1666,[71] and is intended to limit the quantum of material which must be indexed and made available to the public.

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64 For further discussion of this exemption, see section VI, *infra.*

65 In the original version of S. 1666, the exemption in section (a) extended to "any matter relating solely to the internal management of an agency."

66 For further discussion of this exemption, see section VI, *infra.*

67 For full text of section (e) of S. 1160, see section VI, *infra.*

68 See Letter from Bernard Fensterwald, Jr., *Chief Counsel for the Senate Committee on the Judiciary,* to Francis M. Gregory, Jr., March 8, 1965, on file in office of the NOTRE DAME LAWYER.

69 Senate Bill 1666(b).

70 Senate Bill 1160(b).

71 See Treasury Department Detailed Statement on S. 1663, As Revised, To Amend the APA, *1964 Hearings* 177A, 177E [hereinafter cited as 1964 Treasury Department Statement]; Department of Health, Education and Welfare comments on revisions in Senate Bill 1663, *1964 Hearings* 320, 322; Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 386.

Consequently, the distinction between *order*[72] and *rule*[73] becomes a matter of paramount importance under S. 1160. An agency *rule* regulates the future conduct of a single person or group of persons. It is essentially legislative in nature because it is primarily concerned with policy considerations and because it regulates future conduct rather than evaluating past actions. The main considerations in formulating a *rule* are not evidentiary facts, but rather the policy-making conclusions which can be drawn from those facts.[74] Conversely, an *order* is normally concerned with determining past and present rights and liabilities. An *order* generally involves a disciplinary proceeding or determination of a person's right to benefits under existing law.[75] In other words, an agency acts legislatively when it passes a *rule,* but its action is judicial in character when issuing an *order.*

The benefit of this deletion to the agencies is more illusory than real. What has been excluded from the requirements of section (b), as found in the version of S. 1666 which passed the Senate, was already required to be published in the Federal Register by section (a) in both S. 1666 and S. 1160. Agency *rules* are of two types: procedural and substantive. And, under section (a) of S. 1160, the agencies are required to publish in the Federal Register both *rules of procedure* and *substantive rules of general applicability.* Hence, the only result of deleting *rules* from the availability and indexing requirements of section (b), is to exclude *rules* which are not *of general applicability.* Since *rules* will generally apply to many persons while an *order* usually applies only to a particular person or persons before the agency at the moment, this deletion exempts nothing which was not already excluded under the version of S. 1666 which passed the Senate.

Under section (b) of S. 1160, the agencies are required to index and make available not only their *final opinions,* but also *concurring and dissenting opinions.* This requirement will eliminate the agency practice of suppressing *concurring and dissenting opinions* in certain situations.[76] The section insures that "if one or more agency members dissent or concur, the public as well as the parties should have access to these views and ideas."[77]

The second type of matter which the agencies must index and make available to the public under section (b) of S. 1160 includes *those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.* S. 1160 has deleted the limiting phrase, *of general applicability,* which modified *statements of policy and interpretations* in S. 1666. Since such *statements* and *interpretations of general applicability* are already required to be published in the Federal Register by section (a) of S. 1160, this deletion merely drops a superfluous phrase and emphasizes the fact that this requirement extends only to those *statements of policy* and *interpretations* which are not *of general applicability.*

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72 The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001(d) (1958) defines "order" as "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rulemaking but including licensing."

73 The Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001(c) (1958) defines "rule" as:

> . . . the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.

74 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947).

75 *Ibid.*

76 See Moss, *Public Information Policies, The APA, And Executive Privilege,* 15 AD. L. REV. 111, 118 (1963).

77 *Judiciary Committee Report* 13.

S. 1160 adds a third type of material which must be indexed and made available that was not specifically required by S. 1666, as passed by the Senate: *staff manuals and instructions to staff that affect any member of the public.* This addition explicitly includes materials which the agencies feared were impliedly required without this specific provision.[78] This new requirement will make available to the public the suggested interpretative guides and suggested procedures set forth in internal agency publications such as the Social Security Administration's Claims Manual and the Bureau of Federal Credit Unions' Examiner's Guide. The agencies concerned claim that if the contents of these publications become common knowledge, it will open the door to manipulation and fraud by persons appearing before them.[79] Nevertheless, the Judiciary Committee has decided such manuals should be published and made public knowledge.[80] Apparently, the committee feels the benefit which will accrue from this requirement outweighs the danger of fraud and manipulation made possible by such disclosure.

The most cogent agency argument against the requirements of section (b) is made by simply pointing out what will have to be indexed and made available to public inspection within the meaning of the term *order.*[81] The hearings abound with examples. The Treasury Department stated that the Internal Revenue Service would be required to index and make available all opinions on deficiency notices, allowances or rejections of claims for abatements, credits or refunds, acceptances or rejections of offers in compromise, executions of closing agreements and schedulings of assessments and overassessments.[82] In addition, the Treasury Department would have to index and make available millions of Customs and Coast Guard determinations.[83] The Department of State would have to index and make available information concerning its activities in educational and cultural exchange programs, the control and shipment of munitions and arms, and a variety of management practices employed by the Department and its Foreign Service, "all of which would involve voluminous and scattered rules, regulations, delegations of authority and descriptions.[84] Among other materials which would have to be indexed and made available are 690,000 applications disposed of by the Immigration Service each year, the nearly four million transmitter licenses granted by the Federal Communications Commission,[85] and the hundreds of thousands of annual rulings made by the Department of Health, Education and Welfare concerning applications for old age and survivor benefits and disability insurance benefits.[86]

The size of the indexes which would have to be compiled by the various agencies would reach outlandish proportions. The Treasury Department, for example, estimated that providing an index for the three million annual orders of the Bureau of Customs alone would result in a book which was at least twenty times the size of the Washington phone directory.[87] In addition, compliance with the requirements would necessitate large agency increases in personnel, facilities and appropriations.[88] The Treasury Department aptly summed up agency ob-

78 Department of Health, Education and Welfare comments on revisions in Senate Bill 1663, *1964 Hearings* 320, 322.
79 *Ibid.*
80 *Judiciary Committee Report* 5.
81 For a general enumeration of the specific types of materials included under the term *order,* see ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE ACT, 15-16 (1947).
82 1964 Treasury Department Statement, *1964 Hearings* 177A, 177E.
83 *Ibid.*
84 Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 386.
85 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 247.
86 Department of Health, Education and Welfare comments on revisions in Senate Bill 1663 *1964 Hearings* 320, 322.
87 1964 Treasury Department Statement, *1964 Hearings* 177A, 177E-F.
88 See Statement of G. d'Andelot Belin, *General Counsel of the Treasury Department,*

jections to the indexing and availability requirements of section (b) by saying: "It is staggering to consider the time, labor and resulting bulk of publications required for indexing all of the Treasury Department's customs, internal revenue, public debt and other administrative decisions."[89]

Exclusion from the indexing and availability requirement of Federal Register publications and other systematic publications *promptly published and copies offered for sale* will cut down on the enormous mass of information the agencies will have to index and make available. Nevertheless, a tremendous amount of material remains and the broad coverage of this section must be restricted if it is to be workable. As Professor Davis concluded: "The requirement of indexing is much too ambitious in its present form and must be cut back drastically. The present excess does no one any good, and cutting back the requirement will do no one any harm."[90] The added agency expense and personnel which this section will require, not to mention the inconvenience it will cause, may outweigh any benefit to the public it will procure. Given the great number of federal agencies, the total cost of complying with section (b) might well be staggering. Apparently the committee has made a policy judgment that the prospective benefit to the public outweighs the additional burden placed upon the taxpayers. After the Act has been in operation for a few years, this determination may well prove erroneous.

Assuming that the present requirements of section (b) are too broad, how can its scope be restricted? This could be done on an agency-to-agency basis after examining the various types of information dealt with by a particular agency. Then individualized agency requirements could be properly set. However, since the committee has chosen to write one bill to cover all federal agencies, this problem seems insoluble.

Section (b) of S. 1160 further provides:

> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided,* That in every case the justification for the deletion must be fully explained in writing.[91]

The Committee Report stated that the purpose of this provision is, "to . . . balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public."[92] This provision is an obvious attempt to afford the agencies some measure of protection. However, they were neither impressed nor satisfied with it. The Comptroller General complained that it would be an ineffective protection for much of the materials in its files.[93] The Department of State pointed out that such deletions would either make the portion disclosed "dangerously meaningful in conjunction with other in-

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1963 Hearings 172, 176; Statement of Hon. Abe McGregor Goff, *Chairman,* Interstate Commerce Commission, *1964 Hearings* 84, 118-19; Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 386.

89 1964 Treasury Department Statement, *1964 Hearings* 177A, 177E-F.

90 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 246.

91 Senate Bill 1160(b). In S. 1666, this provision read:

> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any case the justification for the deletion must be fully explained in writing.

Although this wording has been changed, the effect seems substantially the same in view of the deletion of *rules* from the requirements of section (b) in S. 1160.

92 *Judiciary Committee Report* 12.

93 Comments by Office of the Comptroller of the Currency on Certain Changes in the Administrative Procedure Act Contained in S. 1663, *1964 Hearings* 189, 191.

formation separately gathered," or "engender misunderstanding which could produce unfortunate consequences in our relations with foreign governments or weaken public acceptance of foreign policy."[94] And, as the Department of Justice pointed out, the protection which the provision seeks to extend "is wholly illusory in any event" since section (c) would open for inspection, without such deletions, the files from which the document in question is taken.[95]

Objection was also made to the requirement that *jurisdiction for the deletion must be fully explained in writing* by the agency concerned. Professors Frankel and Gellhorn of Columbia commented:

> In our opinion, this is an unnecessary restriction. The multiplication of "safeguards" against hypothetically evil public servants is more likely to destroy than to encourage genuine responsibility. Engulfing administrators in a sea of paperwork will not produce wise or moderate judgments; at best it might occasionally forestall a careless decision, but what is needed is an affirmative encouragement of conscientious exercise of judgment by officials in whom confidence is reposed.[96]

This provision, like that requiring an executive order in the first exemption of section (e), is unnecessary and should be deleted from the bill. The purpose of S. 1160 is to give the public access to information, not to subject administrators or the President to a mass of paperwork. If the provision is retained, a short and general justification for the deletion from the proper agency official should be sufficient.

In describing the indexing requirement, section (b) of S. 1160 states that it must be *a current index providing identifying information for the public.* The Committee Report commented:

> Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion, which the agency knows about, but which has been unavailable to the citizen simply because he had no way in which to discover it.[97]

The requirement that the index be *current* raises some questions. For example, how soon after a decision is made will it have to be indexed? The section does not set any time limit and this could lead to conflicting opinions as to whether the index is *current or not.*[98] It must be recognized that absolutely *current* and complete indexing at all times is not possible. Daily indexing might prove impractical, and the agencies should be allowed a reasonable time under the circumstances to incorporate new materials in their index.

The original version of S. 1666 provided that the index contain *adequate information* as to final orders, opinions, statements of policy and interpretations. However, the committee wisely substituted *identifying* for *adequate* after the agencies pointed out that the word *adequate* would produce little except "uncertainty and unwarranted litigation."[99] Rather than force the agencies to make innumerable decisions as to what constituted *adequate,* the committee substituted:

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94 Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 385-86.

95 See Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 199; Letter from Nicholas Katzenbach, *Deputy Attorney General,* Department of Justice, to Hon. James O. Eastland, Mar. 3, 1964, *1964 Hearings* 352, 360-61.

96 Comments of Marvin E. Frankel and Walter Gellhorn, Columbia University Law School, on Subcommittee Revision of S. 1663, *1964 Hearings* 677, 678.

97 *Judiciary Committee Report* 12-13.

98 See Statement of Robert M. Benjamin, *Chairman,* American Bar Association Special Committee on Code of Administrative Procedure, *1963 Hearings* 150, 152; Letter from Laurence D. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 95.

99 Department of Agriculture Report 143.

> . . . the more specific term "identifying" for the vague term "adequate" as a modifier of "Index." This is, in fact what the agencies' indexes should already do, i.e., identify the materials so that interested persons may easily find them. The criterion is that any competent practitioner who exercises diligence may familiarize himself with the materials through use of the index.[100]

The enforcement or penalty provision of section (b) of S. 1160 states:

> No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.[101]

Both Professor Davis and the Federal Communications Commission pointed out a loophole in this enforcement provision.[102] Evidently, an agency could rely on the reasoning embodied in an unindexed and unavailable order or opinion as long as it is not cited. As a result, no one would ever know the real basis of the agency's decision. In other words, "the agency is allowed to rely on secret orders but may not publicly cite them."[103] The only accomplishment of the sanction provision would then be to require the agency to issue a lengthy opinion rather than citing the case on point which has not yet been indexed or which the agency does not wish to index.[104] The provision thus becomes totally ineffective.

This sanction provision is, of course, open to the same objections as the sanction provision contained in section (a) in that it will subject otherwise proper agency action to collateral attacks.[105] Again, it will be up to the courts to prevent unreasonable application of this sanction and to decide each case on the basis of inherent fairness to all the parties concerned.

The sanction provision and the indexing requirements are to apply *to any matter which is issued, adopted or promulgated after the effective date of this Act and which is required by this subsection to be made available or published.* This phrase was added to the revised version of S. 1666 and included in S. 1160 to quiet agency fears that the indexing requirement would apply retroactively and that they would have to begin compilation of an index of all required materials handled since their inception.[106] The Committee Report commented: "This change makes the requirement of indexing prospective in application. It is necessary because some agencies have not kept any form of index, and will be overburdened with the task of indexing all their rules, statements, etc., retrospectively."[107]

Section (b) of S. 1160 raises many problems and requires careful consideration and selective revision. The exemptions applicable to the section are extremely limited and inadequate to cover all legitimate areas where agencies ought be allowed the privilege of nondisclosure. There are many governmental functions

100 *Judiciary Committee Report* 6.

101 Senate Bill 1160(b). This provision in S. 1666, as it passed the Senate, read:

> No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted, or promulgated after the effective date of this Act may be relied upon, used, or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

102 Comments of the Federal Communications Commission on S. 1666, *1963 Hearings* 288, 291; Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 247.

103 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 247.

104 Comments of the Federal Communications Commission on S. 1666, *1963 Hearings* 288, 291.

105 Department of Justice Comments on changes in S. 1666, *1964 Hearings* 356, 360.

106 See Comments of the Federal Communications Commission on S. 1666, *1963 Hearings* 288, 290.

107 *Judiciary Committee Report* 6.

involving law enforcement activities, economic controls, foreign affairs, and other activities which must use internal rules, instructions, interpretations and statements of policy which will affect the public in one way or another and yet have nothing to do with either *national defense, foreign policy,* or internal agency personnel practices. Many of the agencies legitimately feel that there are additional matters which should be exempted from the requirements of section (b) if these functions are to be effectively performed. The requirement of an executive order to exempt matters relating to *national defense* and *foreign policy* as well as the requirement of a written justification to accompany deletion of identifying details should be eliminated from S. 1160. Some sensible method must be found to cut down the inordinate amount of material which will have to be indexed and made available under the present terms of section (b) if it is to prove practical and economically feasible. In addition, agencies should be given a reasonable period to comply with the provisions of this bill and sufficient funds to pay for the increased expenditures it will necessitate.

IV. Public Disclosure of Agency Records

A. The Administrative Procedure Act of 1946

Section 3(c) of the Administrative Procedure Act of 1946 provides:

> Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency — . . . .
>
> (c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.[108]

The Senate Judiciary Committee, in commenting on the proposed Administrative Procedure Act, stated that section 3(c) merely provided that appropriate matters of official record should be made available to properly interested persons.[109] The committee construed the act as imposing a positive duty on government agencies to make information available to the public.[110] The House Judiciary Committee also construed the bill as imposing a duty on the agencies to make information available on the ground that the public has a general right to know,[111] and stated that the public information provisions were among the most useful provisions in the Act.[112]

The same committee commented on the effect of the exemptions prefacing section 3 of the Act. *Public interest* was considered a necessary exemption but was to be construed as "manifest need in order to achieve the due execution of authorized functions,"[113] and was not to be used as a weapon to defeat the remaining provisions of the section.[114] The committee applied the same analysis to the *internal management* exemption and concluded that neither exemption was op-

108 60 Stat. 238 (1946), 5 U.S.C. § 1002(c) (1958).

109 LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 17 (1946).

110 Senator McCarran submitted a report to accompany the final committee version of the bill. The report stated that the agency had the duty of specifying what might be disclosed, how and where application for information should be made, and how such application will be determined. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT 199 (1946). The report further stated that this section was composed on the theory that information concerning public agencies is public property and the general public has a right to know. *Id.* at 198.

111 *Id.* at 255.

112 *Ibid.*

113 *Ibid.*

114 *Ibid.* The current demand for a revision of the Act is based largely on the fact that *public interest* and *internal management* have been used as weapons to defeat the remaining provisions of the section.

erative unless the exempted matter was clearly and directly within the language of the Act.[115]

Attorney General Clark, in his Manual on the Administrative Procedure Act, foresaw the chief obstacles to achieving compliance with this subsection of the Act. Both the *internal management* and *public interest* exemptions were, and are, subject to the ultimate interpretation of the agencies possessing the desired material.[116] With the final definition of terms in the hands of the agencies, both the mandate to interpret the Act liberally and the narrowly defined exemptions, furnished by the congressional committees, were considerably weakened.

The Attorney General clearly stated that only *persons properly and directly concerned* could have access to agency records and that subsection 3(c) was not intended unconditionally to open government files for public inspection.[117] The effectiveness of the Act was further diluted by leaving the determination of who was a party *properly and directly concerned* to the agencies. *Information held confidential for good cause found* was considered to be either information held confidential by reason of an agency rule issued in advance (for good cause) making specific classes of material confidential, or such information as is held confidential for good cause found under a particular set of facts.[118] This subsection was not to be construed as changing existing law as to materials in government files heretofore treated as confidential.[119]

The ultimate result of the 1946 Act was to leave in the hands of the agencies possessing the applicable information the ultimate decision whether to release such information to the requesting party. Since the agency was both the party most directly concerned with the desired information and the judge of whether or not, and to whom, such information was to be released, serious difficulties in effectively administering the Act could be expected to arise.

B. Difficulties Which Have Arisen Under the 1946 Administrative Procedure Act

The language of the present Act has evoked considerable criticism from many authorities. They feel that the Act has served generally to suppress information which should have been made public in accordance with the express purpose of the 1946 enactment.[120] Government departments and agencies have cited the Act as authority for witholding information which should have been disclosed under a fair reading of the Act, but whose disclosure might have been a source of embarrassment or inconvenience to the agency involved.[121] Some commentators have expressed the opinion that the Act in its present form has so restricted freedom of information that they would prefer to see it revoked if a revision is not enacted.[122]

Secrecy in the public interest has been continuously attacked as an unworkable

115 *Ibid.*
116 ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 17 (1947).
117 *Id.* at 25.
118 *Ibid.*
119 *Ibid.* citing Boske v. Comingore, 177 U.S. 459 (1900) and Boehm v. United States, 123 F.2d 791, 805 (8th Cir. 1941) as statements of the existing law.
120 Remarks of Congressman John E. Moss, *Chairman,* Special Subcommittee on Government Information, Before the Administrative Law Section, American Bar Association, San Francisco, Aug. 7, 1962, p. 2, on file in office of NOTRE DAME LAWYER [hereinafter cited as 1962 Moss Remarks].
121 *See, e.g.,* Statement of Everett McKinley Dirksen, *U.S. Senator from the State of Illinois,* on the Right of the People to Know, *1963 Hearings* 72, 74; Statement of Dr. Earl F. English, *Dean,* School of Journalism, University of Missouri, *1963 Hearings* 7, 7-9 [hereinafter cited as Dean English Statement]; 1962 Moss Remarks 4.
122 See, *e.g.,* Dean English Statement, *1963 Hearings* 7, 15; *but see* Statement of Eugene S. Pulliam, *Assistant Publisher,* The Indianapolis Star and News, On Behalf of the American Newspaper Publishers Association; Accompanied by Creed C. Black, *Vice President and Executive Editor,* The Wilmington Morning News and Evening Journal, On Behalf of the American Society of Newspaper Editors, *1963 Hearings* 55, 63 (opinion of Mr. Black) [hereinafter referred to as Statement of Messrs. Pulliam and Black].

standard — a weapon in the hands of the agencies.[123] The exemption for *internal management* of the agency has received similar criticism.[124] Agencies are required to make available matters of official record, but "official record" has never been satisfactorily defined and remains a problem in current attempts at legislation.[125] It has been suggested that if the agency must reveal *in accordance with published rules,* they simply have to pass a rule forbidding the designated information from being made public.[126] *Persons properly and directly concerned* has evoked the comment that this clause effectively prevents *any* applicant from being assured of *any* information.[127] If the agencies' interpretation of this clause does not enable them to refuse a particular request for information, their interpretation of *confidential for good cause found* is a successful final resort for good cause is exactly what the agencies wish it to be.[128]

Instances of agency refusal to reveal information are legion. They include refusals to reveal the contents of telephone books,[129] of a guest list for a private pleasure trip on a Navy yacht by the Secretary of the Navy[130] and of scientific reports concerning this country's space program.[131] Non-disclosure frequently has precipitated uninformed speculation by news agencies with the result that the government departments concerned have had to reveal even more information than was originally requested to prevent public misunderstandings which could have been avoided by a realistic disclosure policy.[132] Delay in receiving information has been as constant a problem as outright refusal, for delay in many instances serves the same purpose as immediate refusal since the information is often outdated and useless when finally revealed.[133]

Congressional influence has often been the only effective remedy in dealing with recalcitrant agencies. The attitude of agency officials, and the availability of information, improves considerably when faced with the possibility of congressional

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123 See, *e.g.,* Judiciary Committee Report 10; Dean English Statement, *1963 Hearings,* 7, 12; 1962 Moss Remarks 3.

124 See, *e.g.,* Dean English Statement, *1963 Hearings* 7, 12-13; 1962 Moss Remarks 3-4.

125 Dean English Statement, *1963 Hearings* 7, 13. See also Statement of Mark P. Schlefer, Maritime Administrative Bar Association, *1963 Hearings* 124, 126. For a further discussion of the problems arising from *records,* see text accompanying notes 143-47.

126 Dean English Statement, *1963 Hearings* 7, 13. For citations of attempts to deal with the problem of defining *rule,* see *supra* notes 38-39.

127 The final two paragraphs of the Public Information Section contain additional qualifications that further vitiate any notion that the section is truly a public information law. The first paragraph attempts to limit the kinds of people to whom information may be given in the phrase "persons properly and directly concerned. . . ." It would appear that this rules out the inquisitive citizen, the industrious reporter, the concerned taxpayer. Just who is "properly and directly concerned"? Ask the agency. And if the particular information is especially embarrassing or controversial, we must expect that few persons, if any, will be found to be both "properly and directly concerned."

1962 Moss Remarks 4-5. See also *Judiciary Committee Report* 10; Dean English Statement, *1963 Hearings* 7, 13; Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 61-62.

128 See 1962 Moss Remarks 5-6. See also *Judiciary Committee Report* 10; Dean English Statement, *1963 Hearings* 7, 13; Statement of Robert M. Benjamin, *Chairman,* American Bar Association Special Committee on Code of Administrative Procedure, *1963 Hearings* 150, 151.

129 1962 Moss Remarks 4.

130 Statement of Leslie H. Whitten, Hearst Papers, *1963 Hearings* 140.

131 Statement of Henry T. Simmons, *Newsweek* Magazine, *1963 Hearings* 75. The hearings on S. 1666 and S. 1663 were replete with citations to specific examples of unreasonable refusal to reveal by agencies. See, *e.g.,* Dean English Statement, *1963 Hearings,* 7, 7-10; Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 57-59; Statement of James Mathis of the Advance News Service, *1963 Hearings* 16.

132 See, *e.g.,* Statement of Henry T. Simmons, *Newsweek* Magazine, *1963 Hearings* 75, 77-78; 1962 Moss Remarks 3.

133 Statement of James Mathis of Advance News Service, *1963 Hearings* 16; Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 65.

inquisition.[134] The fact that congressional influence has been effective in obtaining information which should have been revealed willingly under the terms of the Administrative Procedure Act, does not reflect favorably on the attitude of the agencies toward the public's right to public information. A general reluctance of reporters, and others dealing with the agencies in similar capacities, to express dissatisfaction with agency procedures or to approach congressional contacts for fear that whatever sources of information they do have in the agencies will quickly dry up well illustrates power of agencies to engage in rank favoritism while intimidating potential complainants.[135] The expanding number of government agencies has made it impossible to keep accurate account of their information policies[136] and has made it easier for them to deny valid requests for information.

Agency officials are subject to statutes in addition to the Administrative Procedure Act, many of which establish criminal penalties for disclosing information which should not have been revealed.[137] The possibility of being subjected to criminal sanctions is sufficiently unpleasant to make any official weigh carefully a request for information which could possibly fall under his statutory prohibition.[138]

Although most examples of refusal to disclose, which were cited in the hearings, involved national headquarters of the agencies, attempts to get information concerning agency activities at the local level have met with the same difficulties.[139] At the national level, newspapers and similar media have been generally successful, even if temporarily delayed, in their attempts to secure information because of their superior monetary and manpower resources.[140] However, the same success has eluded individual citizens attempting to secure information concerning their personal affairs.[141]

C. Recent Attempts of Congress To Adequately Provide for Proper Disclosure of Agency Records[142]

1. The Problem of Defining Records

The terms, *public records* and *official record,* because of lack of definition and consequently difficulty of administration, proved to be a problem under the 1946

134 See, *e.g.,* Statement of John J. Pigg, Shattuc, Ill., *1963 Hearings* 25, 27-29. See also Statement of Senator Kenneth B. Keating, *U.S. Senator From the State of New York, 1963 Hearings* 137, 139. The Senator criticizes his colleagues for intervening in agency proceedings.

135 Statement of Clark R. Mollenhoff, Cowles Publication, in Behalf of Sigma Delta Chi, *1963 Hearings* 82, 84.

136 Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 62.

137 See, *e.g.,* 18 U.S.C. § 1905 (1958), the general statute providing for penalties against government employees who make known, without authorization, information received in the course of their employment.

138 Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 62.

139 Statements of Theodore A. Serrill and Walter B. Potter, on behalf of the National Editorial Association, *1963 Hearings* 95, 95-96.

140 See *1963 Hearings* 102-08 for a recounting of the Wall Street Journal's experiences in investigating the Small Business Investment Companies.

141 See Statement of Lawrence Speiser, American Civil Liberties Union, *1963 Hearings* 109 for examples of problems facing the individual seeking information from the agencies.

142 Section (c) of S. 1666, as introduced, provided:

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

Act.[143] The problem does not seem to have been alleviated either by S. 1666 or by S. 1160, nor has *agency records* been defined. The Attorney General attempted to deal with the problem of *records* in his Manual on the Administrative Procedure Act,[144] but his explanation of the import of the term has not satisfied the agencies.

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plainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence.

Section (c) of S. 1666, as amended and passed by the Senate, reads:

> (c) AGENCY RECORDS.—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5)intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (7) investigatory files compiled for law enforcement purposes except to the extent that they are by law available to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court considers of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

Section (c) of S. 1160 provides:

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

The exemptions in S. 1160 were transferred to a separate section and made applicable to all sections of the bill. The previous bills had separate exemptions for each section. For a critique of these exemptions in relation to section (c), see section VI *infra*.

143 *Supra* note 125.

144 The term "official record" is difficult of definition. In general, it may be stated that matters of official record will include (a) applications, registrations, petitions, reports and returns filed by members of the public with the agency pursuant to statute or the agency's rules, and (b) all documents embodying agency actions, such as orders, rules and licenses. In formal proceedings, the pleadings, transcripts of testimony, exhibits, and

The opinion was expressed in the hearings that *records*, in the absence of a limiting definition, seem to encompass everything related to the operation of an agency.[145] Congress is faced with the problem of legislating for over a hundred federal agencies, and it would seem unrealistic to attempt to define records affirmatively to include every applicable agency document. If the agency does not believe that a document requested is part of their records, they should simply refuse the request for information. Then the requesting party has the option of asking the district court to determine if the refusal is justified. The agency will then have the opportunity to establish that *record* does not include the desired information.

The Department of Defense expressed concern over the deletion from the 1946 Act of *official* as a modifier for *record*.[146] *Official*, if used in S. 1160, would only serve to further complicate a difficult provision. Under the basic philosophy of the freedom of information bill, all records are official records and the only records which do not have to be revealed are those which come within the exemptions of section (e). This method of applying a set of exemptions to particular requests for information is certainly better suited for fair administration than a detailed statement of what are official records and what are not.

The Federal Aviation Agency suggested that *factual* be included in the bill to modify *records*.[147] The inclusion of *factual* would exclude records dealing with law or policy which are, in most cases, areas of legitimate public interest. Since a complete separation of law and policy from fact is an impossible endeavor, this suggestion could not be implemented even if it were to be considered of substantial merit.

Although *records* is difficult to define, it serves the purpose of the Act by opening to public scrutiny, subject to the exemptions of section (e), agency matters which have been shielded in the past. It is submitted that *records*, subject to the court's interpretation in particular instances, will better serve the avowed purpose of the bill — freedom of information — than will a series of particular terms designed to cover all contingencies for the individual agencies.

2. Court Enforcement of the Right to Know[148]

The complainant is allowed to bring suit in the district court in which he resides or has his principal place of business. This prompted the Federal Deposit Insurance Corporation to express concern over the prospect of defending suits in all areas of the country and to propose an amendment to limit such suits to those districts where the agency has a branch or district office.[149] Their proposal deserves consideration by Congress in the S. 1160 hearings. It would be difficult for many of the agencies to defend an action or produce records in districts where they have no office or employees. If it is ascertained that the public would be less burdened in prosecuting actions in districts where the agencies have field offices than would the agencies

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> all documents received in evidence or made a part of the record are "matters of official record."
>
> Section 3(c) does not purport to define "official record." Each agency must examine its functions and the substantive statutes under which it operates to determine which of its materials are to be treated as matters of official record for the purposes of the section.

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 24 (1947).

145 See, *e.g.*, Letter from Laurence K. Walrath, *Chairman*, Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 96.

146 Letter From John T. McNaughton, *General Counsel*, Department of Defense, to Hon. James O. Eastland, Oct. 4, 1963, *1964 Hearings* 317, 319.

147 Letter From N. E. Halaby, *Administrator*, Federal Aviation Agency, to Hon. James O. Eastland, Dec. 7, 1963, *1964 Hearings* 414, 416.

148 For text of court provisions in the various bills, see *supra* note 142.

149 Letter from Jesse P. Wolcott, *Director*, Federal Deposit Insurance Corporation, to Hon. James O. Eastland, Nov. 7, 1963, *1963 Hearings* 239, 240.

in defending actions in districts where they do not, the amendment should be written into the bill.

Information is used in section (c) when referring to what must be revealed in court proceedings, while *records* is used in the general title of the section to define what must be made available upon request. Agencies have taken valid exception to the inclusion of *information* at this point.[150] It should be noted that there is no explanation in the final committee report on S. 1666 of the rationale behind this inclusion. Thus, in light of the difficulties which will be experienced in delimiting the range of *records, information* should not be allowed to complicate the problem since it serves no affirmative purpose. The word should be struck by the committee in the course of its consideration of S. 1160.

The provision, in S. 1666, for the assessment against the agencies of costs and reasonable attorneys' fees has been dropped in S. 1160. Some agencies have statutes which provide that they cannot be assessed costs.[151] Moreover the propriety of allowing costs for the complainant if successful but not for the agency if successful was severely criticized in the hearings.[152] The agencies have maintained that parties interested in seeing records should be required to pay a reasonable fee to cover the cost to the agency in supplying them.[153] There is no express provision in S. 1160 for this charge, but the judiciary committee, in its final report on S.1666, expressed the opinion that such a charge was applicable.[154] If a charge for this agency service is desired, it should, in the interest of clarity, be specifically provided for in S. 1160.

If the agency's explanation for its refusal to reveal does not satisfy the requesting party, he is authorized to bring suit to compel revelation. The courts are empowered to determine *de novo* the matter of granting an individual's request. Agencies have maintained that any court proceeding should be subject to the normal conditions of judicial review of agency action, that is, exhaustion of administrative remedies and appeal to the appropriate circuit.[155] By the time of the court proceeding, the agency has had opportunity to comply with the request for information and has refused to do so. To require refusal by a series of agency employees before court action is permitted would deny the complainant the speedy reception of his information — a value the bill is designed to protect. If there is to be judicial review, the trial *de novo* in the district courts seems to be the most effective manner of proceeding.

Section (c) places the burden of proof upon the agency and requires it to sustain a refusal to grant access to the desired records. S. 1666 required a preponderance of the evidence, but S. 1160 merely requires the agency to sustain, leaving to the individual case the question as to what constitutes sustention. The agencies were practically unanimous in criticizing the requirement that they bear the burden of proof pointing out that the normal rules of procedure require the

150 See, *e.g.*, Letter from Nicholas Katzenbach, *Deputy Attorney General,* Department of Justice, to Hon. James O. Eastland, Mar. 3, 1964, *1964 Hearings* 352, 362.

151 See, *e.g.*, Memorandum of the Securities and Exchange Commission to the Committee on the Judiciary, U.S. Senate, on S. 1666, 88th Congress, *1963 Hearings* 308, 312.

152 See, *e.g.*, Statement of Hon. Abe McGregor Goff, *Chairman,* Interstate Commerce Commission, *1964 Hearings* 84, 104.

153 The user charge statute, 5 U.S.C. 140, expresses the "sense of the Congress" that the furnishing of services to particular persons be made self-sustaining. It should be clear that the service of furnishing documents to particular persons required by section 3 is to "be self-sustaining to the fullest extent possible," as provided in the statute. 1964 Treasury Department Statement, *1964 Hearings* 177A, 177F.

154 *Judiciary Committee Report* 13.

155 See, *e.g.*, Comments of the Federal Communications Commission on S. 1666, *1963 Hearings* 288, 290. See also Memorandum of the Securities and Exchange Commission to the Committee on the Judiciary, U.S. Senate, on S. 1666, 88th Congress, *1963 Hearings* 308, 311.

moving party to bear the burden.[156] This criticism is not well taken because the party moving for court action has no way of showing that the requested document is not subject to the exemptions of section (e). The spirit of the bill does establish that all records are to be made public except those within the exemptions,[157] and only the agency is in a position to show that their records are exempted by section (e). It is submitted that the burden of proof should remain upon the agency.

A provision for contempt citation is expressly included in the bill even though the committee believes that the court would have this power absent the provision.[158] Professors Gellhorn and Frankel feel that this contempt provision is "impolitic" since little can be gained by "exacerbating relations between coordinate branches of the Government."[159] Since the committee recognizes the inherent contempt power of a court, this provision should be struck from the bill.

There can be no dispute with the provision allowing for precedence on the district court calendars since delay in receiving information has been continuously condemned.[160] This problem can never be completely solved by statute, for any act will be dependent on the willingness of agency officials to cooperate. The provision for calendar preference seems to be the best that can be done at the moment to insure speedy reception of documents.

An assertion was made in the hearings that the court should make the plaintiff show the relevancy of his demands.[161] However, relevancy or irrelevancy should not have to be shown by the applicant. The agency should have to show that the material requested is or is not exempted by section (e). If the exemptions are sufficiently comprehensive, the agency will have no difficulty finding one when irrelevant demands are made. If there is no exemption available, then, in accord with the general tenor of the bill, the demand is relevant.

The agencies further claimed that the provision for court action was superfluous since the Federal Rules of Civil Procedure provide adequate discovery techniques.[162] In making this claim, the agencies ignore the fact that most requests for information do not involve a court proceeding and consequently the Federal Rules are not available to the requesting party. The present outcry against agency secrecy and the many examples cited in the testimony of successful withholding of information demonstrate that the Federal Rules alone have simply not been adquate.[163]

The Treasury Department suggested an amendment to the court provision which should be considered by Congress in the legislative course of S. 1160. They proposed: "there should be included a provision for the procedure permitted in 18 U. S. C. 3500[164] and for privileged documents under Rules 34 and 45 of the

156 See, *e.g.*, Letter from Stewart L. Udall, *Secretary of the Interior,* to Hon. James O. Eastland, Nov. 15, 1963, *1963 Hearings* 264, 266.

157 The Treasury Department feels that the burden of the agency should be to prove the applicability of one or more of the exemption provisions rather than to bear the burden of proof. 1964 Treasury Department Statement, *1964 Hearings* 177A, 177F. Under S. 1160 the only justification of the agency's refusal to reveal is the applicability of one or more of the exemption provisions. The Treasury Department's proposed amendment is, therefore, implicitly contained in the present bill. It would not lessen the effectiveness of the bill if Congress were to clarify the burden on the agency.

158 *Judiciary Committee Report* 3, 7.

159 Comments of Marvin E. Frankel and Walter Gellhorn, Columbia University Law School, on Subcommittee Revision of S. 1663, *1964 Hearings* 677, 679.

160 Statement of Messrs. Pulliam and Black, *1963 Hearings* 55, 65-66. See also *Judiciary Committee Report* 7.

161 See, *e.g.*, 1964 Treasury Department Statement, *1964 Hearings* 177A, 177F; Statement of Hon. Abe McGregor Goff, *Chairman,* Interstate Commerce Commission, *1964 Hearings* 84, 103.

162 See, *e.g.*, Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1963 Hearings* 299, 303.

163 The Senate Judiciary Committee emphasized the lack of appropriate remedy in cases of wrongful withholding by government agencies. *Judiciary Committee Report* 8, 10.

164 The Jencks Statute, section (c), provides for the delivery of documents to the court *in camera.*

Rules of Civil Procedure; namely delivery of the documents to the court in camera and, if the court finds necessary, sealed for appellate court review."[165] In cases where the agency is able to show that the records requested should not be disclosed, a provision of this type would be in accord with the protection of privileged information established by section (e). If the agency must reveal the contents of the documents requested in a public court proceeding, a subsequent determination that they are not subject to revelation would be a Cadmean victory indeed.

Since there is no mention of special appellate procedure in this bill, it is assumed that the normal appellate rules would apply. If any other procedure is desired, the amended version of S.1160 should clearly specify its nature.

V. Section (d) — Public Record of Agency Votes

There was nothing comparable to section (d) in the original Administrative Procedure Act. Section (d) of S. 1666, as introduced, provided: "(d) AGENCY PROCEEDINGS. — Every agency having more than one member shall keep a record of the individual votes of each member in every agency proceeding and except to the extent required to protect the national defense such record shall be available for public inspection."[166] *Individual* was dropped in the final version of the bill passed by the Senate and *final* was substituted.[167] This substitution was prompted by complaints that preliminary voting should not be the subject of public scrutiny so that individual members could give proper consideration to the case. It was felt that a change in position before the final vote, based on a more perceptive understanding of the particular case, would be more easily made if preliminary voting were not public. Thus, it was thought that a more complete analysis of each case would result.[168]

Professors Gellhorn and Frankel felt that there was no need for section (d) as no proof of suppressing dissents could be found.[169] However, Congressman Moss revealed that his committee heard testimony concerning supression of dissents[170] and stated that he felt a real need for congressional action existed.[171] There is an aversion to this section on the part of agencies not presently required by statute to publish votes, for they feel that publication serves no purpose.[172] In return, the question can be asked whether any real need is served by suppressing final votes? Certainly parties to a proceeding should be informed of the details of voting which affects their interest and the public has a right to know the direction its agencies and commissions are taking.[173] There is a reasonable objection to making votes

165 1964 Treasury Department Statement, *1964 Hearings* 177A, 177F.
166 Senate Bill 1666 (d), as introduced.
167 Senate Bill 1666 (d), as amended.
168 See, *e.g.*, Statement of Paul Rand Dixon, *Chairman,* Federal Trade Commission, *1963 Hearings* 161, 167-68. See also Letter of William Feldsman, *Solicitor,* National Labor Relations Board, to Hon. Edward V. Long, July 16, 1964, *1964 Hearings* 531, 532.
169 Comments of Marvin E. Frankel and Walter Gellhorn, Columbia University Law School, on Subcommittee Revision of S. 1663, *1964 Hearings* 677, 679.
170 1962 Moss Remarks 8, 9. See also Dean English Statement, *1963 Hearings* 7, 8; Statement of Mark P. Schlefer, Maritime Administrative Bar Association, *1963 Hearings* 124, 127.
171 1962 Moss Remarks 10.
172 See, *e.g.*, Statement of Paul Rand Dixon, *Chdirman,* Federal Trade Commission, *1963 Hearings* 161, 163; Letter from Orville A. Freeman, *Secretary,* Department of Agriculture, to Hon. James O. Eastland, Sept. 30, 1963, *1963 Hearings* 250, 252. Those agencies who are required by statute to publish votes find no objection in section (d) of S. 1666. See, *e.g.*, Letter from Robert T. Murphy, *Vice Chairman,* Civil Aeronautics Board, to Hon. James O. Eastland, Oct. 23, 1963, *1963 Hearings* 245, 248; Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 97. Perhaps this is an indication that section (d) will not prove as great a burden to the other agencies as they seem to think.
173 See *Judiciary Committee Report* 15.

public in proceedings where privacy is protected by the exemptions of section (e).[174] However, agencies would not have to publish votes in such a situation since the exemptions, which formerly applied only to section (c), now apply in S. 1160 to all sections of the bill.

The Federal Trade Commission feels that their procedure of allowing votes to be made public at the discretion of the individual members of the commission should be recognized.[175] Their contention is not persuasive. For the members of agencies and commissions are charged with the duty of decision. Since they are public officials, their decisions should be public property unless the proceeding is exempted from disclosure by the bill itself.

Some agencies felt that the provisions for vote publication were too broad,[176] but this concern should be alleviated by the application of the section (e) exemptions to section (d). Similarly, the Department of Justice was concerned with the broad meaning of *agency proceedings,* feeling that it includes just about every agency action.[177] A similar problem of defining records was considered previously. It was then pointed out that it is the declared policy of the Act that all *records* are of public interest. *Agency proceedings* are also of public interest. There is no reason for not including all actions calling for a vote. Thus the public is entitled to a revelation of voting unless the proceeding is removed from the legitimate public interest by a section (e) exemption.

Section (d) does not provide for judicial determination if a party is aggrieved by the nonpublication of a vote.[178] However, when the votes are taken, it would seem that they then become a part of the agency records and will be subject to request under section (c) which allows court action for refusal. Thus, at least indirectly, the parties will be able to go to court to force agency disclosure of votes. If public disclosure of voting is desirable, this enforcement provision is also desirable to remedy the main weakness of the 1946 Act — the complete absence of any method to prevent arbitrary agency determination of what should and should not be revealed.

VI. Section (e) — Exemptions[179]

The foremost change in S. 1160 from the version of S. 1666 passed by the Senate is the inclusion of all exemptions in a separate section to be applied to all

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174 For examples of agency concern, see Letter of Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Dec. 6, 1963, *1964 Hearings* 384, 386-87; Letter from William McC. Martin, Jr., *Chairman,* The Board of Governors of the Federal Reserve System, July 11, 1963, *1963 Hearings* 293, 294. See also Letter from Robert E. Giles, *General Counsel,* Department of Commerce, to Hon. Edward V. Long, July 17, 1964, *1964 Hearings* 479, 480.

175 Letter from Paul Rand Dixon, *Chairman,* Federal Trade Commission, to Hon. James O. Eastland, Oct. 11, 1963, *1963 Hearings,* 294, 295-96.

176 See, *e.g.,* Letter from Robert E. Giles, *General Counsel,* Department of Commerce, to Hon. James O. Eastland, Oct. 1, 1963, *1963 Hearings* 252, 254.

177 Department of Justice Comments, *1964 Hearings* 356, 362-63.

178 Accordingly the Department of State was concerned whether the executive or judicial branch had the duty of applying the standard. Letter from Robert E. Lee, *Acting Assistant Secretary for Congressional Relations,* Department of State, to Hon. Edward V. Long, Aug. 6, 1964, *1964 Hearings* 504.

179 For text of exemptions in S. 1666, as introduced, see *supra* note 142. For text of exemptions in S. 1666, as passed by the Senate, see *supra* note 142. S. 1160 provides:

> (e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) intra-agency or interagency memoranda or letters dealing solely with matters of law or policy; (6) personnel and medical files, and similar files the disclosure of which would constitute a clearly

other sections of the bill. This change was widely encouraged.[180] It alleviates the untoward situation of allowing certain records to be available for public scrutiny under section (c) while they would not have to be published or indexed under sections (a) and (b).[181] Although S. 1666 passed the Senate without a dissenting vote, it is submitted that the separate section for exemptions makes S.1160 a stronger bill and more susceptible to fair administration.

A. Exemption One — Specifically Required by Executive Order to be Kept Secret in the Interest of the National Defense or Foreign Policy

The only change made by S. 1160 in the first exemption is the substitution of *in the interest of the national defense or foreign policy* for *for the protection of the national defense or foreign policy.*[182] Although the substance of the exemption remains the same, *in the interest of* seems to give a broader base for withholding than does *for the protection of.*

S. 1666, as introduced, did not contain an exemption for foreign policy. The addition of this exemption by the committee was prompted by persuasive testimony that foreign policy had to be adequately protected.[183] Even with the addition, there is some agency concern that foreign economic affairs requiring secrecy, such as exchange stabilization activities, are not covered by the foreign policy exemption.[184] If the President felt that secrecy was required in these instances, and agency testimony justifies the conclusion that he would, an executive order, issued to prevent public disclosure of the applicable information, would be covered under a fair reading of exemption one.

The provision requiring the President to issue an executive order to protect defense or foreign policy materials has been the subject of unfavorable comment. Professor FitzGerald asserted that there is too much limitation on presidential power in such an enactment and that such a provision would be of doubtful constitutional validity.[185] Professor Davis stated that he believed the President would veto the bill if the requirement of an executive order were not changed and suggested that Congress scale down the exemption to something which they could properly enact.[186]

Executive privilege has traditionally been a thorn of controversy in relations

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unwarranted invasion of personal privacy; and (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

180 See, *e.g.,* Statement of Robert M. Benjamin, *Chairman,* American Bar Association, Special Committee on Code of Administrative Procedure, *1963 Hearings* 150, 151. The proposed bill submitted by the American Bar Association had a separate section of amendments. For text of this bill (S. 1567, 87th Cong., 1st Sess. (1961)), see *1963 Hearings* 153.

181 For an interpretation showing how such an anomaly could result, see *e.g.,* Statement of Webster P. Maxson, *Director,* Office of Administrative Procedure, Department of Justice, *1963 Hearings* 194, 204; Department of Agriculture Report, *1964 Hearings* 140, 142.

182 Senate Bill 1160(e)(1).

183 See, *e.g.,* Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 203; Letter from Frederick G. Dutton, *Assistant Secretary,* Department of State, to Hon. James O. Eastland, Oct. 28, 1963, *1963 Hearings* 266, 267.

184 See, *e.g.,* 1964 Treasury Department Statement, *1964 Hearings* 177A, 177B.

185 Letter from John L. FitzGerald, *Professor of Law,* Southern Methodist University School of Law, to Hon. Edward V. Long, June 29, 1964, *1964 Hearings* 665. For other expressions of constitutional invalidity see. *e.g.,* Comments of the Federal Communications Commission on S. 1666, *1963 Hearings* 288, 289; Letter from Orville L. Freeman, *Secretary,* Department of Agriculture, to Hon. James O. Eastland, Sept. 30, 1963, *1963 Hearings* 250, 251.

186 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 247.

between Congress and the executive. However, this bill deals primarily with the rights of citizens to seek information from their government. Consequently, there is some question whether the problem of executive privilege is to be considered in the same light as it would be if only Congress were authorized to request records.[187] If the Congress may not require the President to reveal where he considers secrecy to be within the necessary public interest, an individual citizen's desire to know would not weigh more strongly.

The constitutional problem involved in this act is analogous to the problem faced with the 1958 amendment to the federal "housekeeping" statute.[188] It must be remembered that S. 1160 gives the President the right to declare by executive order what materials, in relation to national defense or foreign policy, shall be kept secret. It involves two distinct problems to ask whether this enactment goes beyond the bounds of congressional propriety and whether it is unconstitutional. It is submitted that the question of unconstitutionality is not as clear as some commentators asserted, since the President can determine that materials are not to be revealed and the resulting executive order *is not subject to court review.* It should be noted that the court is not given power to inquire whether the motives of the President were in accord with the philosophy of the act when he issued the executive order, but only whether or not the order was issued. The exemption merely recites that the material is exempt if it is *specifically required by Executive order to be kept secret.* Once the existence of the order is established, the conditions of the exemptions have been satisfied and there is no basis in the bill for a court to examine presidential motives. This procedure is likely to inconvenience the President but it will not prevent the exercise of his constitutional right of executive privilege. It is submitted that, despite inherent difficulties of administration, this exemption will not be easily overturned on constitutional grounds.[189]

B. Exemption Two — Related Solely to the Internal Rules and Practices of any Agency

Exemption two was submitted in S. 1160 in the same form as passed the Senate in S. 1666. The rationale behind the exemption seems to be that information contained in personnel rules and practices of agencies are of interest only to the agencies and their employees. Therefore, any public interest served by publishing this material would not be commensurate with denial of privacy to those employees. In the committee hearings an opinion was expressed by the agencies, not controverted by other sources, that information protected by this exemption would not contain anything of legitimate public interest.[190] Professor Cooper would limit the internal management exemption for agencies to housekeeping functions[191] and this exemption seems to be so limited. It was not a point of major controversy.

187 For a lucid presentation of this distinction, see Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings,* 268, 284-85.

188 72 Stat. 547, 5 U.S.C. § 22 (1958). See also Department of Justice Comment on the April 20, 1964, Subcommittee Revision of S. 1663, *1964 Hearings* 208, 212. For an excellent comment on the housekeeping amendment controversy and a general survey of executive privilege, see Kramer and Marcuse, *Executive Privilege—A Study of the Period 1953-60* (pts. I-II), 29 GEO. WASH. L. REV. 623, 827 (1961).

189 The problems of administration resulting from the placing of this burden on the President should not be underestimated. For a further discussion of this problem and the presentation of alternative suggestions, see text accompanying notes 60-62.

190 See, *e.g.,* Letter from Richard L. Callaghan, *Assistant Administrator For Legislative Affairs,* National Aeronautics and Space Administration, to Hon. James O. Eastland, Jan. 16, 1964, *1964 Hearings* 445, 446; Letter from John W. Macy, Jr., *Chairman,* U.S. Civil Service Commission, to Hon. James O. Eastland, Dec. 13, 1963, *1964 Hearings* 302, 303.

191 Letter from Frank E. Cooper, *Professor of Law,* University of Michigan Law School, to Hon. Edward V. Long, July 7, 1964, *1964 Hearings* 649.

C. Exemption Four[192] *— Trade Secrets and Other Information Obtained From the Public and Customarily Privileged or Confidential*[193]

S. 1160 replaced *other information* with *commerical or financial information.*[194] This substitution serves to clarify the purpose of the exemption — the protection of business secrets from competitors. *Other information* would have been a source of unnecessary litigation.

S. 1666, as introduced, did not contain an exemption analogous to the present S. 1160; but the agencies strongly suggested that such an exemption was needed.[195] The committee complied in the amended act, offering a strong accompanying statement giving a wide definition to the exemption.[196] The committee's liberal position alleviates objections that the exemption is not wide enough.[197]

The final objection posed by the agencies is that the exemption does not provide that information should be revealed only to properly interested persons.[198] These agencies do not seem to have grasped the sense of the bill that information of public agencies is public property and any one is a properly interested party subject to the several exemptions. If the exemptions sufficiently protect those aspects of business and personality which should not be revealed, the problem of properly interested persons will not arise.

Senator Humphrey proposed that the exemption be amended to read: "trade secrets and other information obtained from the public *in confidence* or customarily privileged or confidential."[199] He felt that some items which should not be revealed might not be customarily privileged or confidential.[200] Senator Long pointed out, however, that such an amendment could be construed as allowing the agencies to take testimony in confidence, and thus defeat the purpose of the bill by agreement between the parties.[201] He assured Senator Humphrey that his concern about items not being customarily confidential was not well founded for the exemption was broad enough to encompass information of whatever type should be held confidential.[202] S. 1666 passed without the amendment. Exemption four seems strong enough to adequately handle any contingencies which may arise respecting it.

D. Exemption Five — Intra-Agency or Interagency Memorandums or Letters Dealing Solely with Matters of Law or Policy[203]

Exemption five of S. 1160 was introduced in the same form as that which

192 Exemption three raises only one serious problem and it is discussed in section VII, *infra.*

193 Senate Bill 1666(c)(4).

194 Senate Bill 1160(e)(4).

195 See, *e.g.,* 1964 Treasury Department Statement, *1964 Hearings* 177A, 177C.

196 This exemption is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. *Judiciary Committee Report* 6.

197 The exemption would cover, *e.g.,* information in tax forms (see Statement of Howard Bell, *Vice President for Planning and Development,* National Association of Broadcasters, *1963 Hearings* 88, 91); private business data received by the government (see Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 199); business information in proxy solicitations (See Memorandum of the Securities and Exchange Commission to the Committee on the Judiciary, U.S. Senate, on S. 1666, 88th Congress, *1963 Hearings* 308, 310).

198 See, *e.g.,* Letter from John W. Macy, Jr., *Chairman,* U.S. Civil Service Commission, to Hon. James O. Eastland, July 19, 1963, *1963 Hearings* 248, 249; Foreign-Trade Zones Board —Comments on S. 1666, *1963 Hearings* 259, 261.

199 110 CONG. REC. 17079 (daily ed. July 31, 1964). (Emphasis added.)

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

203 Senate Bill 1666(c)(5), as passed by the Senate.

passed the Senate in S. 1666.[204] The exemption did not appear in S. 1666, as introduced, but the committee was persuaded to change the bill by the many agency statements suggesting the need for the exemption.[205] However, the committee expressed the opinion that the amendment was to be interpreted strictly according to its terms.[206] By providing that preliminary determinations should not be made public, the Senate has recognized the validity of the criticism levied against this exemption[207] and has admitted the need for secrecy in departmental working papers.[208]

The major objection dealing with the form of the exemption is that *dealing solely with matters of law or policy* cannot be adequately enforced.[209] There is no easy way to distinguish fact from law and policy. Thus there arises the possibility of agencies claiming that memoranda contain only matters of law and policy while respondents claim they comment on the facts of a case.[210] While it is true that relying on the courts to determine if the agency has acted fairly in refusing revelation is not an ideal situation, nevertheless, positing a reasonable approach by both agencies and respondents, it is a workable solution and the only one available to implement the legislative determination that matters of fact in agency memoranda should be revealed while matters of law and policy should not.

If Congress should determine, as Professor Cooper urges,[211] that there is no valid reason for denying to a party law and policy memoranda, then the problem of distinguishing between law, policy and fact will be obviated. Senator Humphrey suggested that facts as well as law and policy should be exempt from disclosure.[212] If Congress should adopt his reasoning, the problem of differentiation would also be avoided but all agency memoranda would be protected.

The desire to protect free expression in the agencies in the manner of institutional decisions and the desire to protect the normal woking papers of the agency staff are valid considerations. It is submitted that the determination of the committee that only final matters need be revealed is the most reasonable

204 Senate Bill 1160(e)(5).

205 See, *e.g.*, Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 202; Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 277-78.

206 It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as is consistent with efficient Government operation. All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public. *Judiciary Committee Report* 6-7.

207 For an example of such criticism see Statement of Mark P. Schlefer, Maritime Administrative Bar Association, *1963 Hearings* 124, 130.

208 For an assertion of such need see Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 202-03. Mr. Schlei also pointed out that a number of government actions, which primarily affect security and commodity rates, depend entirely for their effectiveness on lack of advance notice. *Id.* at 203. Congress, in considering S. 1160, should clarify whether these materials are protected by exemption five.

209 See, *e.g.*, Statement of Joseph C. Swindler, *Chairman,* Federal Power Commission, *1964 Hearings* 64, 67. Professor FitzGerald suggests that limiting internal communication to law and policy will prove to be a serious drag on the working paper exchange in agencies to the ultimate disservice of the administrative process. Letter of John L. FitzGerald, *Professor of Law,* Southern Methodist University, to Hon. Edward V. Long, June 29, 1964, *1964 Hearings* 665.

210 Letter from Frank E. Cooper, *Professor of Law,* University of Michigan Law School, to Hon. Edward V. Long, July 7, 1964, *1964 Hearings* 649, 650.

211 *Ibid.*

212 110 CONG. REC. 17079 (daily ed. July 31, 1964).

position to ensure availability of information, efficient functioning of the agencies, and cooperation in the executive branch of government thereby alleviating the recurring problems of duplicated work and repeated investigations. It is hoped that current hearings will elicit suggestions for a clarification of the provision, as it is apparent that the exemption is needed in some form.

E. Exemption Six — Protection of Personal Privacy

S. 1666, as introduced, contained no exemption for personal privacy. S. 1666, as amended and passed by the Senate, provided protection for "personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[213] S. 1160 changed *matters* to *files* to keep the language of the amendment consistent. This amendment is an attempt to resolve a central controversy over the bill's treatment of the public's right to know and the individual's right to privacy.[214] The exemption, according to the committee report, was prompted by the testimony of various agencies as to the amount of highly personal information which they receive[215] but which should not be made public in order to protect personal privacy.[216]

The language of the exemption leaves the question of particular files open in an attempt to provide general coverage for all possible contingencies which threaten to invade personal privacy.[217] The courts are free to give a wide reading to the exemption and the liberal committee report minimizes agency fears that the exemption is not broad enough.[218]

The exemption would not, as some agencies suspect,[219] allow them to exercise judicial discretion in deciding who should be allowed to see records. According to a fair reading of section (c) anyone is allowed to see the records unless the particular records requested are exempted. If it is desired to limit the records only to individuals who show cause, a more specific exemption is needed. Under S. 1160, if the agency feels that records are protected, it must refuse revelation and allow the court to determine if the denial is justified.

Professor FitzGerald feels that the exemption is ambiguous and asks whether all medical records are protected or just those which invade personal privacy?[220]

213 Senate Bill 1666(c)(6).

214 The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are forced to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or a benefit should be disclosed to the public. *Judiciary Committee Report* 7.

215 See, *e.g.*, Statement of Paul Rand Dixon, *Chairman,* Federal Trade Commission, *1963 Hearings* 161, 162. See also Letter from G. D'Andelot Belin, *The General Counsel of the Treasury,* to Hon. Edward V. Long, Nov. 13, 1963, *1963 Hearings* 224, 226, detailing those files which the department maintains whose revelation might be harmful to the citizens involved.

216 Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 272; Letter from Louis B. Hershey, *Director,* Selective Service System, to Hon. Edward V. Long, Nov. 6, 1963, *1963 Hearings* 319.

217 See Statement of the Judiciary Committee, *supra* note 214.

218 For instances of such fears see Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 272 (physician-patient privilege), 278 (attorney-client privilege). See also Comments of Marvin E. Frankel and Walter Gellhorn, Columbia University School of Law, On Subcommittee Revision of S. 1663, *1964 Hearings* 677, 679 (social security records and census reports).

219 See, *e.g.*, Letter from John W. Macy, Jr., *Chairman,* U.S. Civil Service Commission, to Hon. James O. Eastland, July 19, 1963, *1963 Hearings* 248, 249. See also Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 270.

220 Letter from John F. FitzGerald, *Professor of Law,* Southern Methodist University, to

It would seem from the language of the committee report[221] that all medical records, by definition, are considered to be private and entitled to the protection of the exemption. Professor FitzGerald's objection, as well as the objection of the Interstate Commerce Commission, that fairness to the individual is not protected by the language of the exemption,[222] appears to be met by the liberal committee report. This exemption strives to give maximum protection of individual privacy with apt language designed to prevent the agencies' use of the section as authority for withholding whatever they choose. It will be up to the courts to delineate fair standards if reasonable cooperation is not forthcoming from the agencies.

F. Exemption Seven — Investigatory Files Until They are Used in or Affect an Action or Proceeding or a Private Party's Effective Participation Therein[223]

S. 1666, as introduced, contained no protection for investigatory files. The committee was under the impression that many agencies had statutory exemptions for these files. However, when the agencies pointed out that such statutory protection did not exist for most of them,[224] the committee formulated exemption seven.

There seems to be a general consensus that the agencies cannot effectively carry out their law enforcement duties without adequate protection of their files. But to determine what constitutes adequate protection is a difficult task, complicated by the desire to afford to a party involved in an agency proceeding information as to the evidence which is to be used against him. The exemption is an attempt to balance the legitimate interests of both agency and party. The formulation of the exemption caused adverse comment in the hearings with the agencies still claiming that their files would be revealed to an extent never before contemplated and effective law enforcement would consequently be hampered.[225] They felt that not only would any party be able to roam at will through investigatory files discovering agency investigatory techniques but also that confidential sources of information would be reluctant to come forward for fear of discovery by adverse parties.[226]

These and analogous problems led to the consideration of a final amendment to the bill just before Senate passage. Senator Hubert Humphrey proposed to clarify exemption seven by an amendment which was substantially the same as the Jencks statute.[227] Senator Long agreed with the substance of Senator Humphrey's amendment, but proposed that his own suggestions be combined with Senator Humphrey's to read: "investigatory files compiled for law enforcement purposes except to the extent that they are by law available to a private party."[228] The amendment was accepted by Senator Humphrey and the bill passed in this form. It was reintroduced in substantially the same form in S. 1160.[229]

Hon. Edward V. Long, June 29, 1964, *1964 Hearings* 665.

221 *Supra* note 214.

222 Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1964 Hearings* 93, 97.

223 Senate Bill 1666(c)(7), as amended.

224 See, *e.g.,* Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 201. See also Letter from Laurence K. Walrath, *Chairman,* Interstate Commerce Commission, to Hon. James O. Eastland, Oct. 3, 1963, *1963 Hearings* 299, 302.

225 The Department of Justice was worried that their files would be available for public scrutiny in "a very short time in many cases." Department of Justice Comment on the April 20, 1964, Subcommittee Revision of S. 1663, 88th Congress, 2d Session, *1964 Hearings* 208, 212. See also Letter from John L. FitzGerald, *Professor of Law,* Southern Methodist University, to Hon. Edward V. Long, June 29, 1964, *1964 Hearings* 665.

226 See Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 201; Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 275.

227 110 CONG. REC. 17079 (daily ed. July 31, 1964).

228 *Id.* at 17080.

229 Senate Bill 1160(e)(7).

This exemption is designed to answer the objections raised by agencies concerning the protection of investigatory files for purposes of effective law enforcement. However, even with the final amended version of the exemption, there are many files compiled for investigatory purposes, though not for law enforcement purposes, which should be protected and are not.[230] Accident investigation reports seem to call for protection if full information is to be received. They should be either specially included in the exemption, or the committee, in its report to accompany S. 1160, should liberally construe *compiled for law enforcement purposes.*

The Securities and Exchange Commission expressed concern about their disciplinary proceedings being made public.[231] Since they seem to have had success in conducting securities investigations in private, it is submitted that their continuing to do so is desirable and that a liberal reading of the exemption will allow them to do so. In conducting their investigations, they are enforcing the law; therefore, protection of their files is within the language of the exemption. This situation could be clarified in the committee report.

The final point to be considered is whether the public interest is served as well as the agency interest in refusing to allow disclosure of investigatory files without statutory mandate. Professor Cooper of Michigan does not think so,[232] and the testimony of Mr. Paul Rand Dixon, Chairman of the Federal Trade Commission, lends weight to his position. Mr. Dixon admitted that it was FTC practice, when an investigation file was completed and some witnesses had given information which shed suspicion on the defendant while others supported his honesty, to supply the defendant and his counsel only with the names of those who had spoken against him and not to reveal the existence of favorable witnesses.[233] Under this procedure, the defendant can never be assured that he has knowledge of prospective witnesses in his behalf.[234] Therefore, such practice seems indefensible. If exemption seven prevents revelation of this type of information, it has gone too far.

In the committee hearings on S. 1160, the exemption should be reconsidered and a formulation devised which will protect investigatory files from indiscriminate inspection while allowing final files to be inspected by parties who will be affected by the use of these files in agency proceedings. The following proposal is submitted, first, to protect those investigatory files which are not compiled for law enforcement purposes, but should nevertheless be protected,[235] and, second, to allow parties who

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230 The Department of Defense feels that aircraft accident investigations and personnel security investigations should be protected. Letter from Robert L. Gilliat, Office of the Assistant General Counsel, Department of Defense, to Francis M. Gregory, Jr., Dec. 4, 1964, on file in office of NOTRE DAME LAWYER.

231 Memorandum of the Securities and Exchange Commission to the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, *1964 Hearings* 536, 542.

232 I quite agree that private parties should not be enabled to interfere with agencies' investigations by demanding to see the files of incompleted investigations. However, when an investigation has been completed, and an action filed, it would seem to me to be in the public interest to provide that discovery procedures should be equally as available in agency proceedings as in court proceedings, and to allow respondents and other interested parties to examine the records contained in an agency's investigation file. I am fearful that the language . . . might be used by agencies to prevent other parties from examining their files until such time as they were offered in evidence at a hearing. It is then too late.

Letter from Frank E. Cooper, *Professor of Law,* University of Michigan Law School, to Hon. Edward V. Long, July 7, 1964, *1964 Hearings* 649, 650.

233 Statement of Paul Rand Dixon, *Chairman,* Federal Trade Commission, *1963 Hearings* 161, 170-71.

234 In cases which do not involve a public administrative proceeding, the problem of ascertaining the identity of corroborating witnesses is even more difficult. See Statement of John C. Pigg, Shattuc, Ill., *1963 Hearings* 27.

235 *Supra* note 230.

are affected by the use of these files in agency proceedings to have access to their contents.[236] It is submitted that exemption seven should be amended to read:

> (7) investigatory files compiled for law enforcement purposes and other investigatory files customarily privileged; *except* that no information in an investigatory file may be used by an agency against any party in any proceeding if the party has previously requested access to the file and access has been denied by the agency.

It is admitted that *customarily privileged* is peculiarly subject to definitive adjudication, but no more so than many other terms used in the bill. This formulation would strike a reasonable balance between allowing unlimited access to law enforcement files and a blanket endorsement to the agencies to keep all investigatory files secret. Professor Cooper is correct in asserting that more freedom of discovery should be allowed in agency proceedings, and the proposed exemption would accomplish this purpose. If the committee considers deletion of identifying details in the file a necessity to protect informants, an attempt should be made to reformulate the exemption. It is hoped that the problems presented will be furthered considered in the S. 1160 hearings.

G. Exemption Eight — Protection of Banking Information

There was no banking exemption in S.1666, as introduced, but protests of the agencies concerned with the supervision of banking institutions[237] persuaded the committee to include the exemption.[238] The exemption, as introduced in S. 1160, reads: "(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."[239] Some agencies do not feel that the language of the exemption is wide enough to protect all information which should be legitimately withheld from public scrutiny. They assert that all bank records should be exempted.[240] In a recent letter, Mr. William Martin of the Board of Governors of the Federal Reserve System stated: "The Board believes that the exemption now contained in S. 1666 [S. 1160 is identical] will serve the legitimate interests of the public and the several agencies responsible for the regulation and supervision of financial institutions."[241] With such approval it would seem that the exemption should stand as introduced.

H. Conclusion — Effectiveness of Exemptions

The exemptions to this freedom of information bill establish a privileged sanctuary. When records fall within the sanctuary, they do not have to be published, indexed, or revealed upon request. If the exemptions achieve a reasonable balance between the public's right to know and the individual agency's right to privacy, they will achieve the objectives of the bill. A public agency should have no inherent right to privacy, but some privacy is accorded them for it is recognized that some materials must be kept secret if the agency is to carry out its public function.

There is no doubt that the various agencies and commissions are at least publically committed to the proposition that information should be made public as long as no one is hurt by the revelation.[242] Since this bill will apply to over one

236 *Supra* note 232.

237 See, *e.g.*, Letter from Joseph P. McMurray, *Chairman*, Federal Home Loan Bank Board, to Hon. James O. Eastland, July 12, 1963, *1963 Hearings* 292; Statement of Robert Bloom, *Chief Counsel to the Comptroller of the Currency, 1964 Hearings* 178.

238 *Judiciary Committee Report* 7.

239 Senate Bill 1160(e)(8).

240 See, *e.g.*, Statement of Robert Bloom, *Chief Counsel to the Comptroller of the Currency, 1964 Hearings* 178, 179-80.

241 Letter from William McC. Martin, Jr., *Chairman*, Board of Governors of the Federal Reserve System, to Francis M. Gregory, Jr., Dec. 2, 1964, on file in office of the NOTRE DAME LAWYER.

242 See, *e.g.*, Letter from Lewis B. Hershey, *Director*, Selective Service System, to Hon. Edward V. Long, Nov. 6, 1963, *1963 Hearings* 319; Letter from Paul Rand Dixon, *Chairman*,

hundred federal units, the Senate, in passing one bill instead of one hundred, had to conclude that a single bill would be easier to administer and stronger than multiple bills. There are those who do not agree.[243] Their contention that this area does not need another enactment of general language is valid.[244] However, this bill does not falter under the weight of general language. Furthermore, no language, whether contained in one bill or one hundred, will be specific enough to eliminate the complaints and problems of all the agencies. The agencies will simply have to take it upon themselves, if they wish to avoid continuous litigation, to make available records which, *in all fairness,* should be made available under the terms of the bill. The agencies will be interpreting the exemptions in the first instance and the committee report to accompany S. 1666 indicates that the broad language of the exemptions will allow the court to find protection somewhere for records which *should not* be disclosed. Giving each agency a specific bill would not remove the responsibility of the agencies to take each request for information and apply to it the standards established by the bill in question.

Many agencies still feel, even after the extensive committee revisions of S. 1666, that their particular records are not adequately protected.[245] Congress should consider these allegations, and, if the particular documents are not exempted under the *fair implication* of the section as written but are worthy of protection, either the specific language of the bill should be appropriately amended or a liberal explanation should be drafted by the committee. It must be remembered that the exemptions are not designed to provide protection in specific language for each agency record which deserves secrecy. Congress should continue to avoid a long recitation of specific documents which are exempt and should attempt to maintain the balance, evident in the present exemptions, between the necessity for language protecting materials which should be private and a statutory mandate to make public all other records.

Professor Davis, while approving the direction of the bill, is strongly opposed to the present provisions regarding revelation of records. He feels that too much is made available to the public and that this will adversely affect all branches of government.[246] Professor Davis is basically opposed to the enactment of any legislation to enforce section three against the agencies and feels that other means, such as possible withholding of confirmation of agency appointments, should be used in an attempt to make agency officials more responsive to legitimate demands for

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Federal Trade Commission, to Hon. James O. Eastland, Oct. 1, 1963, *1963 Hearings* 294; Memorandum of the Securities and Exchange Commission to the Committee on the Judiciary on S. 1666, 88th Congress, *1963 Hearings* 308.

243 See, *e.g.,* Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings,* 194, 204. Some agencies felt that to make the bill acceptable specific amendments were needed to provide for their particular problems. See, *e.g.,* Letter from Paul Rand Dixon, *Chairman,* Federal Trade Commission, to Hon. Edward V. Long, Dec. 23, 1963, *1963 Hearings* 242.

244 Statement of Norbert A. Schlei, *Assistant Attorney General,* Office of Legal Counsel, Department of Justice, *1963 Hearings* 194, 198.

245 See, *e.g.,* 1964 Treasury Department Statement, *1964 Hearings* 177A, 177D; Letter from Richard L. Callaghan, *Assistant Administrator For Legislative Affairs,* National Aeronautics and Space Administration, to Hon. James O. Eastland, Jan. 2, 1964, *1963 Hearings* 303, 305.

246 Statement of Kenneth Culp Davis, *Professor of Law,* University of Chicago, *1964 Hearings* 244, 247-48.

> A provision in the nature of section 3(c) [section 3(e) of S. 1160] cannot, in my opinion, be properly prepared without 6 months or a year of further work. A good deal of staff work is first essential to prepare appropriate inquiries that will have to go to all parts of the Government, and then adequate time must be allowed for preparation of responses. The hearings on S. 1666 were not designed to elicit the kind of understanding that is needed. I recommend going ahead with 3(a), 3(b), and with the judicial review provision of 3(c), but deleting the rest of 3(c), pending further inquiry. *Id.* at 248.

information.[247] Such tactics, if successful, would eliminate the need for legislation. However, this procedure has always been available to Congress; and, judging by the thousands of pages of testimony heard concerning agency recalcitrance, it has not as yet proved an effective remedy.

In its hearings on S. 1160 Congress should reconsider all previous testimony and seek advice from Professor Davis as to the manner of proceeding which will ensure the testimony which he feels the hearings on S. 1666 did not elicit.[248] It is submitted that the exemption provisions of S. 1160, although raising many problems, present a solid framework around which to build the final enactment of the freedom of information bill.

VII. Section (f) — Limitation of Exemptions

S. 1160 provides: "(f) LIMITATION OF EXEMPTIONS. — Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress."[249] Senator Long stated on the first day of congressional hearings on S. 1666 that section 3(e), the forerunner to S. 1160(f) is

> substantially the present 5 U.S.C. 22,[250] but is written within the context of this more comprehensive bill. Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill. They provide that specific records shall not be released unless authorized by law. *Subsection 3(e) is not such an authorization to disclose.* It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies.[251]

When considering section (e) we withheld discussion of exemption three so that it could be discussed in connection with section (f).[252] Section (e)(3) provides an exemption for information: "specifically exempted from disclosure by statute."[253] Senator Long states unequivocably that statutes which curtail availability of information to the public are not meant to be affected by this bill. There is nothing in the bill which would controvert this strong testimony by the committee chairman. Nevertheless, agency after agency cited as one of their main objections to the bill the fact that the bill could well be construed as curtailing the availability of these statutes.[254] This agency anxiety does not seem well founded. The bill is clear. All records are available except those which fall under one of the exemptions. One of the exemptions is *specifically exempted from disclosure by statute.*[255] If there is a statute prohibiting disclosure of the information requested, the agency can refuse to divulge immediately and its refusal will be sustained by the courts. If there is no statute, or if the statute is not clear, the agencies may then refer to the other exemptions. It is quite likely that many of the records prohibited from disclosure by statute will also be protected by one of the other exemptions.

247 *Id.* at 249.
248 *Ibid.*
249 Senate Bill 1160(f).
250 1958 Amendment to Federal Housekeeping Statute.
251 *1963 Hearings* 6. (Emphasis added.)
252 *Supra* note 192.
253 Senate Bill 1160(e)(3).
254 See, *e.g.,* Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 272-76; Letter from G. E. Leighty, *Chairman,* Railway Labor Executives' Association, to Hon. Edward V. Long, Nov. 5, 1963, *1963 Hearings* 237, 238. For listings of statutes involved, see, *e.g.,* Bureau of International Commerce Comments on S. 1666, *1963 Hearings* 256, 257; Statement in Detail of Treasury Department Objections to S. 1666, *supra.*
255 The Treasury Department suggests that the exemption be amended to read: "the disclosure of which is prohibited by statute." 1964 Treasury Department Statement, *1964 Hearings* 177A, 177C. If the committee desires a liberal exemption, this proposal would serve to alleviate many doubts expressed by the agencies.

The agencies were also apprehensive about the bill's effect upon the protection afforded by the Jencks statute.[256] Congress, in passing the Jencks statute, provided that information of this type should be protected. A fair reading of S. 1160 would indicate that the bill neither refutes that determination nor revokes the grant of the Jencks statute. There is some fear among the agencies that the language of the bill constitutes an *implied repealer* of previous statutes.[257] It is submitted that this analysis is invalid and reads into the bill problems which simply are not there.

The language of the bill and the committee explanation make the conclusion inevitable that statutory protection is a legitimate exemption in the bill and that section (f) is *not* designed to repeal the specific exemption granted in section (e). The only purposes of section (f) are to codify the underlying philosophy of the bill, that all records are to be available except those for which exemptions are provided, and to protect the traditional right of Congress to receive information from federal agencies. There is no other purpose. To attempt to find difficulties in this section seems to be adding imaginary problems to a bill which does not lack real ones.

VIII Conclusion

As stated in the introduction, "it is not an easy task to balance the opposing interests, but it is not an impossible one either."[258] We feel that it is apparent that the Senate Judiciary Subcommittee has been most diligent in its effort to incorporate in the bill reasonable agency suggestions without obviating the goals of the enactment. While no bill can ever satisfy all interested parties, we feel that the present version of S. 1160 is the most satisfactory attempt yet made to supply the needed revision of section three of the Administrative Procedure Act of 1946.

Section (a) aptly tightens the loose wording of the present Act. It has met with little criticism and should be passed as drafted. After additional hearings and with selective revision, it is submitted that a version of section (b) can be formulated which will more effectively balance the legitimate need for an indexing requirement with the practicalities involved in implementing the section. With the placing of the exemptions in a separate section, the provision of section (c) for revelation of agency records and court enforcement thereof is a necessary improvement of the present Act. There is little doubt that the public deserves access to the voting records of its officials as provided for in section (d). Although no quantum of effort will satisfy critics of the exemption provisions of section (e), it is submitted that Congress should reconsider all criticism, solicit additional testimony, and formulate necessary exemptions for records deserving secrecy but presently unprotected by a fair reading of the section. Section (f) presents no problem and should stand as is.

There is no doubt that a freedom of information bill is needed to close loopholes in the present section three. However, no matter how many bills are passed, the ultimate success or failure of any such bill depends upon the reasonable cooperation of the agencies who possess the desired information and the applicants requesting revelation. The power to disclose or withhold can no longer be vested exclusively in agency discretion. It is submitted that no society can ever be great if its citizens are denied access to the records of their government.

Robert S. Krause
Francis M. Gregory Jr.

256 18 U.S.C. § 3500 (1958).
257 Statement in Detail of Treasury Department Objections to S. 1666, *1963 Hearings* 268, 271.
258 *Judiciary Committee Report* 8.