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HEARINGS
Before The

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SENATE COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
CONFERENCE

UNITED STATES SENATE

THURSDAY, AUGUST 4, 1976

SENATE 5

Washington, D.C.

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THE GOVERNMENT IN THE SUNSHINE ACT

THURSDAY, AUGUST 5, 1976

United States Senate,
United States House of
Representatives,

United States Senate Committee
on Government Operations

United States House of Repre-
sentatives Committee on
Government Operations,

Washington, D. C.

The committees met, pursuant to notice, at
10:30 o'clock a.m., in room H-140, The Capitol, the
Honorable Jack Brooks, Chairman, presiding.

Mr. Brooks. The conference will please
come to order.

We are indebted to Chairman Mahon who
very graciously allowed us to use his good room today,
as they are in very short supply in The Capitol, as you

1 well know.

2 As a temporary chairman, I ask the meeting
3 to come to order, and the first order of business would
4 be to entertain a motion for selection of a permanent
5 chairman of the conference committee.

6 Senator Chiles. I move you be made the
7 permanent chairman.

8 Mr. Brooks. Motion has been made by
9 Senator Chiles.

10 Is there any objection?

11 So adopted.

12 Mr. Flowers. We will not even reserve the
13 right to objection, Mr. Chairman.

14 Mr. Brooks. Without objection, then I will
15 undertake this problem.

16 In the matter before the conference is Senate
17 bill 5.

18 Before we start, let me suggest we will
19 welcome the press, and we welcome visitors, and we welcome
20 everybody in the world, but we suggest if they do not
21 have a chair, a seat available here, that they just not stay
22 in this room, because we are not going to be able to handle
23 a lot of people standing around, and we would be delighted
24 to welcome everybody, so if there are any seats
25 available, you are welcome to them.

1 If not, we would be pleased to have you wait
2 until they become available, and the matter before the
3 conference is Senate Number 5, the Government in the
4 Sunshine Act, as passed by the Senate, as amended by
5 the House.

6 This is a very significant piece of legislation,
7 while there are some differences, it will be the subject of
8 this conference.

9 I do not think there is any major disagreement
10 as to overwhelming objectives of the legislation,
11 as demonstrated by the overwhelming margins by which
12 the House and Senate passed this bill.

13 The staff have, of respective House and
14 Senate Committees, involved themselves in identifying
15 approximately 55 differences between the House and
16 Senate versions.

17 Of these 55, 38 appear to be primarily
18 technical, and can probably be handled relatively
19 quickly.

20 These are described in Part II of the
21 memorandum, labeled 55 differences between House and
22 Senate versions.

23 Do all of the House members have that
24 available before them?

25 You have Part I, and you have Part II.

1 The remaining 17 differences described
2 in Part I, are more substantive, and will necessitate I
3 would think some discussion.

4 As to procedure, I would suggest that we proceed
5 with a discussion of the more difficult matters first.

6 We can go thru each of the items listed on
7 the memo, and in the order in which it appears, hopefully
8 we will come to a resolution of these issues, in reasonably
9 expeditious manner.

10 Now, I would say the first issue, have you
11 located Part I and Part II of the memo that was prepared
12 by the staff?

13 Part I, I think it was prepared by the
14 Senate group, Part II by the House group, and the staffs
15 have cooperated very nicely in trying to resolve the
16 issues, and pinpoint what the differences are.

17 The first issue under that procedure would
18 be item 1-a, the definition of a meeting, and before I
19 do this, does this meet with the approval of everybody, that
20 we go thru it in this order?

21 Just get at it, and see what we can resolve, and
22 I would hope we could complete this today.

23 We may go a full day, but there is no sense
24 in playing around.

25 Item 1-a, definition of a meeting.

1
2 The Senate defines meeting to mean "the
3 deliberations of at least the number of individual agency
4 members required to take action on behalf of the agency
5 where such deliberations concern the joint conduct or dis-
6 positions of official agency business."

7 House defines meeting to mean "a gathering
8 to jointly conduct or dispose of agency business by two or
9 more, but at least the number of individual agency members
10 required to take action on behalf of the agency."

11 Now, the Senate language defines it to mean
12 deliberations of at least a number of agency members required
13 to take action, and so on.

14 The Senate version will in effect cover I believe
15 conference calls.

16 I believe deliberations would include
17 that.

18 Senator Chiles. Let me just say initially,
19 and that is kind of divided into parts A and B types of
20 meetings covered.

21 In Part B, types of meetings covered, the
22 House has exempted from the bill that required or permitted
23 by Subsection d, pursuant to Subsection d, an agency
24 may choose to meet to consider whether a subsequent meeting
25 should be open or closed under this Act.

1
2 I think the House has treated that better
3 than we have, and I think we ought to accept your
4 provision there, because I think it allows you to have
5 a discussion as to whether you will close the meeting
6 or not, and not have to make a previous announcement,
7 and set times on that.

8 I think you have thought that thru better
9 than we have.

10 Mr. Brooks. Does that mesh with the general
11 agreement?

12 We will accept the House version without
13 objection.

14 Senator Chiles. That is Part D there.

15 Mr. Flowers. Part D uses the term gathering
16 like in Part A now.

17 Senator Chiles. We still probably need some
18 discussion on that, but what you are trying to do there,
19 and then I would ask that the Senate recede on Part B.

20 All those in favor signify by saying
21 "aye".

22 Opposed?

23 Then the Senate recedes.

24 Mr. Brooks. That is on 1-B.

25 Now, on 1-A, we might discuss that.

Mr. Flowers. Mr. Chairman, could I be

1 heard?

2 Mr. Brooks. Yes, sir, Mr. Flowers.

3 Mr. Flowers. I am concerned the House
4 version would not cover a conference call, and I think
5 a conference call type of deliberation should be covered
6 under this Act.

7 I do not know whether you want to directly go
8 to the Senate version here, or what, but in order to
9 put the matter on the floor, I would move the House
10 recede to the Senate version of Part A.

11 Mr. Brooks. Is there any discussion?

12 Mr. Kindness. It appears that it provides
13 some instrumental obstacles.

14 How can a conference call be public just on
15 the abstract.

16 The proposition, I am certain to begin
17 with, what the gentleman from Alabama inferred by
18 saying the conference call ought to be covered, is that
19 there should be no conference calls.

20 Mr. Flowers. That is what the gentleman
21 intends.

22 You prohibit the type of conference call to
23 jointly called meetings on agency business, which I
24 think ought to be included.

25 Mr. Moorhead. Many times there are some

1 very serious items of business that can be taken care of
2 by that kind of communication.

3 Usually all of the materials that can
4 be made available to the public anyway, if they went into
5 the meetings in which they had present the results of
6 those things, but lots of times, they get people with
7 various expertise that can get together at a time
8 when there is no meeting, and then schedule one, but
9 whether there is a problem that is creating a great
10 deal of difficulty, they can iron it out, and you
11 may eliminate a chance to correct things in a simple
12 way.

13 Mr. Flowers. If this bill, Mr. Chairman,
14 if I might be heard, if we are talking about letting
15 the sun shine in, it ca-not shine in on a conference
16 call, then all of these people we are talking about
17 generally are located, or should be in the Washington,
18 D.C., area, I do not see any problem of them getting
19 together in a meeting that the public could be in, and
20 I think that otherwise, we create a loophole at the very
21 outset here.

22 Mr. Fascal. I certainly agree with the
23 gentleman from Alabama.

24 That is the guts of the whole thing. I have
25 a conference call, and I make a decision without a

1 public meeting, what is the purpose?

2 Mr. Brooks. Is there further discussion
3 on the motion of the gentleman from Alabama,
4 Mr. Flowers?

5 If not, all in favor of that on the House
6 side will vote "aye".

7 Opposed?

8 In the opinion of the Chair, the "ayes"
9 have it.

10 The House will recede in Section 1-A, and
11 we will proceed to 1-C, the second page, definition
12 of a member.

13 The Senate does not separately define the
14 term member of an agency.

15 The House defines member to mean "an individual
16 who belongs to a collegial body heading an agency."

17 The House version is probably, just to
18 clarify that all members, including non-Presidential
19 appointees will be covered.

20 I think that it is probably preferable,
21 Senator.

22 Mr. Fascell. The Senate want to
23 recede?

24 SenatorChiles. I think without objection,
25 the Senate will recede there.

1 Mr. Brooks. The Senate recedes.

2 1-D.

3 Ladies and gentlemen, the staff in trying
4 to get this lined up, we agreed to 1-B, gentlemen and
5 ladies, and you want to conform the language in 1-B on
6 gatherings, on 1-A, to 1-B for gatherings, the
7 language that would make it conform would be to put
8 gatherings required by subsection D, would be used in 1-A,
9 to conform with 1-B.

10 Mr. Horton. I am sorry I was late, but
11 I had another meeting, but I would like to know where
12 we are, Mr. Chairman.

13 Mr. Brooks. We are in the process of
14 discussing what are the first seventeen differences
15 between the two versions of these bills, where we are
16 now discussing part 1-A and 1-C.

17 1-A, we agreed to the House position.

18 1-B, we agreed to the Senate position, and we
19 are now agreeing to include in 1-A some of the language
20 from 1-B, so that the two sections will conform.

21 Is there objection to that confirmation?

22 Senator Chilez. No objection.

23 On 1-C, we have agreed, we are now on

24 1-D.

25 Prohibition against noncompliance of the

1 Act, the House in addition to requiring the agency
2 meetings to be open, provides that "members as described
3 in subsection (a) (2) shall not jointly conduct or dispose
4 of agency business without complying with subsections
5 (b) and through (g)."

6 The Senate does not contain this additional
7 provision.

8 The House version I think is somewhat
9 stronger.

10 It prohibits meetings outside the Act, but
11 has no sanction for the violation.

12 The Senate staff suggested that.

13 Mr. Brooks. Fine. Senator Chiles, and Members
14 of the House, that the language could be possibly acceptable
15 there, it has been suggested, but they would suggest it
16 be made a little bit more clear in saying that the House
17 in addition to requiring agency meetings to be open,
18 provides that members other than, members as described
19 in subsection (a) (2) shall not jointly conduct or dispose of
20 agency business without complying with subsection (b)
21 through (g).

22 I think they probably had a good idea.

23 Mr. Horton. Could I get that
24 language, please?

25 Mr. Brooks. I-D, the House in addition

1 to requiring agency meetings to be open, provides that
2 members as described in subsection (a) (2) shall not
3 jointly conduct or dispose of agency business without
4 complying with subsections (b) through (g).

5 Strike without complying.

6 Mr. Horton. Do you have that written
7 out?

8 Could we have that?

9 I mean the amendment you are proposing.
10 I just do not want people to be able to have meetings
11 in telephone booths.

12 Mr. Brooks. No, they are not. We have
13 passed that, and they will not do that.

14 Mr. McCloskey. Other than in accordance
15 with what, this section?

16 Mr. Brooks. In accordance with this
17 section, period.

18 Mrs. Abzug. This is not a substantive
19 change.

20 I think the staff is correct in suggesting
21 we clarify that, because it is rather awkwardly
22 drafted in 1-B, because it says members described in
23 Subsection A-2, and it says at the end, without
24 complying with Subsection B through G.

25 Actually all of the suggested changes that the

1 Chairman reads does is to simply clean up the language.

2 It is not substantive in nature, and that
3 members shall not conduct or dispose of agency business.

4 Mr. Brooks. Is there objection to the
5 language?

6 Senator Chiles. The Senate without
7 objection will accept the House language in D, as you
8 just covered that.

9 Mr. Brooks. Is there objection on the
10 House side to this revision?

11 Mr. Fassel. Technically, I suppose
12 the Senate precede with an amendment?

13 Senator Chiles. I guess that is right.

14 Mr. Brooks. 2-A, exemption for premature
15 disclosure of information.

16 Applicability of exemption's qualifying
17 language to financial agencies.

18 The Senate provision qualifying the exemption
19 for premature disclosure of certain information applies
20 to the entire exemption, including the portion applicable
21 to an agency which regulates currencies, securities,
22 commodities, or financial institutions.

23 In the comparable House provision, the qualifications
24 on the exemption do not apply to agencies which regulate
25 currencies, securities, commodities, or financial

1 institutions.

2 The Senate version is broader, with more
3 meaning, for open meetings, as it limits a provision
4 for those closing of meetings.

5 Mr. Horton. Could we have some discussion
6 on what this does?

7 Senator Chiles. Yes, sir, I think what
8 we are talking about here, we are making a general
9 exemption.

10 We have made an exemption. We said
11 for the premature exemption, that is the disclosing of
12 those facts, if you disclose them premature, it might
13 affect some kind of transaction, speculation, and the
14 other things, we have provided that this paragraph shall
15 not apply in any instance where the agency has already
16 disclosed to the public the content, or nature of its
17 proposed action, or where the agency is required by law
18 to make such a disclosure on initiative prior to taking
19 a financial agency approval on such action.

20 The difference is, in the Senate bill that
21 provision is made to all agencies, and in the House
22 bill, you only make those, not to disclosing, not to
23 those dealing with financial agencies as the SEC, or
24 the Federal Reserve.

25 It is our feeling, where you are talking

1 about something that has already been disclosed, it is already
2 in the hands of the public, there is not much reason for
3 treating the agency separate on that.

4 There is no reason where premature exemption
5 should apply, with the SEC, in an instance, where
6 the agency has already disclosed the public content of
7 the nature--

8 Senator Roth. Are you talking about official
9 disclosure?

10 What about if one member does it?

11 Senator Chiles. We are talking about in the
12 public domain.

13 Senator Roth. I think that is an important
14 difference, that is, whether you are confirming.

15 Senator Chiles. It is where the agency
16 has.

17 Senator Roth. So it has to be official
18 premature disclosure.

19 Senator Chiles. It says where the agency
20 has already disclosed to the public.

21 The language says the agency.

22 Mrs. Jordan. Disclosure of individual
23 initiative is probably in the next section.

24 Mrs. Abzug. I move we recede to the Senate
25 language, Mr. Chairman.

1
2 Mr. Horton. Can we wait just a minute until
3 we look at it more closely?

4 Mr. Brooks. I would say, Senators, maybe the
5 House should go up and vote now.

6 There is a vote on the postcard registration
7 bill.

8 It will take only one minute.

9 (Whereupon, the conference was in short
10 recess.)

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AFTER RECESS

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4 Mr. Brooks. The conference will come
5 to order.

6 Senator Chiles. We are waiting on Mr.
7 Horton, Mr. Chairman.

8 Mr. Horton. Mr. Chairman, I am still a
9 little loss to understand what is involved here, and
10 I think it might be helpful if we could have Mr.
11 Biddle--

12 Mr. Fascal. How about the general counsel
13 to the Senate side?

14 Mr. Horton. I think it would be helpful
15 for us to have Mr. Biddle to explain of OMB what the
16 problem is, as he understands it, and which I think would
17 be very helpful to the members of the conference.

18 He is right here.

19 Mr. Brooks. I believe I would rather
20 prefer to have counsel for the Senate Committee, or
21 the House Committee, and if he has anything to add to that,
22 we would be certainly pleased to hear his additional
23 comments, in all fairness to him, because when he gets
24 on the staff of the House and Senate, then we will rely
25 on him more directly, but at this point, we have agreed to

1 1-D, and we are now on 2, and I would think it might be a
2 simpler version to have Paul Hoff with the Senate Committee
3 briefly explain what the Senate bill does, as distinguished
4 from the House bill.

5 I briefly mentioned it, but you might give
6 him a better and more definitive explanation of that,
7 Mr. Hoff, if you would.

8 Mr. Hoff. What is issue number 2 involves
9 is the 7th exemption.

10 In the Senate version it is number 7, and
11 it is number 9 in the House version.

12 It is on page five, line 17 and 24 in the
13 House bill.

14 The provision applies to cases where there
15 has to be a closed meeting to prevent premature
16 disclosure of information.

17 Both House and Senate have the same basic
18 provision.

19 The two issues that differ are the
20 wording at the end of the exemption, in other words,
21 the ones that appear on lines three and eight in the
22 Senate, and lines 17 thru 24, that wording which qualifies
23 the exemption for premature, applies in the Senate bill
24 to the entire exemption, which would include in 7-A agencies
25 that regulate currencies, securities, commodities and

1 financial institutions, as well as any other agency which
2 discusses information as to the maturity problem.

3 The House version applies only to B, that
4 is agencies other than agencies that regulate financial
5 institutions, and the first issue in 2-A is whether or
6 not that qualifying language should apply to the
7 entire provision, or only to agencies other than financial.

8 The second issue which appears on page 3
9 of the memo, is differences in wording.

10 Mr. Fascell. Let us stick to the first
11 one.

12 Mr. Brooks. I think the gentleman has
13 stated clearly the issues, whether you want all of this as
14 it applies to A, B or C, or whether you think it should
15 apply only to B, as probably the House position
16 was.

17 Mr. Horton. I would urge that we adopt
18 the House provision, because even though something is
19 made public, they are not, there might be occasions
20 when it is necessary for the exemption to apply especially
21 as it relates to currencies, securities, commodities,
22 and financial institutions.

23 I am not a member of the Subcommittee, but
24 I understand there was, that this was gone over very
25 carefully in the subcommittee.

1
2 We did put in the language by the agency, which
3 I think it is important to include, so I would
4 urge we adopt the House position.

5 Mr. Brooks. Is there any further
6 discussion?

7 The motion pending is that of Mrs.
8 Abzug to recede to the Senate position.

9 Mrs. Abzug. I have been reading it
10 over.

11 Our Subcommittee helped develop the
12 original language of the House. I thought there was a
13 greater consensus, a greater consistency and clarity
14 in the language of the Senate side, that it should
15 apply to both A and E, and then the language, generally,
16 if you read it, is much clearer in the Senate, not only
17 with respect to 2-A, but also with respect to 2-A and
18 2-B, that the paragraph shall not apply in any instance,
19 I am reading from the Senate language, has already disclosed
20 the content, etc.

21 I think that that language intended by us on
22 page 5 in B, and I think that the Senate displays that
23 intent more clearly, and I do think there is consistency
24 to their proposal that applies to both A and E.

25 Mr. Brooks. Would the gentlewoman yield?

1
2 Do you think possibly the language, I am
3 inclined to agree the language is a little more
4 succinct, but do you think we might apply that language
5 to B only, and still meet generally what the House
6 passed, with the improvement of the Senate language, as
7 you agreed?

8 Mrs. Abzug. Yes, if that is the feeling
9 of the body.

10 Mr. Flowers. Mr. Chairman, the Judiciary
11 Committee added a proviso at the end of the pre-session,
12 the language beginning, or after the agency publishes,
13 etc.

14 I am not sure what we are doing substantively
15 in this whole thing.

16 The House version possibly is narrower
17 in its exemption.

18 Mrs. Abzug. Would the gentleman yield on
19 that?

20 That language is the reason I thought we
21 should reced to the Senate language.

22 It appears to me, perhaps you can clarify
23 it forme, but it appears to me in reading it over very
24 carefully before this conference, that that
25 added language, and we are talking, gentleman, and Barbara
Jordan, about the last phrase on the bottom of page 5, in B,

1 or after the agency publishes, etc., that appears to be
2 inconsistent with the clause right before that, which says,
3 unless, or it should read, if or where the agency is
4 required by law to make such disclosure prior to taking final
5 action, final agency action on such proposal.

6 What that says there is that this paragraph
7 in general does not apply in any instance after the
8 content, or the nature of a proposed agency action
9 has already been disclosed to the public by the agency, then
10 obviously it should make it public, or the agency is required
11 by law to make that disclosure before it takes final agency
12 action.

13 Your phrase says after the agency publishes
14 or serves as substantive rule, whereas the clause right
15 before that suggests if it has to publish it, they
16 have to tell you about it before, it has to publish it as
17 a matter of its final ruling, so there seems to be an
18 inconsistency to me in the two clauses, and that is why
19 I thought the language in the Senate version was clearer.

20 If I am wrong, I would like to hear from the
21 gentleman on it.

22 It seems totally inconsistent.

23 Mr. Flowers. I think you stated it reasonably
24 accurately.

25 Mr. Horton. The language that you just

1 referred to at the bottom of page 5, line 20, by the
2 agency, unless the agency is required by law to make such
3 disclosure prior to taking final agency action, or after
4 the agency publishes or serves as substantive rule
5 pursuant to Section 5-D of this title, that seems to me
6 to qualify the type of disclosure.

7 It would seem to me that is an important
8 inclusion, is it not?

9 Mrs. Abzug. No.

10 Mr. McCloskey. That is probably true, in
11 line six, where it says that it is the Agency has to
12 disclose.

13 What we are worried about is here is a situation,
14 where somebody has leaked and somebody other than the
15 agency--

16 Mr. Fascell. I think the Senate language is
17 better, frankly.

18 Mr. Brooks. Gentlemen, ladies, then I
19 understand, Mrs. Abzug, you asked for permission to amend
20 your motion?

21 Mrs. Abzug. I ask for permission to amend
22 my motion to recede, to accept the language of the
23 Senate, but have it apply solely to B, that is in the
24 House language.

25 Mr. Brooks. Is there objection on the

1 House side?

2 The Chair hears none.

3 Senator Chiles, what we agreed to is your
4 language, and making it apply to B only as in the House
5 version.

6 Senator Chiles. I just kind of wish I could
7 understand the reason that you would not apply this
8 to all of the agencies.

9 When I was just saying where there shall not,
10 this shall not apply in any instance where the agencies or
11 the agency has already disclosed to the public.

12 It seems to me, whether it is the Federal
13 Reserve System, or whether it is the SEC--

14 Mr. Fascell. They have already disclosed it.
15 Just take the Senate language all the way--

16 Mr. Brooks. The House has agreed to accept it
17 as to B.

18 I hope, Senator, that we could solve that, then get
19 to this next one.

20 We have a vote, and we have about three
21 minutes before we need to leave.

22 If you all would make up your mind, to see
23 what you think about that--

24 Mr. Horton. Let me ask a question, are we
25 talking about a disclosure that is made by the Agency?

1

Is the Senate language clear on that?

2

Is that the way you understand it, no

3

question about it?

4

Mr. Brooks. There is no question.

5

Mr. Horton. We are not talking about

6

unidentified disclosure, that we can then find ourselves
in a situation where it will not apply.

7

8

Mr. Brooks. Right.

9

Senator Chiles. It says where an

10

agency has already disclosed, or it is required by law.

11

Mr. Horton. I am not sure the language says that

12

in the Senate bill.

13

Where does it say that?

14

Mr. McCloskey. Page six, line four.

15

Mr. Horton. It says this paragraph shall

16

not apply where the agency has already disclosed to the
public.

17

18

Mr. Brooks. All right.

19

Gentlemen, we must go for a vote, and

20

we can discuss it further.

21

Mr. Horton. I would like to clarify this

22

when we get back.

23

Mr. Brooks. You will get an opportunity.

24

Gentlemen, we must get down there for a vote

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at this time.

We will stand in recess.

(Whereupon, the conference was in short recess.)

AFTER RECESS

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3 Mr. Brooks. The conference will come
4 to order.

5 Mrs. Abzug. May I say, in answer to the
6 colloquy of the House, I said this issue, was intended
7 in the House version to be covered in B, so again I would
8 say the language of the Senate, obviously I think is
9 clearer.

10 I did indicate that was our legislative
11 intent, in the colloquy on the floor during the
12 debate.

13 Mr. Horton. That is why I suggested we
14 drop C, and have the Senate language applicable to B.

15 We would have it solved that way.

16 Senator Chiles. For the Senate to drop
17 C?

18 Mr. Horton. It is not necessary.

19 It is covered in B, and that is what Mrs.
20 Abzug said on the floor.

21 Mrs. Abzug. Our version did not contain C,
22 and there was a colloquy on the floor, asking whether
23 or not B would apply to an agency in Federal matters
24 relating to purchase by an agency of real property, and
25 my answer was yes.

1 Senator Chiles. All right.

2 I think we could drop C, and just cover it
3 with language.

4 Mrs. Abzug. We would have to make a
5 notation in the conference report on it.

6 Mr. Brooks. Fine.

7 That leaves us with an agreement.

8 What do you think about A?

9 Do you want the language to cover A and B?

10 Now, we have agreed to drop C altogether,
11 so that would be moot, but we still have A.

12 We dropped C.

13 Do you still have some problems covered in
14 A and B, where the agency has already disclosed it
15 themselves?

16 Mr. Kindness. I do want to express a
17 point of concern.

18 Sometimes this might be by an agency
19 regulating financial institutions or security, there
20 might have been past disclosure of information,
21 sometimes in the past, but the disclosure at this particular
22 time of what action is being taken by the agency could
23 give speculators an opportunity.

24 Mr. Brooks I surrender. You have got me.
25 I cannot for the like of me know why once an agency has

1 made something public, why they should not be able to say
2 later they should not make it public again, but I will
3 agree the Senate recede on that provision.

4 Mr. Fascell. Whatever we do, do we --

5 Well, I am trying to find out what the
6 technical motion will be.

7 The Senate is going to recede with an
8 amendment, or are we going to take the House language?

9 You have to take the Senate language, so
10 the House will recede with an amendment.

11 I just want to be sure what we are doing.

12 Mr. Brooks. The House recedes with an
13 amendment to strike C, and accepting of course the
14 Senate basic language.

15 Mr. Fascell. The staff all agreed, I understand
16 what we are doing.

17 Do they?

18 I just want to be sure. I do not want
19 to come back and open it up again.

20 Mr. Brooks. Now, at this point, we had a
21 question from--

22 Senator Javits. I would like to get this
23 clarified, if I could, Mr. Chairman.

24 As I understand it, we would strike the
25 Section C from page six, the House would accept the

1 language, which immediately follows line three, but
2 it would be confined to its applicability to B, as
3 described in the House.

4 Mr. Brooks. In the House amendment on
5 page five.

6 Is that the understanding of the staff?

7 Is that the understanding of the members?

8 Mr. Horton. Let me ask one further question,
9 which is where we were before we had the roll call.

10 I had a question to the Senate language
11 on page six, three and four, which said this paragraph
12 is now contained, is now confined to the agency, is
13 already disclosed to the public the contents of the
14 proposed action, and I wanted to make sure that that
15 meant that a disclosure by someone other than the agency
16 would not be covered.

17 In other words, I just want to make sure that
18 we had that understanding, that Mr. Chiles indicated to
19 me that it was so understood, and I think maybe we could
20 have some language in the report that could cover that.

21 Mr. Brooks. It is the same thing.

22 The agency has already disclosed, that means
23 the agency has done it.

24 Senator Chiles. It is so clear in the
25 language.

1 Senator Javits. I respect Congressman
2 Horton, and he has a point, in that this is a generic
3 description, which applies to a particular kind of
4 meeting out at an agency.

5 It does not merely say the disclosure is
6 by the agency.

7 You want to be very precise, where you can
8 say where the agency, that is fine, or where the agency
9 is required, you would have to add by the agency, by
10 the agency, and where the agency is, but that is too much
11 language, and I would hope that the Chair would see
12 fit to comply with Congressman Horton's request, that it
13 be spelled out in the report, but what we mean in that is in
14 disclosures by the agencies.

15 Mr. Brooks. I think that is no problem, no
16 problem, and that is resolved.

17 Mr. Horton. Now I recognize, well, I have
18 suggestions, first of all, as I explained to you
19 yesterday, I was not able to be here right at 10:30,
20 when the meeting was called, because I had another
21 committee meeting.

22 I am very much interested in this
23 legislation.

24 I did not get the documents until late
25 yesterday afternoon, and I did not get a chance to go over

1 them very carefully.

2 There are some areas in this, in both these
3 bills in which there is no real contention.

4 It would be my suggestion that we try to
5 resolve those matters first, and then come back say
6 this afternoon, and take up these more complex matters,
7 which would give us and staff an opportunity to look at
8 these more carefully.

9 I make that request because I think this
10 is a very complicated piece of legislation.

11 We have seen with the Privacy Act and
12 the Freedom of Information Act, all sorts of ambiguities
13 and questions about it, and I think it would be to the
14 benefit of both Houses if we were very careful in looking
15 at the language we will be adopting here, and so I would
16 urge first of all that we handle it in that manner, which
17 I think would be very helpful to the members of the
18 conference, and I do not think it would delay it at all.

19 This is a very important piece of legislation,
20 and we are dealing with some very technical language here,
21 which I think ought to be pursued and looked at very
22 carefully before we go back to the two houses, and the
23 other point I would like to bring up is, I understand that
24 the definition of meeting was taken up before I arrived.

25 The House definition is the result of an amendment

1 which I proposed to the House, and which was adopted by a
2 large majority, and I would respectfully urge that we go
3 back at some point, and discuss that again with the option
4 of perhaps changing the course of action that has already
5 been taken.

6 I was the principal sponsor of the amendment, and
7 I feel it should have been passed over at least until I
8 could have arrived, so I could have discussed my points
9 on it.

10 Mr. Brooks. To my distinguished friend
11 from New York, the first suggestion we take up the more
12 difficult matters this afternoon, at the opening of this
13 conference, it was agreed by members unanimously without
14 any objection that we discuss those issues in disagreement
15 between versions between the House and Senate of Part I,
16 which are about 17, we would take those up this
17 morning.

18 We agreed to it, and agreed that this
19 afternoon, or rather at the conclusion of that, we would
20 take up the less controversial, more technical changes,
21 which total about 39, which are described in part 2 of
22 the document before you, and we have been proceeding on
23 that basis for the last two hours, a hour and a half, and
24 have proceeded thru one, two, three, four, five, six,
25 seven, eight, of the 17 items, and are making I think

1 fairly good progress along that line.

2 If any of these are not completed this
3 morning, by 12:00 o'clock, in ten minutes, then we
4 will continue on them this afternoon, and so I would
5 without objection be pleased to clear with you, to hear
6 your comments on Section I, if there is no objection
7 to that, I would be pleased to recognize you.

8 Mrs. Abzug. I would also agree for you
9 to restate your position, it would be fair to restate
10 your position on it, but I do want to point out to my
11 dear colleague from New York, it was not a wide majority
12 of difference.

13 It was only about 20 votes.

14 Mr. Horton. That is a majority of the
15 House.

16 Well, the definition that we had as you
17 recall in the debate on the floor, we had several
18 definitions, it was the Senate definition, and there
19 was the Judiciary Committee definition, and then there
20 was the definition which I proposed, and that was
21 I think overwhelmingly adopted by the members of the
22 House, and it was a roll call vote.

23 I forget what the vote is, but we would like
24 to find out what it was, but the purpose of that is to
25 prevent the type of meetings, for example, in the

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telephons booth, where they happen to meet at the golf course, or something like that, and then have provisions of this law applicable to those type of meetings, and it was to more adequately define what a meeting was, and that is why it was a gathering to jointly conduct, or dispose of agency business.

In other words, there was a purpose set for it, and that was the reason for the amendment, the purpose, rather than the subjective approach to a meeting, and I think we should be realistic about this matter of meeting.

I do not think anyone wants to prevent the provisions of this bill applying when there is to be a meeting, but as was brought out on the House floor, when we debated this matter, we certianly do not want to preclude the opportunity for people who are members of these bodies from discussing matters, and having the provision apply to that type of procedure.

I think it is a very important definition, and I felt the House supported it; and I would hope the House will support the position of the House.

If they do not, then I am certainly going to make certain when it goes back, we do give the House an opportunity to vote again on that matter.

Mr. Flowers. Mr. Chairman, could I raise an

1 issue here, we are not just dealing with definitions, as it
2 relates to a gathering versus deliberations, which we
3 are also dealing with the question of jointly conduct to
4 dispose of agency business, rather it is a loose or sort
5 of definition in the Senate version.

6 We are also, now, let us -- correct me if
7 I am wrong, under this Act, any gathering, or any coming
8 together would be avoided, would be illegal, would be
9 against the law, if it does not meet this definition of
10 a meeting, is not that correct?

11 It would prohibit under this Act any
12 meeting except what would fall within this
13 definition?

14 I think under the House version, a conference
15 call, would likewise be prohibited, just like it would under
16 the Senate version.

17 Mr. Brooks. Is there any further
18 discussion?

19 Mrs. Abzug. I would like to, if I may,
20 Mr. Chairman, since what we did agree here was to recede,
21 and concur with the Senate language, I think that the
22 Senate report gives us the reason why we do so.

23 If I may refer this to the conference,
24 on page 18, it says the words deliberation and
25 conduct were carefully chosen to indicate that some degree

1 of formality is required before a gathering is considered
2 a meeting for purposes of this section.

3 Now, it does not cover a casual meeting. It
4 is a question of what you are doing.

5 You have to be conducting business under
6 a certain degree of formality, and I think the language
7 of the Senate makes that much clearer, and I believe that
8 it gives our legislation a lot more substantive meaning
9 than the language we put together, and I really feel, I
10 am sorry I did not have a chance to read this on the
11 House floor in the course of our debate, but it was
12 pretty hectic, we had so many amendments, with your
13 assistance, so it was hard to do it, but I really feel
14 this definition makes it more succinct, gives us better
15 guideline, and gives us greater clarity.

16 Mr. McCloskey. Will the gentlewoman
17 yield?

18 Out of due respect, I think our amendment which
19 was adopted by the House on the floor in the roll call
20 vote was intended to return to the Senate a concept
21 of deliberation.

22 It was the purpose of the meeting, it was to
23 have deliberations, and not to have the casual type of
24 meeting, and it seems to me what we did find on the floor
25 is fairly close to what the Senate did in the original

1 version.

2 What we were trying to do was cure what the
3 House Government Operations Committee had defined in its
4 meeting.

5 Mr. Horton. I would like to know what
6 deliberations as opposed to the language in the House
7 means.

8 Perhaps we could have some discussion on
9 that.

10 Senator Chiles. I can tell you what
11 the intent, and what we were reaching for, as the
12 distinguished Congresswoman pointed out, we are not
13 trying to cover a social gathering, where two people
14 bump into each other, and have a conversation.

15 We expressly wanted to make sure that we
16 had clear that by our report language, but we were trying to
17 cover something other than what you would say could
18 be a formally called meeting for a purpose.

19 Now, we have had some experience with this,
20 and that experience relates like this, we found that
21 in Florida, at one time, prior to the cabinet meetings in
22 Florida, there was a breakfast that was had, and
23 at that breakfast, all votes were decided, every one knew
24 exactly what was going to vote on what, who was going to
25 vote on what, who was going to make what motion, and then

1 they went into an open cabinet meeting, and it went off
2 slick as glass, and the sunshine bill in Florida
3 specifically, and through tests that have come up, we tried
4 to cover that kind of situation, having sort of a pre-
5 meeting, in which you discovered all of that, so and so
6 we thought our language was covering that.

7 I am a little concerned, where it says a
8 gathering to jointly conduct.

9 Now, when you say, that seems to be the
10 purpose of that meeting had to be to conduct that, if
11 your language had said a gathering which conducts, then
12 we are probably a lot closer than where we are in our
13 deliberations.

14 Mr. Fascell. Will the Senator yield
15 for a moment?

16 That is the whole problem with the House
17 language, Frank, as you know, that word, to just, it
18 just leaves a loophole as big as a barn door.

19 Senator Javits. Would the Senator
20 yield?

21 I have a suggestion. If the managers could
22 call attention to the particular elements of the Senate
23 language, using the definition of deliberations as
24 defined by Senator Chiles, calling attention to something
25 else not been discussed, that is "at least the number of

1 individual agency members" that immediately rules out the
2 meeting on the golf course, the lunch, etc., because you
3 have to have a quorum.

4 Mr. McCloskey. The SEC does do business
5 with two.

6 Senator Javits. Then that too is substantive.
7 You cannot have it both ways. If the two can do
8 business, then that is it.

9 Then you want to cover it, and then I think
10 also, the words concerning the joint conduct, to join
11 that with the deliberation as being a considered development
12 and discussion of what the agency is going to do
13 by a number sufficient to do it, I think if you spell
14 that out, that would cover most of the contingencies that
15 Frank is concerned about.

16 I have just added one other element, you
17 have not discussed this, which is the number involved, so
18 it would be three elements, deliberations, number
19 involved, like the SEC with two, well, that is tough, they
20 can make it four if they want to, but until they do, two
21 is it, and the word concern, which means they really
22 go into a consideration of what is to be done in some
23 deliberate way.

24 Mr. Fascell. Are you talking about
25 taking the Senate language, and then spelling out in the

1 report the three criteria you laid down, which is what
2 we mean in accepting the Senate language?

3 Senator Javits. Even a discussion of two
4 guys over a drink, but they are not deliberately sitting
5 down to determine what to do.

6 Mr. Brooks. Mr. Horton, what do you think
7 of that?

8 I think it should be done in that fashion.

9 Mr. McCloskey. Mr. Chairman, Mr. Horton's
10 concern I think is the last line of 17 of the Senate
11 bill, that the deliberations have at least the number
12 of individual agencies required to take action on behalf
13 of the agencies, where such deliberations are concerned
14 of joint conduct, and if our amendment is adopted on the
15 floor of the House, that which was adopted was to bring in
16 the word purpose, it is proposed we delete it at the end
17 of line 18, the words concerning they, and insert the
18 words for the purpose of affecting joint conduct or
19 disposition of official agency business.

20 That language would then put the purpose section
21 in, retain the Senate concept.

22 Mr. Fascell. The problem with that is when
23 you are changing it, as you suggest, you are right back
24 where you are, it does not eliminate the problem of the
25 pre-meeting meeting.

1 Mr. McCloskey. It does not require the
2 meeting be called for the purpose of anything.

3 People can get together casually, which
4 is what you want to permit, but the minute they start
5 taking up something that affects joint agency business,
6 they violate the law, and we want that to be a violation
7 of the law.

8 We do not want to catch anybody that does
9 not have the purpose of violating the law, and when the
10 deliberations concerning the joint conduct, you will
11 have lawyers disagree on what deliberations are.

12 Deliberations is not a legally defined
13 term.

14 We are not sure when a discussion ended, and
15 when deliberations commenced, and that could be a
16 subject of litigation.

17 I think if these words, the deliberations
18 are for the purpose of affecting the disposition of business,
19 they meet Mr. Horton's objections.

20 Mrs. Abzug. Will the gentleman yield?

21 The problem is if you come together without
22 a purpose, as you are now proposing, there is no limit on
23 what you can discuss at that meeting, and for all
24 intents and purposes, you are conducting a meeting.

25 The language in the Senate bill, and

1 the language that was proposed by Senator Javits with a
2 report, and what now exists in the Senate report, makes it
3 quite clear, that what we are talking about is a formal
4 meeting, that the words deliberations and conduct are
5 carefully chosen which indicate some degree of formality
6 is required, and right above that, the report says
7 luncheon attended by commissioners would not be a
8 meeting, simply because one commissioner made a brief
9 casual remark with an agency matter, and the same would be
10 so about a chance encounter, or an encounter on a golf
11 course.

12 You actually have to be conducting business, whereas
13 then you raise the question, what is the purpose of a
14 meeting, in my opinion, and I think in the opinion of
15 many of the others, that worked on this bill for a long
16 time, you would then be inviting a great deal of
17 litigation, or you would be providing a vehicle unwittingly
18 to evade the purpose of the law.

19 Mr. McCloskey. If the gentleman will yield
20 back, when you state your concern about the pre-meeting,
21 and that is what the gentleman from Alabama raised, we added
22 that section B-1, at the bottom of the House bill, line
23 of the page 2, that members shall not jointly conduct or
24 dispose of agency business without complying with subsection,
25 so we covered the pre-meeting meeting specifically in

1 that section, and once you dispose of pre-meeting meeting
2 question, then I think this compromise of placing the words
3 to say the purpose of affecting a joint disposition,
4 I think we have covered all of the phases.

5 Mr. Horton. I think he made a good point,
6 which probably should have been made earlier, and that
7 is that definitely the language he is referring to on
8 lines 23, 24, 25, on page 2, I would hope that we could
9 adopt the language that we adopted in the House.

10 I think it would take away a lot of the
11 problems.

12 Senator Chiles. What it does not deal with,
13 is what we were pointing out, in your language, in the way
14 you have it now, it is a gathering too, and so there has
15 to be a formal purpose, that that gathering is to affect
16 that business, as long as you can say it was not called,
17 specifically for that, you get together, and do anything
18 you want to do.

19 Mr. Horton. You cannot, however, with
20 this language, we have got 23, 24, 25, members shall not
21 jointly conduct or dispose of agency business without
22 complying with Subsection B thru G.

23 Mr. Fascell. That means a formal action has
24 to be taken, but all of the agreements reaching that
25 decision can be taken in private.

1 Mr. Horton. It does not.

2 It says shall not conduct.

3 Mrs. Abzug. What is the answer, that
4 is, what is the sanction?

5 There is not any.

6 Mr. Fascell. It means you can do everything,
7 except take the final vote.

8 Mr. McCloskey. If the Senate sense is that
9 replacement of the words concern, I would agree with
10 Senator Chiles.

11 Can we compromise that?

12 We take the purpose of calling the meeting
13 out of it, but we make the deliberations for the
14 purpose of affecting the business before they are made
15 civilly liable.

16 Senator Chiles. We are really going to
17 your definition exactly.

18 Mr. McCloskey. No, because we meet
19 your objection.

20 If these people once meet, then if they take
21 it up, intending to affect it, they violate the law, but
22 we do not require that the meeting be called for the
23 purpose of doing something different than it is, and that
24 was your objection, as I understood it.

25 Senator Javits. I have one other idea in my

1 mind, maybe it will help you solve the problem.

2 A fellow does not like purpose, and you
3 gentlemen do not like concern, because it may be only
4 light conversation, whereas if two guys are out on the
5 golf course, playing golf, they are going to talk
6 shop, and what else are they going to talk, so what about
7 using the word determine, which would then read where such
8 deliberations determines the joint conduct or disposition
9 of official agency business.

10 Now, that is a performance standard.

11 In other words, it actually results in the
12 fact that these guys are cooking up their deal,
13 that is another matter.

14 I suggest that as another possibility. That is
15 really what you are after.

16 You are after a pre-meeting meeting, or some
17 kind of caucus.

18 So I just suggest that to try to help
19 our members.

20 Mr. Brooks. Thank you very much.

21 Of course--

22 Senator Chiles. I am just a little bit
23 afraid that --

24 Senator Javits. You have joint conduct.
25 That is what I am banging on. The word determined--

1 Senator Chiles. What about if you put
2 results.

3 Senator Javits. Fine.

4 Mr. McCloskey. That is less strong.

5 Senator Javits. It may be a way out for
6 everybody.

7 Mr. Flowers. You might use both of those
8 terms.

9 Senator Javits. Strike the word concern
10 and insert the word determine, or result in.

11 Result in would mean striking the words
12 concern they.

13 Mr. Flowers. I think that is fine.

14 Senator Javits. So that of course--

15 Mrs. Abzug. Is not it pretty
16 subjective?

17 Senator Javits. One car hits another,
18 and the jury has to determine. so everything is
19 subjective.

20 Mr. Brooks. I think that will be fine.

21 Mr. Horton. I am just trying to be very
22 careful, that there is the meeting, not necessarily that
23 they meet, but it does not necessarily result in, to begin with,
24 and then you find out it does result in, and you have
25 to make applicable to provisions of the Act, and I think

1 that is very subjective, and it is not clean enough.

2 That is just my interpretation.

3 Senator Javits. I like the word concern.

4 Mr. Horton. That is a little bit better.

5 Mr. Brooks. Would you like affect?

6 Mr. Horton. I still like the language
7 better in the House bill, I think that says it, but
8 I understand the Senate wants to get at the possibility
9 of a pre-meeting meeting, and I am just saying I think
10 for the beginning of this Act, that what we ought to do
11 is make sure we define a gathering, or meeting, so that it
12 pretty well defines it, maybe they can come up with a sub-
13 terfuge, then we can certainly amend the act again, but
14 I think you will create all kinds of problems by using
15 the word deliberations, and the language that is in the
16 Senate bill, and I do not think that solves the problem.

17 Mr. Mazzoli. May I ask the Senator from
18 Florida, you mentioned in your State, which has the
19 sunshine laws, the pre-meeting meeting, how did you
20 solve that problem?

21 Senator Chiles. A lot of it was ultimately
22 solved in court tests of the Act.

23 Our sunshine act is a very simple act, there
24 are no exceptions, so they said--

25 Mr. Mazzoli. If in fact we are trying to get

1 at the pre-meeting meeting, it is possible we could make
2 some language specifically, but if I understand the
3 general condition of the discussion, we are seeking to
4 put words there which would eliminate, again to go back to
5 the conference call, or the meeting, which is not billed,
6 but which does in fact determine, and result in disposi-
7 tion of business, which I do not really think should be
8 excepted in our bill.

9 A pre-meeting meeting, if we could
10 address ourselves, that that in fact is the problem, it
11 seems to me we could address that specifically.

12 Here in the report language, saying this
13 section is what we want this law to cover, and then the
14 rest of the so-called casual meetings, which are not
15 really casual, could be covered in the general
16 language.

17 Mr. Horton. Maybe that is the way to solve
18 it, to take the language of the House, and say admonish
19 this subterfuge of having a pre-meeting meeting, and
20 refer to the language that I read on page six of the
21 House language, 23, 25, 25, that we are not condoling, and
22 we are opposed to having any subterfuges to try to get
23 around the provisions of this Act.

24 Mr. Brooks. Any further amendments?
25

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2 Mr. Flowers. Mr. Chairman, I would like to
3 align myself with what the gentleman from Kentucky said.

4 I do not think the problem is pre-meeting
5 meeting, not the one scheduled regularly, but the one
6 that results in the action that maybe is confirmed at a pub-
7 lic meeting later.

8 I think Mr. Javits makes sense with his
9 languaga.

10 Perhaps using both together to determine the
11 results in, that might be better than the word concern,
12 but I think the purpose of the House language does require
13 to structure a thing in advance, and it could be a stumbling
14 block here.

15 Mr. Kindness. From the standpoint of people
16 that have complied, that have to comply with this, it
17 seems to us of the word determine, or results in, gives
18 them something they can understand, live with, because
19 when they are reaching a point where they are actually
20 deciding something, to be confirmed later, it puts a clear
21 test to them, I think, which none of the other approaches have
22 really quite applied.

23 I think determine is all right.

24 Mr. Brooks. Gentlemen, we have no motion
25 pending on that whatsoever because we are discussing.

Mr. Fascell. You want to go with that?

1 Mr. Brooks. Does that satisfy you, Mr.
2 Horton?

3 Mr. Horton. I do not know whether you
4 are talking about determined or result in.

5 Mr. Brooks. We are talking about substi-
6 tuting the word concerned, the word determined, or
7 result in, the joint conduct.

8 Mr. Horton. Would you mind reading it.

9 Mr. Brooks. On page 2, line 18, 13, for the
10 purpose of this section, the amendment required to take
11 action on behalf of the agency, where such deletion is,
12 strike the word concern and say deliberations did determine
13 or result in the joint conduct or disposition of official
14 agency business.

15 It makes sense to me.

16 Mr. Fascell. It makes sense to me.

17 Mr. Brooks. Any objection to that?

18 If not, you might, Mr. Horton, make a
19 motion that we amend the language to that extent, if
20 you so desire.

21 Mr. Horton. I do not think I want to make
22 the motion.

23 Mr. McCloskey. I will make the motion.

24 Mr. Brooks. And the House will recede with an
25 amendment.

1 Mr. Horton. Before you go, let me read it,
2 and ask you your interpretation.

3 For purposes of this section, a meeting
4 means deliberation of at least a number of individual
5 agency members required to take action on behalf of the
6 agency, where such deliberations determine, or result
7 in the joint conduct of this position of official agency
8 business.

9 Suppose it does not result in conduct,
10 this is confusing, or disposition of official business,
11 then it leaves out--

12 Mr. Brooks. That is right.

13 Mr. Horton. And there are times when
14 perhaps they would be covered with the language we have
15 got, it seems to me.

16 Mr. Brooks. Maybe we ought to stay where
17 we are on the conference, and not worry about changing
18 it.

19 We have already agreed to it.

20 Mr. Horton. I will yield to Mr. Javits.

21 Senator Javits. It is like everything you
22 settle or work out, you cannot see everything really that
23 has an objection, you have got to rely on your judgment.

24 This is too structured according to the
25 House members themselves, and while the House is bound to

1 maintain its position, the fact is that the Senate presses
2 upon it an even broader position, so you are really taking
3 something less than the Senate's maximum.

4 You have defined it yourselves as a
5 maximum.

6 You have to expect a settlement in some
7 way.

8 On none of these things can any of
9 us have our own way.

10 Senator Ribicoff. I wonder if what bothers
11 Mr. Horton, would not be settled by using the word
12 influence, such deliberation influence conduct of
13 official agency business.

14 Mr. Horton. I don't think that word
15 influence I would like.

16 Mr. Brooks. They got nervous on that
17 one.

18 Senator Ribicoff. Then we can go back to
19 determine or results.

20 Mr. Moorhead. The word determine is a precise
21 word that actually means something.

22 If we say results in, anytime you have a
23 casual conversation, to say what might be a swinging
24 vote on a committee, sometimes down the line, that casual
25 conversation could result in a certain kind of action,
and someone could trace it all the way thru.

1 I think you leave yourself wide open to a lot
2 of confusion, if you use or results in.

3 Determines is something that is more
4 precise, and I think that word, and I think it will really
5 solve the problem.

6 I think Senator Javits really hit the nail
7 on the head when he pulled that word out to begin with.

8 Mr. McCloskey. Mr. Chairman, I make a
9 formal motion that the House recede from its disagreement
10 with an amendment that we place the word concern with the
11 word determine.

12 Mr. Horton. I will accept that

13 Mr. Brooks. Any further discussion?

14 I would just say, I think as Chairman, it
15 is a very restrictive word, and I think determine and
16 result in might be acceptable, but I would be opposed
17 to changing it to determine by itself, and I would hope
18 the House members would join me in not agreeing to that,
19 and perhaps the Senate would do the same.

20 Mr. Fascal. That makes it more restrictive
21 than where we started.

22 Mr. Brooks. Any on the House side feel
23 we should vote for the motion of Mr. McCloskey, we
24 substitute determine for the word concern?

25 Those in favor, signify by saying "aye".

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Opposed?

The "noas" have it.

Mr. Flowers. I call for an amendment to Mr. McCloskey's motion to add determine or result in.

Mr. Brooks. The amendment is offered to Mr. McCloskey's suggestion, it is a new motion, Mr. Flower's motion is it be determined or result in.

Mr. Flowers. In lieu of the word concern.

Mr. Conyers. Are we going to have a chance on the House side to determine whether we want to keep in the original Senate language?

Mr. Brooks. We have already done that.

This would be an amendment to that original language.

Mr. Conyers. As I understand his motion, if we are to eliminate concern on line 18--

Mr. Brooks. Let me say--

Mr. Conyers. So that we would have to vote against Mr. Flowers' version to keep the original Senate language?

Mr. Brooks. That would be correct.

Those who are in favor of the motion signify by saying "aye".

Opposed?

1 It is the opinion of the Chair that the
2 "ayes" have it.

3 The amendment is agreed to.

4 Mr. Fascell. We are not playing any games.
5 Let us get this thing rolling.

6 Mr. Horton. I do not like or result
7 in.

8 Mrs. Abzug. I ask for a record vote.
9 I want to see whether we will go to the floor
10 with this.

11 Mr. Brooks. You ask for a record vote?

12 Mrs. Abzug. Yes.

13 Mr. Brooks. The clerk will call the
14 roll.

15 (The Clerk called the roll as follows:

16 Mr. Morse. No. (by proxy)

17 Mr. Fascell. No.

18 Mr. Conyers. No.

19 Mrs. Abzug. No.

20 Mr. Flowers. Aye.

21 Mr. Kindness. Aye.

22 Mr. Danielson. Absent.

23 Mrs. Jordan. Aye.

24 Mr. Mazzoli. Aye.

25 Mr. Pattison. Absent.

1 Mr. Horton. No.

2 Mr. McCloskey. Aye.

3 Mr. Moorhead. Aye.

4 Mr. Conyers. Aye.

5 Mr. Brooks. Aye.)

6 Mr. Brooks. The Clerk will announce the
7 vote.

8 The Clerk. Seven "ayes" and five "noes".

9 Mr. Brooks. The vote is seven to five, and
10 the amendment is approved.

11 Mr. Chiles, the House side agrees to
12 the language, determine or result in, and if the Senate
13 would agree to that, we would be in position to move on.

14 Senator Chiles. The Senate will agree.

15 Mr. Brooks. Without objection then, one has
16 been amended in that fashion, and we will proceed to 3-A,
17 and 3-B, the exemption for limitations on disclosures in
18 other statutes.

19 A, Sunshine Act Provision.

20 The Senate permits an agency to close a
21 meeting to protect "information required to be withheld
22 by any other statute establishing particular criteria
23 or referring to particular types of information."

24 The comparable House clause exempts:

25 "Matters specifically exempted from disclosure

1 by statute (other than section 552 of this Title):
2 Provided that such statute (A) requires that the matters
3 be withheld from the public or (B) establishes particular
4 criteria for withholding or refers to particular types
5 of matters to be withheld;"

6 I would say to Counsel, Mr. Hoff, would
7 you like to add to that discussion?

8 If not, our inhouse expert is Mr.
9 McCloskey.

10 Mr. Hoff. I will just add, this is a
11 provision that would incorporate statutes which may refer
12 to withholding of information that is described in
13 those other statutes.

14 The question is whether or not the words
15 required to be withheld should have a separate test from
16 the words permitted to be withheld, whether you want to
17 distinguish between the statutes that require withholding.

18 The Senate did not have a separate test. The
19 House had a separate test. The Senate referred to just as
20 required, and the House voted for required and permitted.

21 Mr. Brooks. Mr. McCloskey, would you like to
22 discuss this?

23 Mr. McCloskey. I can explain it to the
24 Senate.

25 Mr. Brooks. Explain it to me too.

1 Mr. McCloskey. This statute, the Sunshine
2 Act will be the third part of an openness section 552 of the
3 Privacy Act.

4 Now, this Act will be 552-B. Now, when
5 the statute came before us in the Sunshine Act, and
6 many of its exemptions paralleled the Freedom of Information
7 Act, just as a matter of legislative craftsmanship, so
8 the attorneys dealing with this, we adjusted the language
9 of I think 7 of the 10 exemptions of the Freedom of Informa-
10 tion Act, and the Privacy Act to be identical, so that
11 you would not have to look at what was exempt for
12 disclosure under the Freedom of Information Act, and a
13 different exemption under the Sunshine Act.

14 In the Freedom of Information Act, the
15 exemption that applied to information required to be
16 withheld by statute, was affected by the Robertson case
17 in the Supreme Court, which held that in the case of
18 the Federal Aviation Administration, if the administrator
19 had the right to withhold information, that the Freedom
20 of Information Act requirements that he divulge it unless
21 it meant specific criteria did not apply.

22 In fact, the court held that the Freedom
23 of Information Act restrictions, and exemptions were
24 not intended to apply to perhaps 200 different Federal
25 statutes, and some of those 200 Federal statutes require

1 that information be kept secret, such as in the census
2 acts, as in the original Social Security Act.

3 Others of the Federal statutes are
4 permissive in that the Administrator of the Agency, or
5 the agency has the right to withhold information from
6 the public, if, for example, he determines in the
7 public interest that information should be withheld.

8 Mrs. Abzug. Which was the case in the
9 Robertson case.

10 Mr. McCloskey. So what we sought to do in
11 this amendment is to overrule the Robertson case, in
12 those cases where the statute is permissive.

13 Where it is permissive, where the Administrator
14 has a right to withhold it or make it public, then we
15 think the Freedom of Information Act exempts or
16 exemptions should be allowed.

17 He should be allowed to withhold it only
18 if it comes within the Freedom of Information Act.

19 On the contrary, if that statute requires the
20 Administrator keep the information secret, as in the
21 Census Act, it was our feeling we should not overrule those
22 50 odd individual statutes, by requiring he now make it
23 public under the Freedom of Information Act, so this section
24 is intended to overrule the Robertson case with respect
25 to permissive statutes, yet not to overrule the statutes

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2 that require the Administrator to keep information
3 secret.

4 That is the explanation of it.

5 Mr. Brooks. We have a vote. We will
6 come right back.

7 (Whereupon, the conference was in
8 recess.)
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AFTER RECESS

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3 Mr. Brooks. The conference will come
4 to order.

5 Please continue.

6 Mr. Fascell?

7 Mr. Fascell. It is a clarifying
8 amendment?

9 Mr. McCloskey. Pardon?

10 Mr. Fascell. This is a clarifying amendment
11 in overruling the Robertson case?

12 Mr. McCloskey. It really does not affect the
13 Sunshine Act very much, but as an amendment to the
14 Freedom of Information Act, it is a highly important
15 amendment.

16 Mr. Fascell. On permissive statutes, it
17 requires in order to make it possible for whoever has
18 authority to withhold?

19 Mr. McCloskey. In the statute it gives
20 permissive authority to withhold, lays down specific
21 criteria, that is different from the Freedom of Information
22 Act, then the specific criteria of that act applies.

23 If there are no specific criteria in the
24 statute that allows him to withhold, then the Freedom
25 of Information Act will come in.

Mr. Fascell. On the basis, there is mandatory

1 authority to withhold, that Act is not affected anyway?

2 Mr. McCloskey. That is correct.

3 Senator Chiles. I believe we want to do
4 the same thing you want to do.

5 I think we have a concern that your language
6 as it is set forth now, requires the matter be withheld
7 from the public, but that is overly broad, and raises new
8 problems of interpretation.

9 Mr. McCloskey. If you have any amendment, there
10 is no pride of authorship, anything that would clarify
11 what I said is fine.

12 Senator Chiles. We have two alternative
13 proposals, and either one would kind of cover it.

14 One would be to apply, the House wording to
15 read following your House wording, to where you get A,
16 requires that the matter be withheld from the public, in
17 such a manner, and then we would add as to leave no room for
18 discretion in the matter, or, B, establishes particular
19 for withholding.

20 Mr. McCloskey. We would have no
21 objection.

22 Ms. Abzug. It would be in the matter --

23 Senator Chiles. As to leave no discretion
24 in the matter, that we are talking about here.

25 Senator Percy. Mr. Chairman, a parliamentary

1 inquiry, may I inquire when we are going to adjourn?

2 Mr. Brooks. We are going to adjourn very
3 shortly.

4 I hope we might be able to conclude this, and
5 then we will adjourn until 2:00 o'clock.

6 Senator Javits. Would a motion be in
7 order to accept the provision made by the Chair, and
8 offer it back to the House?

9 Senator Chiles. I think the Senate would
10 recede with an amendment.

11 Senator Javits. I so move.

12 Senator Chiles. Fine.

13 Mr. Brooks. Read the language again,
14 please, Senator Chiles.

15 Senator Chiles. If you look at page three
16 in the House language, where they have a paragraph,
17 requires that the matters be withheld from the public
18 in such a manner as to leave no discretion in the matter,
19 or just an addition of that to the proviso--

20 Mr. McCloskey. Mr. Chairman, because of
21 the dialogue that I had on the floor on this matter,
22 as to a particular statute, in which discretion is
23 involved, I could not vote for this compromise, but
24 I understand the Senate's position, and I think it
25 overrules the House position on this one with a HEW

1 statute that was brought up as part of our legislative
2 history, and I think the record should reflect that.

3 Mrs. Abzug. They have six months in which they
4 could change that statute, before this becomes law.

5 Senator Chiles. I would move the Senate
6 withdraw with an amendment.

7 Senator Javits. As I understand it, the
8 only difference is that these agencies which have the
9 discussions, that would not mean the particular piece of
10 information would be disclosed.

11 The manager should spell it all out
12 very carefully, it should not be assumed, but because of
13 what you have written here, where an agency has
14 described, ipso facto, it is made public.

15 You now have the authority under the
16 Freedom of Information Act, so we deprive the agency of
17 its discretion in favor of.

18 Mr. McCloskey. Unless it is on the
19 statute, and lays down the criteria.

20 They may be in some cases be different.

21 Senator Javits. Suppose they have a
22 discretion to waive their own section?

23 Senator Chiles. They have six months in which
24 to change.

25 Senator Javits. Then you would want them

1 to pass over to the Freedom of Information Act?

2 Mrs. Abzug. I think we are making the
3 same thing, the same change, if I recall the Freedom
4 of Information Act.

5 Senator Chiles. Any further discussion?
6 Those in favor of the amendment, say
7 "aye".

8 Opposed?

9 The Senate recesses with the amendment.

10 Mr. Brooks. Is there any objection on
11 the House side?

12 Mr. McCloskey. My comment on the House
13 floor, with Congressman Burke, I take that exception.

14 Mr. Brooks. All in favor, say "aye".

15 Opposed?

16 The "ayes" have it, and it is agreed to by
17 the conference the Senate recesses with an amendment.

18 The conferees will stand adjourned until
19 2:00 o'clock.

20 Wait a minute. We could take up 3-B at this
21 time, and finish it up.

22 Senator Javits. May I see that before we
23 jump?

24 Mr. Brooks. Page 20.
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1 Senator Javits. May I ask a question, all
2 I want to be sure of, I want to see it, this does not
3 nullify the non-disclosure provisions of the Freedom
4 of Information Act?

5 In other words, once an agency has discretion,
6 that is it?

7 Mr. McCloskey. That is where the exemption
8 comes in.

9 Senator Javits. What we are doing now still
10 preserves the exemptions from disclosure of the Freedom
11 of Information Act, if it does not fall under a
12 mandatory exemption under an agency's--

13 Mr. McCloskey. It can only uphold the
14 Freedom of Information Act, or such different criteria
15 as already exists in a different statute.

16 Senator Javits. The amendment would be--

17 Mrs. Abzug. Will the gentleman yield?

18 It would not in any way nullify the existing
19 exemptions or provisions of the Freedom of Information
20 Act, except the ones by reference.

21 Senator Javits. What do you mean by the
22 ones except by reference?

23 Mrs. Abzug. In conforming, it does not
24 nullify the exemptions of the Freedom of Information
25 act or requirements.

1 Mr. Conyers. The one question is it including
2 the phrase other than Section 552(b) of this title, which
3 is the section being amended?

4 Senator Chiles. That is not included in this
5 provision for the Freedom of Information Act.

6 Mr. Kindness. I am looking at page 25, where
7 it appears on line nine, and it is somewhat kind of
8 misleading, and I cannot kind of figure out why the
9 parenthetical phrase there.

10 Mrs. Abzug. For reference, so that the Freedom of
11 Information Act does not pull in all of the exemptions of
12 the Sunshine Act.

13 It has its own exemptions, the Freedom
14 of Information Act.

15 Mr. Kindness. They are contained in what
16 places?

17 Mrs. Abzug. They are in the Freedom of
18 Information Act.

19 Mr. Kindness. In what section, 552(b)?

20 Mrs. Abzug. We will show you a copy of it,
21 so you will be satisfied.

22 Mr. McCloskey. In some respects, the
23 Sunshine Act exemptions from disclosure are stronger than
24 the Freedom of Information Act.

25 We did not want to say in the Freedom of

1 Information Act that a statute which exempted something
2 from disclosure, like the criterion Sunshine Act could
3 be made a subject of disclosure under the Freedom of
4 Information Act.

5 Senator Javits. You are doing that practically
6 by adopting Mr. Horton's provision to which where the
7 agency has discretion.

8 It seems to me the agency has discretion
9 built into the law, and it has the mandate of the
10 law.

11 You gave them discretion, because we wanted
12 them to judge by certain criteria, but under certain
13 basic criteria, there should be an exception.

14 I think by just taking it out in
15 block, you do run a risk of nullifying our own purposes.

16 Mr. McCloskey. Well, it was our intent,
17 we think, when we passed the Freedom of Information Act
18 to say that when those people exercised discretion, it
19 would be subject to the Freedom of Information Act exemption,
20 the circuit court so held, but then the Supreme Court in
21 the Robertson case held, no, we did not intend the
22 Freedom of Information act to apply to those discretionary
23 criteria.

24 In FAA, the criteria was solely at the level
25 where the Administrator thinks it is in the public interest

1 to withhold crash information.

2 This would say, if he has to withhold crash
3 information, it has to be because it protects the privacy
4 of an individual, national security, or one of those
5 exemptions.

6 Mr. Brooks. The question is on the
7 adoption of 3(b), on the Freedom of Information Act
8 provision.

9 Is there any objection?

10 Then it is done, and we will proceed at 2:00
11 o'clock with item number four.

12 We stand in recess.

13 (Whereupon, the confarence was recessed at
14 12:45 o'clock p.m.)

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AFTER RECESS

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3 Mr. Brooks. The conference will come to
4 order.

5 We are now going to number four, requirements
6 for transcripts or minutes, and that will be on page ten
7 where the House and Senate language is laid out.

8 The Senate requires an agency to keep a
9 transcript or electronic recording of closed agency
10 meetings. The transcripts or electronic recordings must
11 be maintained for at least two years, but disclosure of
12 transcripts containing sensitive matters is protected.

13 There is no requirement that the agency
14 prepare minutes of open or closed meetings.

15 The House does not require an agency to keep
16 transcripts of open or closed meetings.

17 Instead, it requires the general counsel to certi-
18 fy publicly that the meeting may be closed under one of the
19 exemptions and to state the relevant exemption.

20 This must be included in minutes kept of the
21 closed meeting. Minutes of closed meetings must include
22 information on the generic subject matter of the meeting
23 and actions taken on them.

24 The House also requires each agency to maintain
25 and disclose minutes of open meetings.

1 The minutes of open meetings, but not closed
2 meetings, must be kept for at least two years.

3 Now, Mr. Hoff, do you have any comments
4 on that?

5 Mr. Hoff. No comments.

6 Mr. Brooks. Mr. Jones, you have a delineation
7 of a problem.

8 Is there any discussion on this?

9 The issue seems fairly clear cut to me.

0 Any discussion on this?

1 Mr. McCloskey. Perhaps the Senate might
2 undertake a motion to recede to the House position.

3 Mr. Brooks. I did not see him twitch.

4 Senator Percy. Mr. Chairman, I would
5 like to comment on this, because I have looked at the
6 House position on it, and we have a Commission on
7 Paperwork to try to cut down on paperwork, and if you
8 just take 50 agencies, and you say you have five meetings,
9 you have a meeting a week, or you will have 50 times
10 50, and you have got subcommittees in the agencies, an
11 average of I don't know how many, five, I don't know,
12 that takes you up to a fantastic number of transcripts,
13 and I wonder if that pouring out of paperwork is
14 really necessary.

15 Now, the FED has a real objection to it,

1 and I have looked at the House side of this, and if we can
2 have an assurance that minutes are complete, and accurate,
3 and fully representative of what went on at that meeting,
4 and there are not obvious omissions, then I think minutes
5 would be far better.

6 If we required each corporation, every
7 partnership, and every business, and every lawfirm to
8 have verbatim minutes and transcripts, of everything they
9 do, we could just bury ourselves, and I think what we
10 are after, is to know what went on.

11 For instance, we have now a committee,
12 a permanent investigating committee, looking into an
13 organization, and we want to know what their minutes
14 are.

15 We want to look over a period of ten years,
16 and we happen to know they have minutes.

17 I am awfully happy they could not get by
18 by dumping a carton load of tapes on us.

19 You do not know who the voices are, you
20 cannot identify them, but minutes, you can scan and find
21 what you are looking for, so I think the House position
22 really, if we can absolutely be certain the minutes by
23 minutes, we can certify them to be accurate, with no
24 omissions, I really feel the House position is better, and
25 I move we recede to the House position, unless some member

1 would like to have some wording that would strengthen
2 the provision involving minutes for the purpose of the
3 report.

4 Mr. Fawcett. I just want to ask, did your
5 subcommittee on preparedness or paperwork, do you have
6 a transcript?

7 Senator Percy. We have a transcript of formal
8 meetings, yes.

9 Senator Javits. As a practical matter, of
10 course transcripts are kept of many meetings, and
11 undoubtedly many of these agencies have a transcript.

12 The reason it interests me is the purpose
13 of this legislation is to enable the public to understand
14 and to know.

15 My experience with transcripts, they
16 put a big volume on your desk of a transcript, very, very
17 few of us go into it, and when you start to read it, to
18 the House or Senate, you need read only one sentence, and
19 you lose their attention immediately.

20 The worse thing I can do is pick anything
21 up to read. I am dead in debate, right away, so if we
22 can lock this in, and I think we can, so as to
23 give the information, I think we will make it more rather
24 than less likely the sunshine law will be a sunshine law,
25 and we are, again, I repeat, I say this so often, we are

1 bound to sustain the Senate position, and that is our
2 duty.

3 My own opinion is that we would do better
4 for the public if we did not lock the electronic thing
5 in so tightly.

6 I was going to suggest, Senator Percy,
7 you make the motion.

8 I would be happy to suggest the language,
9 but I was going to suggest that we impose responsibility
10 on the agency counsel respecting the truth, accuracy,
11 and identification of persons, in respect to any set
12 of minutes, which the agency closest to the issue, by
13 them, instead of a transcript, and if it satisfies those
14 criterias, that we let the agency decide whether it
15 wishes to issue a transcript, or wishes to issue the
16 minutes, and the criteria which I had in mind would
17 read as follows:

18 Which shall fully and clearly describe
19 all matters discussed, and shall provide full and
20 accurate, and shall provide a full and accurate transcript,
21 rather a full and accurate summary of any actions taken,
22 and the reasons thereof, including a description of each
23 of the views expressed by any item, and the record of any
24 roll call vote reflecting the vote of each member on
25 the question.

1 Mrs. Abzug. I find it very interesting,
2 because we have been thru this discussion at great
3 length.

4 I think that there is some basic assumptions
5 that are incorrect, if I might suggest, respectfully.

6 The purpose of this bill is to have open
7 meetings, so I realize the paperwork is a serious
8 problem for all of us.

9 It is a bureaucratic problem that is
10 absolutely consuming human beings on every level of
11 government, but if we start out with a premise as to what
12 this bill is, which is an open government bill, a bill
13 that will have open meetings, we should have fewer
14 transcripts, then I think the various bills of paper that
15 have been discussed in this debate indicate, number one,
16 number two, so I envisage that the occasion on which
17 we close meetings will be much fewer than on those we
18 open them, otherwise this bill will not be working.

19 It is just like our committee meetings,
20 you know, when we first agreed to open our meetings, most
21 people felt we never would be able to conduct our
22 business properly, if we had them open, and most of
23 our meetings are open, and very few of them are closed,
24 so I think the paperwork argument is a limited argument
25 frankly.

1 My concern about keeping a transcript
2 is that most of our business is conducted with
3 transcripts.

4 Our own committee meetings are all being
5 conducted with transcripts for the most part.

6 This is a bill which is a first step. It
7 does not provide any real sanctions in any form, and
8 even those meetings which will be closed obviously will
9 have much material in it which will be open to the
10 public, and, therefore, if we have just minutes as
11 proposed by Senator Javits, we will not have that
12 information available, which I think is our obligation
13 under this statute, to make sure that that which is
14 not exempt is made available to the public.

15 Now, with respect to a certification of
16 counsel, I would like to meet that counsel that is
17 employed, that will certify other than what the board
18 has agreed. This is not to say I do not respect members
19 of the Bar.

20 I have practiced law all of my life, but I
21 think it is unlikely that he will do anything but certify
22 whatever the Board decides it wants to do, and I think
23 the minutes are whatever you want to make them.

24 Every one of us have been associated with
25 organizations that maintains minutes, and we all have

1 been at the same meetings, we have been at the same places,
2 and minutes never reflect what each of us believe may have
3 transpired at those meetings.

4 Unless they were exact transcripts, you
5 are not keeping this transcript to read it to the
6 public.

7 You are keeping this transcript in order
8 to make certain that there is information available
9 to the public that wants to read it, and in the event
10 ultimately, this is only the last part of it, it is
11 the only sanction in the whole bill essentially, if a
12 meeting is primarily closed, on the rare occasions,
13 where this I hope will be taking place, there will be
14 some remedy to the public, so that a judge in looking at
15 this thing can see whether or not a meeting was properly
16 closed or not.

17 He will not be able to determine that from
18 minutes.

19 Senator Javits. Will the lady yield?

20 We are both in a very anomolous position.
21 You are arguing for the Senate bill, whereas it is
22 your duty to argue for the House bill, and in a sense,
23 we are somewhat arguing for the House position, so I
24 think neither of us can be too virtuous in this
25 matter.

1 Mrs. Abzug. I don't know about you,
2 Senator Javits.

3 (Laughter)

4 Senator Javits Thank you.

5 I yield on that note.

6 Mr. Brooks. So as we understand, we have
7 a very practical problem, we have tried to provide
8 with respect to that problem in other sections of this
9 bill, we just finished one, and that was my only point,
10 and I think that was Senator Percy's point.

11 We have a pragmatic problem, each House has
12 a position which seems to be untenable, and taken
13 separately, and so I have tried to help Senator Percy
14 in making a pragmatic suggestion to us all, but I
15 think for me, in all fairness, the inspirer and author of
16 this legislation on our side is Senator Chiles.

17 I think much of what you said is valid. I
18 do not really want to get into any debate, but, for
19 example, we often do not release a transcript, we
20 release a report, and in the Foreign Relations Committee,
21 for example, highly secret matters are discussed, very,
22 very often, I am sure you have been thru it too, you say
23 to the reporter, hold it, you do not even want that on
24 the record, so the transcript is not necessarily holy
25 writ.

1 I have seen our discussions, and Senator
2 Percy will then go on for a half hour or more, with no
3 transcript being made.

4 We just do not even want to give what we are
5 talking about to the reporter.

6 Senator Percy. But if your language were
7 accepted as a modification of the House language, half of
8 the hour or fifteen minutes would not be permitted to go
9 unrecorded.

10 It would have to be included, and a complete
11 write up of what transpires at that meeting and summarized,
12 whereas it is just lost otherwise.

13 Mr. Fascell. From memory, if not by
14 transcript.

15 Senator Percy. There would have to be
16 something to have the duty of taking the minutes or
17 someone.

18 Mr. Fascell. We would not be doing it by
19 transcript, so you would do it by memory.

20 Senator Percy. You would write up the
21 notes as they go along.

22 Mr. Fascell. I have several problems with
23 it.

24 I do not have any constitutional inhibitions
25 about transcripts.

1. Transcripts are of government record.

2. You either want a governmental record or you do not.

3. If somebody wants minutes, fine, or
4. somebody may want a transcript.

5. For accuracy I will take the verbatim
6. transcript.

7. I will start from there as a matter of
8. practical pragmatic common sense.

9. We do it in court, we do it here. Aside
10. from that, now getting to the politics of the issue,
11. I do not know why we ought to go to minutes.

12. The FED wants out, and everybody else
13. is nervous.

14. If everybody else is perfectly happy in keeping
15. transcripts, why not keep it?

16. So to take care of one problem, I do not
17. know why we have to discard the whole thing.

18. The second question I raise is this, what
19. is the remedy with respect to the minutes?

20. I do not understand that. The whole
21. theory of the bill, the thrust of the bill is that you
22. have open meetings, and you permit closed meetings under
23. certain exemptions, and if you challenge the legality of
24. the closed meeting, a court has to decide whether or not
25. your challenge is proper or improper, and the only decision

1 the court can make is that that information which was not
2 properly classified, or withholdable under the law,
3 should be made public.

4 That is the only decision a court makes.
5 How does he do that with minutes?

6 I do not understand it.

7 Does he go behind the minutes?

8 Do you subpoena every person who was
9 present, ask him what their conversation was, whether
10 or not the minutes correctly reflect their attitude, or
11 what they said, or whether that is classified information
12 generally, categorically, or specifically?

13 Under the law, I do not know how a judge
14 would make that determination.

15 Senator Javits. If he has to make it today,
16 in respect to classified discussions, opinions, the
17 judge, as Judge Cereka decided that.

18 Mr. Pascell. But he has the material.

19 Senator Javits. Not necessary. Not
20 necessarily so.

21 He has to decide you can go behind the
22 material too.

23 That is how you discovered the blanks
24 in the Nixon transcript.

25 The courts have decided, and the Supreme

1 Court has decided that the judge is entitled to receive
2 and retain in the same degree of confidence that he
3 feels the law requires.

4 The evidence which he hears upon these
5 discussions--

6 Mr. Fascell. The Senator is absolutely
7 right, but you are making my case now.

8 Senator Javits. No, because he is entitled
9 to determine, as I said in the Foreign Relations
10 Committee, we say go off the record.

11 We cannot include that even in the
12 report.

13 Mr. Fascell. That is a judgment you can
14 make if you want to at any point, but I still do not
15 understand how under the House language, or the proposed
16 language, the judge would make a decision, theoretically,
17 we give the public here some kind of cause of
18 action, and what we do on the other hand, it seems to
19 me we very clearly take it away from them.

20 We are saying all the judge can examine
21 are the minutes to determine whether or not there
22 is any information that should have been made public,
23 and how in the world can a judge looking at the minutes
24 make that decision, I do not understand, and then I
25 ask the question, and the judge certainly seems to be

1 empowered to be able to do it, and I will ask my
2 distinguished colleagues on the Judiciary Committee if I am
3 on the right track, the judge has to decide, I cannot decide
4 anything from looking at the minutes, I do not know what ought
5 to be made public, or what ought to be kept private, or which
6 is withholdable under the law, so he has to make the
7 decision.

8 He has to be able to look at the information,
9 and say, this is clearly withholdable under the exemptions
10 in the Sunshine Law.

11 This is clearly outside of it.

12 It should have been made public. There is
13 no reason to withhold that. How does he make that
14 determination from the minutes?

15 I think we have given the judge an impossible
16 task, a ponderous thing.

17 We have taken away what every, whatever
18 remedy that might exist for the public, and in short,
19 we have just emasculated the principle of the bill,
20 the principal purpose of the bill.

21 That is the way I see it, without a
22 Transcript.

23 Now, all we are talking about now is a
24 government record which is being kept in those circumstances
25 where the boards decide they have a clear exemption in

1 the law.

2 It is this transcript. It is locked up in
3 the safe.

4 It is not released to anybody, except to the
5 court, and the plaintiff has to prove his case.

6 Mr. Horton. Mr. Chairman --

7 Mr. Fascell. Are you asking me if I am
8 through?

9 Mr. Horton. I want to get the floor.

10 Mr. Fascell. I guess I will yield then, if
11 you put it that way, and give up the floor.

12 Mr. Horton. Mr. Chairman, first of all,
13 I would like to make a point that the House adopted the
14 position on minutes which was the amendment which I
15 offered, which was adopted in the House, and the House
16 conferees did not put up a very strong effort I think
17 to insist upon the House position.

18 Here we are again--

19 Mrs. Abzug. We lost it by eight
20 votes.

21 Mr. Horton. We never even took up the
22 House position.

23 Mr. Fascell. What are you talking about
24 now?

25 Mr. Horton. There is the second amendment

1 adopted by the House, and here we are talking against
2 the House amendment.

3 Mr. Fascell has already talked, he was
4 opposed to the amendment.

5 I am talking now, namely to do away with
6 the transcript.

7 Now, we studied the State statutes, this
8 statute is primarily based upon State statute.

9 We studied all of the State statutes, and there
10 is no State statute that requires a transcript.

11 Mrs. Abzug. Will the gentleman yield?

12 You see, the difference between our
13 legislation, and the State statute, is that 24 of the
14 49 open meeting state statutes provide criminal penalties
15 for violation, two more impose civil penalties, and
16 19 render a substantive action taken with an unlawfully
17 closed meeting void or voidable.

18 You have no sanctions under this bill.
19 There is only one reason why the State statutes
20 do not bother with transcripts--

21 Mr. Horton. Are there State statutes that
22 do require transcripts?

23 Mrs. Abzug. No.

24 Mr. Horton. That is all I said.

25 Senator Chiles. On that point, if you

1 are including Florida, Florida is one that does not
2 require a transcript, but we do not allow closed meetings,
3 so you do not exactly say we do not come close, but
4 if you do not have any exception to sunshine, that is
5 considerable progress.

6 I wonder how many States do not allow to
7 have closed meetings.

8 Mr. McCloskey. When you discuss the firing
9 of the city manager, whether he has stolen public money
10 or not, is that in public?

11 Senator Chiles. Yes.

12 Mr. McCloskey. When you discuss whether you
13 will condemn a parcel of land here, or a parcel of
14 land there, knowing it will affect the parcel's value,
15 is that discussed in public?

16 Senator Chiles. Yes, sir.

17 Mr. McCloskey. Good God.

18 Mr. Fascell. Just like in the courts.

19 Senator Javits. The courts do have closed
20 proceedings also.

21 Mr. Horton. The reason for this amendment is
22 that it applies only to closed meetings.

23 There is no question about an open meeting
24 we will have a transcript, but what we are talking about
25 is if you close a meeting, will we have a transcript.

1 There are certain other things that follow,
2 if you require a transcript, this is required in this
3 bill, that you release the transcript, and that you
4 eliminate the part that is to be deleted.

5 Now, the point I made on the floor in
6 the debate, was that when you do that, that there are
7 skilled people, who can very easily determine what course
8 of action was involved, and they can very easily determine
9 what occurred at that particular meeting, and some of the
10 things we are talking about are extra sensitive, and I
11 think it is very important for us to not have the
12 requirement of the transcript.

13 Now, coming to the question that Mr.
14 Fascell was talking about--

15 Mr. Fascell. When does the public get that
16 transcript, before they go to court or after?

17 Mr. Horton. That is the point I am getting
18 to.

19 There is no requirement you have to have a
20 transcript for the court to determine whether or not the
21 meeting was closed improperly.

22 Because the court can in camera, look at all
23 of the problems involved, they can subpoena the witnesses,
24 they can get a copy of the minutes, and all of the other
25 things.

1 The only purpose of your argument is to have
2 the transcript available for the court to determine
3 whether or not it was properly or not properly closed,
4 and I say that is not necessary.

5 Mr. Fascell. I did not say that.

6 Mr. Horton. And it is not necessary to have
7 it for that purpose, so there is no reason in my judgment
8 to have the transcript, except that it also, when you
9 delete it, it takes away really what the exemption is,
10 because there are certain exemptions under the
11 Freedom of Information Act, on which you could
12 close the meeting, so it is tantamount to disclosing,
13 what is involved, when you have to publish the transcript
14 with the deletion, so I think it is a very bad situation
15 we find ourselves in, and I hope we will insist upon the
16 House position.

17 Mr. Brooks. Gentlemen and ladies, we
18 will have further discussion, but at this point we are
19 conducting a vote on the Skubitz amendment to delete
20 land in the National Park system.

21 We will have to recess and return after
22 our vote.

23 Meanwhile perhaps our colleagues on the
24 Senate side can think about it, and perhaps have a
25 solution for us.

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We stand in recess.

(Whereupon, the conference was in
recess.)

AFTER RECESS

1
2
3 Mr. Brooks. The conference will come
4 to order.

5 I recognize the gentlewoman from Texas,
6 Mrs. Jordan.

7 Mrs. Jordan. I just want to add here that
8 I did support the amendment which was offered providing
9 for the recordation of minutes and of transcripts.

10 I support that position, and I would prefer to see
11 this conference committee adhere to that position, and I
12 also know that it would be unnecessary to have a
13 conference committee if we were not willing to yield to
14 compromise on the points.

15 I cannot agree with the gentleman from
16 Florida to accept the House position emasculates the
17 bill in its entirety.

18 The only way that this provision could
19 emasculate the bill is that if we presume, that the general
20 counsel, and the management, and directors are all
21 dishonest, and will with dedication proceed to somehow
22 violate the spirit of this legislation, and the bill
23 as the House has it not only says you may close the
24 meeting, but it does state you must state the exemption
25 under which the meeting is closed, the relevant
exemptions, and that is a point of controversy that

1 could be resolved if someone were to feel that the
2 meeting was improperly closed.

3 If we want to further guarantee then that
4 agency personnel act honestly and do not further violate
5 the spirit of the Sunshine law, I think the compromise
6 position which was suggested by Senator Percy does have
7 merit, if we can work within the framework of that.

8 It has requirements for the discretionary
9 action by the agency, by the verbatim transcript or
10 minutes, and if I understand your amendment, it does make
11 it discretionary with the agency, and you do require that
12 the subject matter, the speakers be identified.

13 There you have the opportunity for sunshine
14 on a closed meeting, which we must assume was legally
15 closed, since in the minutes there must be contained a
16 statement of the relevant exemption under which the meeting
17 was closed, and I would hope we would try to work within
18 that framework.

19 Mr. Horton. Would the gentlewoman
20 yield?

21 I would be very happy to agree with the same
22 position that Mrs. Jordan has expressed.

23 The language that I have before me, which
24 is (f) (1), which does say the agency shall maintain
25 either a complete transcript, or electronic recording

1 adequate to record fully the proceedings of each
2 meeting, or a portion of the meeting closed to the public
3 or set of minutes which will fully describes, etc.

4 I think it is a good modification, and I
5 think it would make it more clear, and it would be
6 very helpful, and I think that would be a good compromise
7 on the overall position that each of us have taken.

8 Mr. Brooks. To make clear Mrs. Jordan's
9 position, I understood you to be speaking about this
10 document offered by Senator Percy.

11 Mrs. Jordan. That is correct.

12 Mr. Horton. I am talking about the same
13 document, that Senator Percy has, but not section 2.

14 Mr. Brooks. You are talking about the first
15 half of Senator Percy's amendment?

16 Mr. Horton. That is right. I do not think
17 Senator Percy offered section 2.

18 Senator Percy. Mr. Chairman, the pending
19 motion is to recede to the House, but in my statement
20 of that, I said I would incorporate in that motion a
21 modification of the House language which is now subsequently
22 before the House.

23 I accept that language, and I incorporate
24 that.

25 Mr. Brooks. Then your position is

1 reflected by this document?

2 Senator Percy. Yes.

3 Senator Javits. We have moved only on
4 ons.

5 We have not yet talked about two.

6 Mr. Brooks. That is correct.

7 Senator Javits. The motion is only to
8 one.

9 Mr. Brooks. This will be a motion to recede
10 with an amendment, and the amendment will be (F) (1) and
11 2.

12 Senator Javits. Let me check out 2 a minute.
13 We have to vote.

14 Mr. Brooks. All right. Go with our
15 blessing and come back soon.

16 Senator Muskie, we are delighted to see you.

17 Senator Muskie. I think I am on the next
18 issue.

19 I am strongly for Senator Chiles' position,
20 and I hope I can get back to articulate it a little
21 bit.

22 I cannot do as well as Barbara does, but
23 I will do my best.

24 I would appreciate the opportunity to speak
25 on the bill.

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Mr. Brooks. We will be happy to hear
from you.

We stand in short recess.

(Whereupon, the conference was in short
recess.)

AFTER RECESS

1
2
3 Mr. Brooks. The conference will come
4 to order.

5 There is pending now a motion by Senator
6 Percy that the Senate recess with an amendment.

7 The nature of that amendment seems to
8 vary, and at this point I recognize Senator Chiles.

9 Senator Chiles. Mr. Chairman, I have listened
10 with interest to some of the problems that have been
11 raised about the problem whether we have a transcript
12 or not.

13 I listened to the first argument which was
14 the problem of tremendous volumes of paperwork.

15 We are only talking about closing these
16 meetings for the exception, and when you determine we only
17 close them for the exceptions, I do not think it is a
18 great volume of paperwork.

19 I think it boils down to the fact whether
20 you are trying to determine, did they close the meeting
21 for an avowed purpose or not, and I think that is the
22 whole reason, in seeking a transcript, and the rationale
23 and the basis for it.

24 I thought Congress would
25 as Mrs. Abzug raised a good point, when she started talking

1 about sanctions, and whether there were any other
2 sanctions in the Act, and I sensed that people are talking
3 about some kind of a compromise on this.

4 I recognize that again, as we said, you
5 do not ever get all or exactly what you want, and I think
6 what I would like to see of course is complete transcripts,
7 but if we are talking about some kind of compromise, Mr.
8 Chairman, although we have gone thru this kind of section
9 by section, I think we have to look a little further,
10 and with your indulgence, I would like to say the
11 next area, the Senate had a provision that provided for
12 a court, that a court otherwise had jurisdiction to
13 review an agency's final action may as part of that review
14 and inquire into violations by the agency of requirements
15 of this section.

16 Now, the House has no comparable section
17 in that regard. That is six in our table on page five. It
18 is Senate section 4(h) on page 13, lines 16 and 21.

19 Now, we happen to think that is a very, very
20 important part of the Senate bill, and the reason of
21 course we think so is because it does give the court
22 that has the appropriate review the right, if they find
23 there has been such a violation, that violation would
24 amount to something that is that serious, that they
25 could take the appropriate action.

1 Now, that is the kind of thing, the reason
2 I say you need a transcript, because of that, or if
3 for some reason we decided to compromise on any of
4 these, that we had minutes that would cover that kind
5 of situation.

6 The Senate went further, and the Senate provided
7 in the next provision that we authorize an individual agency
8 member to be named as a defendant, and permitted the court
9 to assess reasonable attorneys' fees and other litigation
10 costs against an agency member, only if that agency member
11 has intentionally and repeatedly violated the Act.

12 Now, the House bill does not provide that suit may
13 be brought against an individual agency member, or provide
14 that litigation fees may be assessed against him.

15 Again, I am not sure that legally we have
16 much effect, that it has to be intentionally, and it has
17 to be repeatedly done, but I think on the other hand, we
18 had the idea to satisfy the Senate.

19 We were very concerned about this provision,
20 and I think Senator Javits, we put in intentionally
21 and repeatedly, because we felt that it still has a
22 great effect to that kind of agency member who says, well,
23 I am only covered with minutes, so I can have something
24 done about how they are going to be put in, no one can set
25 aside any action we take, and no one can sue me, or do

1 anything, so you have a Sunshine Act on the book, so what,
2 you can just dance about it, because we will repeatedly
3 violate it, we will intentionally violate it, and we
4 will go on and on, and I think then what we are talking
5 about is a provision to allow these kinds of things to
6 take effect, and that is why when somebody starts
7 talking about we will just go to minutes for all of the
8 the agencies, I think that does, I agree with the
9 Congressman from Florida, that if you just go to minutes
10 for everybody, you do emasculate the Act, and especially,
11 I am going in advance, without knowing what the next
12 positions of the House will be on these provisions, but if
13 we do not have something in these provisions, then we have
14 a nice title, but we are not going to have much force
15 and effect, so it looks to me unless we can know that
16 the appellate court can act appropriately, where they
17 find there is violation, and unless we have some kind of
18 constraint from someone who would intentionally and
19 repeatedly violate the Act, then I do not know what kind
20 of Act you would have, and again I have great concern
21 about going to a form of minutes as opposed to a
22 transcript, because a transcript will be there for
23 everybody, because it is a verbatim record of what took
24 place, and the other is at best somebody's memory, and
25 many times the person trying to set the minutes will

1 be trying to cover actions that they have taken, and
2 that is really the concern that the Senator from
3 Florida has.

4 Mr. Horton. Would the gentleman yield?

5 We did not as I understand it in the
6 Government Operations Committee, we did not take it
7 up, but I understand the Judiciary Committee did take
8 a look at this, giving the court a right to review,
9 and, as I understand, it was taken out in the House
10 Judiciary Committee review of this matter, and my under-
11 standing is that there are sanctions under Section 706
12 of Title VII, perhaps the Judiciary Committee might
13 comment on that, but I understand there are some sanctions
14 of sort.

15 Mr. Kindness. If the gentleman would yield,
16 I would like to respond.

17 In Section 706 of the Administrative
18 Procedures Act, there already exists provision for a court
19 in reviewing where in the scope of review to take
20 appropriate action as is stated similarly in the Senate
21 version of this bill.

22 Mr. Brooks. Then there would not be any
23 objection to having this language in here?

24 Mr. Kindness. Except it is surplus.

25 The language in the Senate version said, and

1 before any such relief as it deems appropriate.

2 In the context of this bill, this is a little
3 hard to understand.

4 It is quite broad, but the Administrative
5 Procedures Act is complete, and we will say it is
6 well defined, as to the scope of review, and gives the
7 guidelines that have been in effect for some time.

8 By this further comment, on the matter in the
9 Senate bill, about individual member liability, that it
10 is very difficult, and it was considered in the House
11 and Judiciary Committee, it is very difficult to rationalize
12 applying a penalty to a individual member who cannot
13 act by himself or herself.

14 That is what we are concerned with totally
15 in this legislation is the interaction of people
16 in collegial bodies, and, therefore, if an action is
17 taken by a collegial body, or a majority thereof, it
18 is just impossible to place criminal liability, or for
19 that matter, civil liability, and, of course, it is
20 the latter that is a question, how do you place liability
21 on one person for the action taken by a group.

22 Mrs. Abzug. Would the gentleman yield?

23 Just on that point, I think if the corporation,
24 for example, can make some illegal act, each of the officers
25 are responsible, each director of the corporation.

1 Mr. Kindness. The liability is established
2 by statute, that certainly has been done in some
3 cases.

4 Mrs. Abzug. And in common law as well.

5 Mr. Kindness. I do not understand the
6 applicability.

7 Mrs. Abzug. Talking about a collegial
8 body, how can the individual be responsible.

9 If there is an action on the part of the
10 collegial body, those responsible for the collegial
11 body have responsibility.

12 Mr. Fiaschi. We are separately and jointly
13 responsible for any civil or criminal act.

14 Mr. Kindness. We are apparently moving
15 in the direction of trying to establish criminal
16 liability, quasi-criminal liability in a bill that is
17 meant really to open up the operations of government.

18 Mrs. Abzug. No one has suggested or used
19 the word criminal except you.

20 Mr. Brocks. The gentleman from Florida
21 has the floor.

22 Mr. McCloskey. I do not have any
23 concern about the first part of the suggested
24 compromise, as I understand it, that a court would have
25 the right to afford relief.

1 I think that is a matter of working out the
2 language.

3 The question here is whether the judiciary
4 opinion finds it is already in the act of another
5 language, but when we move to the civil liability of
6 government officials, I would like to call our attention
7 to this, we are reacting here to abuses of commissions
8 that have held secret meetings in the past.

9 I have in mind the Pollution Control
10 Commission that worked at Commerce, that really held secret
11 meetings, and did not have any minutes, and did not
12 disclose to what they were doing, and we are reacting
13 to that in this bill, and for the first time, we make it
14 a matter of Federal law, that these commissions hold public
15 meetings except under specific circumstances.

16 Do we need to go farther and assume that
17 people appointed to the government by the President of the
18 United States are going to violate that law?

19 I do not think we need to make that
20 assumption. I think once we write into that law,
21 government servants will be accountable, as the President
22 is accountable every four years for his appointees, we
23 have to balance the need to attract in general good
24 men and good women to government, and I have been testing
25 this bill, whether I would be willing to advise a client

1 to serve on a governmental commission, and try to
2 serve the Nation as anyone of these commissioners did,
3 and yet subject themselves to civil damages, and lawsuit,
4 and I think the discussion that we have had about litigation,
5 really focuses on the true worry over this
6 bill.

7 If you have a transcript of a private
8 meeting that is closed, there will be an almost
9 irresistible impulse on the part of an attorney to sue the
10 agency involved, if they can force an in camera inspection
11 of the deliberations of that agency.

12 We do not mean to hamstring the operations
13 of the government by inviting lawsuits.

14 Mr. Fascell. To what benefits?

15 Mr. McCloskey. When you make your arguments
16 for the transcript, you spoke entirely to the benefits
17 of the litigatory that would ensue, if the litigator could
18 prove his case by the transcript of the private meeting.

19 We are trying to balance by getting good
20 people, and when you bring in the possibility of litigation,
21 and assume in advance there will be litigation, and make
22 it easy and tempting to have litigation, I think you maybe
23 strike a balance that is too heavy against the operations
24 of good government.

25 I would say in conclusion, Senator, the

1 first part of your suggested compromise, if I
2 understood it correctly, that a court have the jurisdic-
3 tion to afford appropriate relief does not bother
4 me at all, but to go further, the Senate's position of
5 civil liability, I would prefer to leave them accountable
6 when the President faces the electorate every four
7 years, than to face the possibility he might be liable
8 for a lawsuit, whether frivolous or not, brought during
9 the course of their administration.

10 Mr. Brooks. Any further comment?

11 Mr. Flowers. Could I speak to that?

12 Mr. Brooks. The gentleman, Mr.
13 Flowers.

14 Mr. Flowers. I would pretty much endorse
15 what the gentleman from California said, and
16 what the gentleman from Ohio said, as to the relief
17 by the court.

18 It was our intention to extract it from
19 the bill, because it is covered in the Administrative
20 Procedures Act, maybe even a little more forcefully in
21 the APA, but as far as I am concerned, I would accept the
22 suggestion of the Senator to put it back in here.

23 It may add to strengthen the Act. I
24 think that one other ingredient, since we have thrown
25 all of the marbles on the table, and that is the variance

1 between the House and Senate version on the
2 venue, which is wrapped up in the same thing you are
3 talking about.

4 Senator Chiles. We were trying to make
5 it easier on venue, and my personal feelings are not
6 as strong on venue, and maybe there is some basis for
7 the House feeling that these actions could be brought
8 here, and should be brought here rather than pursued
9 elsewhere.

10 Mr. Flowers. Our version would have the venue
11 lie either in D.C., or where the meeting was held, as opposed
12 to maybe Maine to California, wherever the plaintiff
13 might lie, but I think we are getting close to something
14 we can deal with in terms of what the Senator from Florida
15 says.

16 Mr. Pascell. Let us get back to
17 transcripts.

18 Senator Chiles. Now that we have the
19 general idea, I am ready to go back to talk.

20 Senator Ribicoff. First my apologies that I
21 had to go back on the floor to handle a conference report
22 on FEA, and then there were four or five amendments, I
23 was involved in the tax bill, but I think the key
24 to this whole conference is probably item four on
25 transcripts.

1 Now, of course, the Senate conferees have
2 an obligation to bury their personal feelings for
3 what the Senate actually voted on.

4 I know in the PEA conference report, I found
5 myself defending Senate positions that I really despised,
6 with the question of pricing, the stripper well, but that was
7 a Senate vote by two to one.

8 Now, I talked with Senator Javits, and
9 Senator Chiles during the voting, to see if there was
10 some way we could work this out, and I wonder if we do
11 not have the elements of a solution, if we looked on
12 page five of H.R. 11656, on 9(a), where you have the
13 set aside of a certain group of agencies, in the
14 case of agencies, which regulate currency, security,
15 commodities, or financial institutions, be likely to
16 unleash considerable disruption to the economy, etc.,
17 and I think this would include the Federal Reserve,
18 the SEC, the Commodity Credit Corporation, the Commodities
19 Futures Trading Commission, the Export-Import Bank,
20 the Federal Deposit Insurance Corporation, the Federal Farm
21 Credit Board, and the Federal Home Loan Bank Board.

22 Could we, Senator Javits, and also the others,
23 Senator Percy, and Senator Chiles, work something out
24 that for this group, only require them to keep substantial
25 minutes, and all other agencies keep transcripts, because

1 this is a special group of people, and a special
2 group of agencies that if anything leaked, or anything
3 got out, it would really raise hob with our financial
4 institutions, or credits, allow speculation, and if we
5 addressed ourselves to this particular group who are
6 in this class all by themselves, we might be able to
7 work out a compromise between the strong and flexible posi-
8 tion of the Senate and the House which did not cover it
9 at all, therefore, most of the agencies would have
10 transcripts, but this group that would come in within
11 this definition would have minutes.

12 If that has meaning, then we could put our staffs
13 together to try to work this out.

14 Mr. Brooks. Senator, the language, we have
15 some language somewhat like that.

16 Senator Javits. Would you yield?

17 What I was looking at, and it fits right
18 within the framework, is the provision found on page 8
19 of the comparison under the heading Senate bill.

20 Let us take the House bill, lines 13 to line 15.
21 That has a specification taken right out of the statute,
22 right out of this bill, of the types of meetings, the
23 majority of which are closed, and they include, one where
24 disclosing trade secrets, and I refer back, because it
25 refers back to the numbered section, page four, disclosing

1 trade secrets, and I refer back, because it refers back
2 to the numbered section, page four, disclosing trade
3 secrets of financial or commercial information
4 obtained from any person that such trade secrets or
5 other information could not be obtained by the agency,
6 etc., or where such information must be withheld from the
7 public, etc.

8 And then there is the 7(a), to which
9 you referred, which is directly analogous to 9(a), on
10 page five, and then we have that relating to information
11 picked up by regulatory or supervising agencies, and
12 item 9 on page 5 relates to the legal proceedings of
13 particular cases.

14 It seems to me if you used that reference
15 as it is used in the House bill, that that is the best
16 way to classify an agency to which the minute proceedings
17 may be applied.

18 Mrs. Abzug: The problem I think with that
19 proposal, it is much broader, it could take in almost
20 every agency, because it covers as you pointed out,
21 trade secrets, speculation problems, civil actions, and
22 I think it is much broader than necessary for the
23 objective that people have been objecting to, which
24 essentially deals with those agencies which fear the
25 transcript will create some significant financial

1 I apologize for not being here before.
2 Maybe it was discussed.

3 Mrs. Abzug. It is very helpful.

4 Senator Javits. Mr. Chairman, just to deal
5 with a question, and then I will be thru, certainly it
6 seems to me we would have to spell out the language of 8 on
7 page six, which deals with the regulation of financial
8 institutions.

9 I do not mind if you wrap that in. The
10 FDIC, the comptroller of the currency, etc., we have to
11 be sure they are protected, so it would read, let us take
12 the House line on page six, it would read in the case of
13 an agency that regulates, security commodities, or regulates
14 or supervises financial institutions, and then go on.

15 Senator Ribicoff. That is basically the
16 thrust.

17 Senator Chiles. I do not think you have
18 done anything different there.

19 Mr. Fascell. Eight and nine (a) are
20 the same.

21 Where it ought to be is in the Senate bill
22 on line 13.

23 Senator Percy. Mr. Chairman, I really feel
24 we ought to get off the dime on this, and come to a
25 decision.

1 We have a pending amendment, and I will
 2 accept modification of that amendment so that the only
 3 exclusion would be agencies which regulate currencies,
 4 securities, commodities, or financial institutions,
 5 except that modification, and I thank Senator Ribicoff
 6 very much indeed, and Senator Javits for improving the
 7 pending motion.

8 Mr. Brooks. That involves one or two or
 9 just one?

10 Senator Percy. Just one.

11 My motion only covers paragraph one.

12 Mr. Fascell. Just so I am sure I understand
 13 what we are doing here, we have so many pieces of
 14 paper in front of us, I am not sure I have the right
 15 piece.

16 Would you mind reviewing
 17 your proposal?

18 Senator Percy. It is (f) (1), for
 19 every meeting closed, etc.

20 Mr. Fascell. I still do not understand, if
 21 I could finish this, I do not understand in the typewritten
 22 language you have made if any.

23 I do not know what I am dealing with
 24 yet.

25

1 I do not know what it is yet.

2 Senator Ribicoff. If first we could get the
3 principle nailed down, if we get the principle
4 nailed down, then we can put it, we have enough staff
5 around here to put it on a piece of paper, and get it
6 back to us while we go or from there.

7 Senator Percy. I think we can clear it up
8 so staff could carry it out.

9 After about two-thirds of the way down in
10 paragraph one, starting with the line that says or
11 a portion of the meeting closed to the public,
12 insert in there, in the case of an agency which regulates
13 currencies, securities, commodities, or supervises, regulates
14 or supervises financial institutions, currencies,
15 securities, commodities, or financial institutions.

16 Mr. Fascell. I only understand the
17 exemption.

18 this starts out that says the agency shall
19 maintain either a complete transcript or electronic
20 recording.

21 Senator Chiles. Again, we are talking
22 about a compromise.

23 The staff will have to draft a little bit.

24 Mr. Fascell. I am trying to understand
25 the basic principle.

1
2 Mrs. Abzug. It would be much easier if we
3 dealt with page ten of our comparative.

4 Mr. Fascell. Let me see if I understand
5 the general principle, Senator Percy.

6 You are talking about with the idea of
7 a transcript except--

8 Senator Percy. Except those agencies.

9 Mr. Fascell. And those agencies could go
10 with minutes?

11 Senator Percy. They can substitute with the
12 requirement to have a transcript, electronic recording,
13 they can substitute minutes.

14 Mr. Fascell. You are talking about
15 exemption of 8, 9(a), which either regulates or
16 supervises?

17 Senator Percy. Right.

18 Mr. Horton. That is quite a long
19 distance from what we started out with.

20 What we started out with was to not
21 require one thru ten any transcript, and now what we
22 are talking about is limiting it very, very carefully,
23 and I do not think we ought to go that far.

24 Nobody has convinced me at least why
25 minutes are not adequate, and I thought the language
submitted by Senator Percy, in the paragraph one, was

1 adequate to cover the whole problem, and I thought that
2 was a compromise.

3 Senator Chiles. Nobody has convinced me why
4 a transcript is not adequate.

5 Mr. Horton. I thought you were going to
6 be satisfied with minutes with a court procedure.

7 That is what you were concerned about.

8 Mr. Flowers. No, sir.

9 We have a good compromise here.

10 Mr. Horton. I do not think we need to go
11 that far down the line.

12 Mr. Brooks. The House is having a vote now,
13 and I recommend we go and make that vote and come back,
14 and in the meantime, maybe with all of the lawyers we
15 have got in this room, they might be able to figure out
16 a way to put this together in fairly simple language, of
17 which we have already gotten eight sets of an amendment,
18 and we can take a look at that on Senator Percy's
19 motion.

20 Mr. McCloskey. May I make one comment before
21 you break, I want to say in the long year in which this
22 Subcommittee and Committee examined this bill, Senator
23 Percy, Senator Ribicoff have proposed an amendment that
24 would cover every single agency that has ever objected
25 to keeping a transcript with one exception, National

1 Transportation Safety Board, which I think raised the
2 question, but I wanted to ask if there was anybody in
3 the room that knew of any agency of the Federal
4 Government who would contest the transcript provision except
5 those covered in the amendment.

6 I know of none.

7 Mr. Horton. We ought to act on it. There
8 are other matters, trade secrets, national security,
9 personnel matters, and those items are covered by
10 agencies involved here, and I do not think we should
11 throw them out the window because they have not
12 complained.

13 They will complain later, I can assure
14 you.

15 Mr. Brooks. We stand in recess for a
16 vote.

17 (Whereupon, the conference was in short
18 recess.)

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AFTER RECESS

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3 Mr. Brooks. The conference will come
4 to order.

5 The Chair recognizes the gentleman
6 from Florida, Senator Chiles.

7 Senator Ribicoff. I think we ought to
8 have somebody from the minority here.

9 Mr. Brooks. Then we will wait, and
10 recess until somebody is here.

11 (Whereupon, the conference was in short
12 recess.)

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1 AFTER RECESS:

2 Mr. Brooks. The conference will come
3 to order.

4 The gentleman will proceed.

5 Senator Chiles. We propose that the Senate
6 recede with an amendment, and that amendment would
7 strike section (f) of the House bill, and substitute
8 in lieu thereof (f) (1) for every meeting closed pursuant
9 to paragraphs 1 thru 10 of Subsection (c), the general
10 counsel, or chief legal officer of the agency shall
11 publish, shall publicly certify in his opinion the meeting
12 may be closed to the public, and shall state the
13 relevant exemptive provisions, copy of such certification,
14 together with a statement of the presiding officer of
15 the meeting, setting forth the day, time and place of
16 the meeting, and the persons present, shall be retained
17 by the agency, the agency shall maintain either
18 a complete transcript or electronic recording adequate
19 to record fully the proceedings of each meeting, or a
20 portion of a meeting, closed to the public, except that
21 in the case of a meeting, or portion of a meeting closed
22 to the public, pursuant to paragraphs 7(a), 8 or 9,
23 of Subsection (h), the Agency shall maintain either such
24 a transcript, or electronic recording, or a set of minutes
25 which shall fully and clearly describe all matters

1 discussed, and shall provide full and accurate summary
2 of any actions taken, and the reasons thereof including
3 a description of each of the views expressed on any
4 item, and a record of any roll call vote reflecting the
5 vote of each member on the question.

6 All documents in connection with the
7 action, of any action taken shall be identified in the
8 meeting.

9 Now, two, the agency shall make promptly
10 available to the public, in a place easily accessible to
11 the public, such complete transcript, electronic recording,
12 or minutes of the discussion of any item on the agenda, or
13 of the testimony of any witness received at the meeting,
14 where no significant portion of such discussion or
15 testimony contains any information specified in subsection
16 (c), and copies of such transcript or minutes, or a
17 transcription of such electronic recording disclosing
18 the identity of each speaker.

19 The agency need not include in any transcript,
20 electronic recording, or minutes disclosed to the public any
21 information authorized to be withheld under subsection
22 (c) of this section.

23 Copies of such transcript, or minutes, or a
24 transcription of such electronic recording disclosing
25 the identity of each speaker, shall be furnished to any

1 person at the actual cost of duplication or transcription.

2 The agency shall maintain a complete verbatim
3 copy of the transcript, a complete copy of the minutes,
4 or a complete electronic recording of each meeting, or
5 portion of a meeting, closed to the public, for a period
6 of at least two years after such meeting, or until one
7 year after the conclusion of any agency proceeding
8 with respect to which the meeting, or a portion thereof,
9 was held, whichever occurs later.

10 Senator Javits. Would you be kind enough
11 to be clear, I just read it for the first time, at the
12 top of page two, where you say copies of such transcript
13 or minutes, except as provided in the previous
14 sentence.

15 Senator Ribicoff. That would be cleared
16 up.

17 Mr. Brooks. Has the gentleman concluded?
18 Let's be sure.

19 Senator Chiles. I have concluded in
20 the reading.

21 Mr. Brooks. I recognize the gentleman
22 from New York, Mr. Horton.

23 Mr. Horton. The language that has been
24 prepared by Senator Chiles, which I do not have a
25 copy of, which I tried to follow closely as I could, but

1 I think it is very important that we have an opportunity
2 to study the language that has been submitted.

3 We started off with the House position,
4 which again I want to reiterate, which required there be
5 no transcript, and that there be provided minutes.

6 I am not sure whether the language Senator
7 Chiles has provided here covers the comments that were
8 made earlier by Senator Ribicoff.

9 If they do, Senator Ribicoff and I believe
10 this to be true, he indicated there were certain agencies
11 that would be exempt or not subject to.

12 I feel that there are other agencies that
13 ought to be looked at very carefully.

14 Maybe I am on the wrong track. Maybe I do
15 not understand what the amendment is.

16 I do feel we ought to have an opportunity
17 to look at the language, and see what is involved, but
18 I would like to call attention to the members of the
19 conference that there are other agencies than those listed
20 by Senator Ribicoff, which I feel have some very
21 important aspects, of the national security, etc.

22 Senator Ribicoff. My proposal was generic.
23 I was just giving examples, as my eye passed down the
24 list, which agencies would not be included, but any other
25 than that which would be proper can be included.

1 Mr. Horton. Would the Nuclear
2 Regulatory Commission fit into that definition you
3 have there?

4 Senator Ribicoff. No.

5 Mr. Horton. There are some very important
6 trade secrets, national security matters, that I
7 think are very important.

8 Senator Ribicoff. Those are protected by
9 the exemption.

10 Mr. Horton. No, sir. We are talking about,
11 we are talking about a closed meeting, and then publishing
12 a transcript.

13 That is what you are talking about in
14 disclosure.

15 In the amendment I had on the House
16 floor, we did not have any disclosure, and there
17 are other agencies.

18 I have a copy of a letter to Mr. Brooks
19 from the Overseas Private Investment Corporation, which
20 they say as follows:

21 (The letter follows:)

22 COMMITTEE INSERT
23
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25

1 Mr. Norton. That I think creates some
2 serious problems.

3 I mentioned the Nuclear Regulatory
4 Commission, the Parole Board, the National Transportation
5 Board, the Civil Service Commission, the Consumer
6 Products Safety Commission, which certainly deals
7 with trade secrets, the Civil Aeronautics Board, there
8 are many others I think were covered in the original
9 exemption, and I do not think they are covered in what
10 we are talking about here.

11 Senator Javits. Let's see where we are
12 now.

13 Here is what I understand, we have established
14 three categories, we have established agencies in which
15 there may have been secret meetings.

16 That is items one thru ten of
17 Subsection (c). One to ten, or we have established
18 a category, which consists of 7, 8 and 9, of that
19 same subsection.

20 Those are where you can have minutes
21 instead of transcripts, and then we have established
22 another section, which says you have got to give everybody
23 everything, except from one to ten, and in that case
24 you do not have to give them the transcript or the
25 minutes.

1 That is the scheme of the legislation
2 as we have it now, as it stands today, and those that
3 must have secret meetings, they are fully satisfied
4 under this legislation.

5 If they say they cannot have a transcript,
6 then they are not satisfied, because they have to have
7 a transcript.

8 Mr. Horton. That is what they say.

9 Senator Javits. They may say one thing.
10 I do not know how hard the shoe pinches, but if you are
11 a financial agency, or a supervisory agency, or
12 if you are considering a final decision, then you do not
13 have to give a transcript, you know, the fellows that
14 have to give a transcript do not have to give it anyway,
15 unless they are compelled to, or unless it is classified,
16 but number nine does not keep it, neither does the SEC,
17 neither does the Federal Reserve, neither does the
18 National Banking, the Comptroller of the Currency.

19 That is the scheme of the legislation.

20 I just wanted to be sure.

21 Mr. Brooks. The gentleman has stated it
22 very well.

23 Mr. Horton. I yielded to Senator Javits,
24 and what I would like to say is, on the second part, what
25 I am trying to get across to the members of the conference,

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that there are other agencies that ought to be included in the minutes proposition, the Nuclear Regulatory Commission is one, that ought to be included.

I can see some very serious problems with the Civil Service Commission.

I can see some problems with the organization of the letter I received.

I have not met with all of these boards, and I do not know what all of their problems are.

Senator Javits. If parliamentary procedure always balls us out, if I may most respectfully suggest, that you move it either separately or collectively, that in Senator Chiles' proposition, there should be included all of the subsections of (c), which are omitted.

That would do it, and then you could have a vote on them one by one, or you could have a vote on them together, and you could move each one.

You could move that one be included, that two be included.

I am only suggesting a way.

Mr. Horton. That is fine to do that, Senator, but the point is we have not been doing it, because there was an earlier motion made by Senator Percy which we did not vote on, and we moved down the road to what we

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have now, and that is perfectly all right, if we want to adopt that procedure.

We have been trying to work it out, and we have worked it out to the point where Senator Chiles presented something, which was quite different from something presented earlier, which I have not even seen a copy.

Mr. Brooks. The question is to the motion the Senate recede, with an amendment by Mr. Chiles.

Those in favor, signify by saying "aye".

Opposed?

The "ayes" have it.

Mr. Horton. A roll call vote.

Mr. Brooks. A roll call is demanded.

I would ask the Clerk to poll the House, and we will poll as soon as we get back from voting.

(Whereupon, the conference was in short recess.)

AFTER RECESS

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3 Mr. Brooks. The conference will please
4 come to order.

5 The Clerk will call the roll.

6 All those in favor, signify by saying
7 "aye".

8 First the gentleman from Florida--

9 Mr. Horton. I have a question.

10 Mr. Brooks. Is it a parliamentary
11 inquiry?

12 We are in the voting process.

13 Mr. Horton. Number nine, page six, specifically
14 concerns the agencies' participation of civil
15 action, in Federal or State court, etc.

16 I do not think we are talking about that
17 at all.

18 They said it was in the Senate bill.

19 Mr. Brooks. Mr. Hoff, will you clarify
20 that for the gentleman from New York?

21 Mr. Horton. I am trying to find out where
22 Section 9 is.

23 Mr. Hoff. Page nine.

24 Mr. McCloskey. It is inserted in the
25 parallel to our exemption 7.

1
2 Senator Chiles. I do not think we should
3 include nine.

4 Senator Javits. Where they are discussing
5 what they will do about a particular decision, I think
6 you ought to think about that.

7 Senator Chiles. It is one of the
8 exemptions.

9 The question is if you put that in.

10 Senator Javits. You want a transcript
11 of that?

12 Mr. Brooks. That is right.

13 You think nine should be stricken,
14 and as I understand, the amendment would now read
15 pursuant to paragraph seven (a) or 8.

16 Senator Javits. I would like to say a word
17 about that.

18 A number of us are lawyers here, and it
19 really is quite, I would like to say a word on this
20 side.

21 Mr. Brooks. Senator, we are in the
22 process of a vote.

23 We will go and take our vote.

24 Senator Javits. I will waive.

25 Mr. Brooks. No, go ahead.

1 Mr. Horton. I think we ought to know
2 what we are voting on.

3 Mr. McCloskey. Mr. Chairman, a parliamentary
4 inquiry?

5 For purposes of this Act, it applies to
6 the Federal Election Commission, and any agency, we
7 are voting that every agency accept, except those excepted
8 will be subject to the transcript requirement.

9 I want to make sure before I vote that the
10 commissions to which this applies are those defined
11 in 551 under Title V.

12 Those that include the joint chiefs of staff,
13 or the National Security Council, or any other collegial
14 body hereunder the definition we have adopted thus far.

15 Mr. Brooks. I do not think so.

16 Mr. McCloskey. I do not think it does.

17 Mr. Brooks. I do not think so. We will
18 make it clear in the report.

19 Mr. McCloskey. Is that understood, because
20 when this came to us from the Senate, they had a list
21 of the agencies and there were only 30 some odd agencies.

22 I do not worry about the Nuclear Regulatory
23 Commission, but I would worry about the Joint Chiefs.

24 Mrs. Abzug. I believe this question also
25 came up on the floor of the House, and I believe we answered

1 it, that the Joint Chiefs of Staff were not involved
2 in the coverage under this legislation, they are not part
3 of a collegiate body.

4 Mr. McCloskey. To answer my question before
5 I vote, has any member of the staff, or any member of
6 the conference had any objection from any of those listed
7 in the Senate report, the collegiate body, because it seems
8 that every one that has objected to is now included, except
9 the National Transportation Safety Board.

10 Mr. Brooks. Call the roll.

11 (Whereupon, the Clerk called the roll
12 as follows:

13 Mr. Morse. (Aye by proxy)

14 Mr. Fascell. Aye.

15 Mr. Conyers. Aye.

16 Mrs. Abzug. Aye.

17 Mr. Flowers. Aye.

18 Mr. Danielson. Aye.

19 Mrs. Jordan. Aye.

20 Mr. Mazzoli. (Aye by proxy)

21 Mr. Pattison. Aye.

22 Mr. Horton. No.

23 Mr. McCloskey. No.

24 Mr. Moorhead. (No by proxy)

25 Mr. Kindness. No.

1 Mr. Brooks. Aye.)

2 The Clerk. The vote is ten "eyes" and
3 four "noes".

4 Mr. Brooks. And the issue is agreed to
5 by the House conferees, Senator Chiles.

6 Has the issue been resolved by the
7 Senate?

8 Senator Javits. Mr. Chairman, just if I
9 could speak a moment, I promise it will not be more than
10 three minutes, and I will quit, to just raise the issue
11 with my colleagues, of whether or not we should or
12 should not include 9, which was included originally, but
13 which Senator Chiles feels he does not wish to raise it
14 with my Senate colleagues, because what it relates to
15 is, it is page six, lines 13 to 19.

16 It relates to that particular conference,
17 agency, an agency will have to have its members, for
18 the purpose of coming to a decision.

19 It seems to me, like any judges' conference,
20 it should not be required to have a transcript, but as
21 I say, I certainly do not want to make or break this
22 settlement on that particular issue, but I put it up
23 to my colleagues, three of whom are lawyers.

24 Senator Chiles. I am persuaded by my
25 Counsel, that 9 is all right.

1 Senator Javits. Thank you.

2 I move we adopt the provision of the Chair
3 with number 9 in it.

4 Mr. Flowers. Could we re-open the matter
5 on the House side?

6 Senator Chiles. We now find we included
7 it in the Senate bill, that persuades me, we do not
8 want to change it.

9 Mr. Brooks. But by unanimous consent on
10 the House side, could that vote still stand with 9
11 included?

12 Mr. Horton. That is what it was.

13 Mr. Brooks. Our provision did not include
14 9.

15 Mr. Horton. It certainly did.

16 Mr. Brooks. I thought we had accepted an
17 amendment by him to strike it.

18 Mr. Horton. Just a moment. You informed
19 the members that we were in the process of a roll call,
20 and we had already voted.

21 We were in the process of a roll call, and
22 9 was in it.

23 I raised a question about it, and it
24 was not changed, and we voted for 9. If they want to
25 make a change on it, then I have an amendment.

1 Mr. Brooks. Then your vote stands.

2 Senator Javits. On the Senate side, I
3 ask for a roll call vote.

4 Senator Chiles. Can we call the roll?

5
6 (Whereupon, the Clerk called the roll
7 as follows:

8 Senator Muskie. (Aye by proxy)

9 Senator Metcalf. (Absent)

10 Senator Chiles. Aye.

11 Senator Percy. Aye.

12 Senator Javits. Aye.

13 Senator Roth. (Aye by proxy)

14 Senator Ribicoff. Aye.

15 The Clerk. There are six "ayes" and two by
16 proxy.

17 Senator Brooks. Gentlemen, we are now
18 moving forward with that agreed on.

19 Senator Chiles. I move on five that
20 the venue, that the Senate recede.

21 Senator Chiles. Is there objection?
22 If the Chair hears none, on five, on
23 venue, we shall proceed.

24 Six, Review by Appellate Court of compliance
25 with Act.

1 The Senate provides that a court that otherwise
2 has jurisdiction to review an agency's final action may,
3 as part of that review, "inquire into violations by the
4 agency of the requirements of this section, and afford any
5 such relief as it deems appropriate."

6 The House Act contains no comparable
7 provision.

8 Senator Javits. I move the House recede.

9 Mr. Brooks. Is there objection that the House
10 recede from its position and agree to 6?

11 Mr. Kindness. Mr. Chairman, I would really
12 like to be heard on this one, since I never was recognized
13 on the last proposition.

14 Mr. Brooks. Well, you are going to be
15 heard on this one.

16 You are recognized, Mr. Kindness.

17 Mr. Kindness. In the Administrative
18 Procedures Act, 706, describing the scope of review,
19 there is some certainty that is applicable, and it points
20 out that the reviewing court can compel any agency action
21 unlawfully held or unreasonably delayed, and holds
22 unlawful and set aside any agency action and conclusions
23 found to be without observance of procedure found to be
24 by law, which the Sunshine bill would be, when enacted.

25 It could do these things that are well

1 settled over a period of years, the Administrative
2 Procedures Act has been in effect, therefore, I think
3 that the House version is reasonable in that it
4 does not cloud the issue.

5 The Senate language while perhaps intending
6 to do about the same thing, does cloud the issue, because
7 it says at the end, and afford any such relief it deems
8 appropriate, meaning that they could do something not
9 included within the Administrative Procedures Act.

10 I would also like to point out in the
11 Senate language, there is restrictive word in which I
12 would like to read, any Federal Court otherwise
13 authorized by law to review agency action, etc.,

14 Well the person going to court has to
15 prove something that they are properly there.

16 The Administrative Procedures Act really
17 parallels that anyway, but what this particular wording
18 means as compared to the APA, we do not really know,
19 until it is litigated, so I would strongly urge we leave
20 the Administrative Procedures Act, and maintain the
21 language, the lack of language that is in the House
22 bill.

23 Mr. Brooks. Mr. McCloskey, did you
24 desire the floor?

25 Mr. McCloskey. I want to echo that comment,

1 and point out to the Senate that in the House amendment,
2 on page 13, which apparently the Senate has accepted,
3 it states nothing in this section that refers to any
4 jurisdiction on any district court acting to set aside
5 or validate, etc.

6 That language is different from the
7 Senate language, to afford any relief, and I think
8 you cannot adopt the Senate version here in this question
9 number six, without casting doubt and confusion into our
10 amendment in the House bill.

11 That same language incidentally is in
12 Section H of the Senate bill.

13 You have Section H at line 11, nothing
14 permits the set aside, and the next line says any
15 relief.

16 Mrs. Abzug. It says except to the extent
17 provided in Subsection H, and that is how it is taken
18 care of.

19 Mr. McCloskey. If we recede to the Senate
20 bill, I see what you are saying.

21 Mrs. Abzug. Line ten.

22 Mr. McCloskey. I think it is wrong. I do
23 not think we want to give the court the right to set
24 aside an agency action.

25 I thought that was our agreement in the

1 House.

2 Mrs. Abzug. Well, --

3 Mr. McCloskey. This is a very significant
4 amendment.

5 This is not just the Administrative
6 Procedures Act.

7 Mr. Fascell. I do not see in the argument
8 you make, if you read all of the language starting
9 on line ten, page 13, down thru lines 21, and you have
10 to read all of the language in order to make the
11 argument you are making, it is quite clear that the
12 language is retained on line 11.

13 Nothing in this section confers jurisdiction
14 on any district court to set aside, or invalidate
15 any agency action.

16 That is clear.

17 Now, the words of exception starting on
18 line ten, relating to the next subparagraph H, cannot in
19 any way take away from that.

20 In other words, we make it very clear to the
21 limit of the court's ability is to set aside the action, it
22 is limited by the language in this bill.

23 Mr. McCloskey. May I ask the question of
24 the gentleman from Alabama, it seems to me our language
25 is much better than the Senate version.

1 Mr. Flowers. I think it is more restrictive.

2 It is clearer.

3 I think Senator Chiles made a good case that
4 it is important to the Senate.

5 If there is some way the path to compromise
6 can be had with them, and put it in another form that would
7 not open up any ambiguity here, it might be something
8 we ought to consider.

9 Mr. McCloskey. If maybe Senator Chiles
10 would yield to a question, is it the Senate's intention
11 to allow on the one hand, maybe I am taking this wrong, is
12 it the Senate's wish to have the right to set aside an
13 agency action when a meeting is improperly closed?

14 Senator Chiles. What we covered in our
15 report language on that would be, as we were covering in
16 our legislative language, in talking about this subsection,
17 we are talking about 201(a), allows any court, authorized
18 by law to review other agency action, to also review an
19 agency compliance with the section, if the agency took
20 it at a closed meeting, which is not otherwise reviewable
21 by the court, this subsection does not make that action
22 reviewable.

23 Review of the agency compliance of this section
24 may be conducted under this subsection at the request
25 of any persons and that goes on down.

1 The reviewing court can afford any relief it
2 deems appropriate.

3 Mr. McCloskey. I just want to speak out
4 against receding to the Senate's position, because it
5 seems to me clear that our House position was that, and
6 this was argued, when we argued the other matters, that
7 there were no sanctions against action, and we have
8 argued and debated the whole matter, and they have the
9 sanction against the improper closing, because the sanction
10 would permit the set-aside of the complete agency action,
11 and I do not think we can cure that by report language
12 suggesting to a court that it will only happen in a
13 rare instance.

14 I think we go right to the heart of the bill
15 with this, and it affects the other compromises we made
16 earlier.

17 My understanding when Senator Chiles raised this
18 as a compromise, it was to get a concession we have
19 already given.

20 Senator Chiles. This is exactly why I raised
21 this issue, when the Senate was debating the issue of a
22 full transcript, or requiring transcripts of every
23 agency, we provided on further to examine a challenging
24 the validity of an agency move, that it may include
25 in its challenge the fact that the agency adopted the

1 rule in a meeting improperly closed to the public.

2 Now, if an agency will go in and adopt the
3 rules, they will do that in secret, and that is going to
4 be placed upon somebody, I think we certainly should have
5 the ability, the court should have the ability if they
6 want to reverse that.

7 Mr. Flowers. What about instead of reverse,
8 to set aside.

9 Mr. Brooks. If they set it aside, certainly
10 anything they do, the agency can go back properly and adopt
11 the rule, but they would have to adopt it in the
12 open and afford the public a chance to see what took
13 place.

14 Mr. Danielson. Could the gentleman yield?

15 I think we would be imposing a sanction, if
16 we could have nothing at all to do with the merits of
17 the agency action.

18 The agency action may very well have been
19 justified by the facts, the evidence before it.

20 It seems like we are with an over-kill
21 cure, and have a procedural defect.

22 Senator Chiles. I would agree with you, if
23 you said they must reverse, but you do not say that.

24 You simply say that the court may grant
25 such appropriate relief, so you are not telling the

1 court they have got to reverse everything.

2 That would be certainly a sanction, but
3 what you are doing is saying, if that amounted, if the
4 improperly closing of that meeting amounted to the fact
5 of not allowing somebody notice, or not allowing somebody
6 to be heard, or it went to that extreme, then the court
7 could take such appropriate action, if it wanted to.

8 Mr. McCloskey. Mr. Chairman, I used to make my
9 life suing the government, and I am not averse to
10 suing the government when there is a proper thing to
11 set aside, but I fear that someone injured by agency
12 action would find the temptation to try to set that aside
13 by suggesting on the question of whether the meeting was
14 open or properly closed, so we are inviting litigation
15 by this kind of procedure.

16 This is a sanction far greater than civil
17 liability of an individual member, if he is
18 willfully and knowingly repeating violation of the Act,
19 and this is a sanction that invites litigation by anybody
20 injured by any governmental action.

21 Senator Chiles. Where I have a problem
22 with this, you started off arguing that under the
23 Administrative Procedures Act, the court could grant such
24 remedies were appropriate where appropriate, and now
25 you come back, and the argument as I hear it, is wait a

1 minute, in spite of the Administrative Procedures Act,
2 and where the court might be able to do something deemed
3 appropriate, we will limit it further, we are going to say
4 there is no way you can review an action, no matter how
5 flagrant the close of the meeting is, no matter how
6 many times it is done, how repeatedly the violation is, or
7 what the effect in prohibiting the action was, the
8 court is not going to be able to under the House language,
9 they cannot set aside, they cannot enjoin, they cannot invali-
10 date agency action, or discuss at an agency meeting in which
11 the violation of the section arose.

12 Mr. Brooks. If they set aside an agency
13 action, would not that agency, as you said, have the
14 full right to meet again in open session and
15 take exactly the same action, if the facts, as they had
16 them laid out, and presented properly?

17 Senator Chiles. It certainly would, and when
18 you have something like this, you are taking away the
19 inducement of an agency to try to violate the Act, they
20 know whatever they go in there for and do incorrectly,
21 they are liable to have to come back and do in the open
22 in the future, then you take away their wanting to violate
23 the act.

24 I tried to argue this pretty clear to start
25 with when I was saying that, why I thought these things

1 were important, where the House had not covered them, and if
 2 this Act is really going to have any meaning, I think
 3 you just have to have this provision, or a provision that
 4 allows this.

5 If not, you just have a nice title, and you have
 6 a nice provision, but it has no meaning.

7 I am willing, as I said, because I am willing
 8 to give up the individual liability, that I was trying
 9 to propose, and I very much feel that, but it seems to me
 10 we do not have something if we do not have this, we do
 11 not have an Act that has any meaning.

12 Senator Ribicoff. Is it not a pretty good trade,
 13 he is willing to give up the personal liability for the right
 14 to reverse, if it is flagrant.

15 I think that is a pretty good trade off,
 16 and it is sort of fair.

17 It is still within the discretion of the
 18 court. They do not have to, but they may, but I never
 19 thought I would ever hear Senator Chiles give up
 20 7.

21 Senator Chiles. That is an argument I had
 22 with Senator Javits long and hard.

23 Mr. Flowers. What about setting it aside, or
 24 invalidating or reversing?

25 Mr. McCloskey. Mr. Chairman, if I understand

1 it correctly --

2 Senator Chiles. We did not have any of
3 that language.

4 If you want to say set aside, I could have
5 no problem.

6 Mr. McCloskey. It is the standard the
7 gentleman referred to in the court, if it were
8 included in the statute, that only in rare, unusual and
9 outrageous situations the court set aside an agency
10 action, but I think the burden of proof ought to be laid
11 out very carefully, if this is justified on the basis
12 of report language, that I think we ought to include it
13 in the report language.

14 Senator Chiles. I think we could draft
15 some language.

16 I do not mind it being a willful violation
17 of something, but --

18 Mr. Fascell. You are not talking about
19 changing the basic right of the court under the
20 APA?

21 Senator Chiles. You have done that.

22 Mr. Fascell. I hear you, but I am talking
23 about now in this rewrite.

24 That is the question I am raising.

25 Senator Chiles. I do not see why we could

1 not do it in the conference report.

2 Mr. Fascell. They can set it aside under
3 the APA, so now what are we saying.

4 Mr. McCloskey. In our version of the
5 statute, nothing in the section confers jurisdiction on
6 the district court.

7 Mr. Fascell. We are talking about the
8 question of whether or not 4(h), or whatever that is there,
9 line 16 thru 21, on page 13, are going to be in or out.

10 We are not talking about lines 5 thru 7 of the
11 House bill, on page 13.

12 Mr. McCloskey. Five thru 9 mean nothing.
13 They are replaced under the Senate section
14 under your motion to recede.

15 Mr. Fascell. Is that the motion?
16 Would that be the motion?

17 Mr. Brooks. The motion pending is to
18 recede from the House position, and agree to the
19 Senate position.

20 Senator Javits. May I try my hand.
21 I think there is a little problem in under-
22 standing.

23 We are talking about two different courts,
24 and different criteria applying to each.

25 Whoever heard of the district court, in

1 lines ten thru 15, we are referring to an action in the
2 district court to enjoin, or otherwise get relief under
3 the Sunshine Act.

4 Wherever we are referring to review under
5 the appellate court, of an agency decision, under lines
6 16 to 21, we are talking about the Administrative
7 Procedures Act, we are talking about a totally different
8 law in a totally different court, therefore, as I
9 understand what Senator Chiles is willing to do, he is
10 willing to do the following, the injunction against the
11 District Court in varying from a decision of the agency
12 primarily, simply to protect you against some zealous
13 judge, who in the course of making an order under the
14 Sunshine bill will try to set aside, or otherwise affect
15 an agency's decision, which is only reviewable in the
16 appellate courts, so if you take the precaution against that,
17 and we should strike it out except to the extent provided
18 in Subsection H.

19 It really has no relevance. All we are saying
20 is do not do it, Judge, and then we say to do it, because we
21 are ourselves confused about what court handles the review
22 of the agency decision, and then when you come to the
23 agency decision, if you want to follow what our
24 Chairman says, then you should write the word willfully,
25 flagrantly, intentionally, something in there, to indicate

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that an appellate court will not act lightly to set aside an agency decision because of a violation of the supplemental bill.

Mr. Horton. On that theory, if you will yield, what then is the effect of Section 706 of the Administrative Procedures Act?

Senator Javits. The effect of that--

Mr. Horton. That is eliminated?

Senator Javits. Not at all, except we say when the court is dealing with a reason for reversing, or setting aside an agency decision which is based upon its violation of some section of the Sunshine bill, it will only apply where the violation is, whatever the word is you use, willful, intentional, flagrant, whatever.

Mr. Fascell. Senator, let me just add a little bit to that comment.

We have the problem of actions under the APA, which are now in effect, and the other is we do not want court actions solely for reversals under the authority of this law, as I understand it, solely, and that is one of the problems that was raised as I gather over there.

I wonder if we cannot do both in this way, looking at the Senate language, starting on page 13, line 10, reading to the extent provided in Subsection H of

1 this section, and that would be inserted to set
2 aside or invalidate any agency action taken or discussed
3 at the agency meeting, out of which the violation of
4 this section arose.

5 As I read that, it would allow the normal
6 application of the Administrative Procedures Act, and
7 it would allow the Court to take into consideration for
8 whatever remedy it wants under that Act, or this Act, for
9 that matter, the question of whether or not there is a
10 violation of this Act.

11 Senator Javits. Would you yield now?

12 You pinpointed the point. All I say, other
13 than what you say, is to strike out the words, except for
14 the extent provided, the Subsection H of this section,
15 because this is not the same court.

16 They have no authority over it.

17 Mr. Fascell. Counsel tells me sometimes you
18 get--

19 Senator Javits. You should take specification
20 whenever a court has jurisdiction over an agency decision--

21 Mr. Fascell. H restricts that, Senator.

22 H lays down that restriction, it says any
23 Federal Court otherwise authorized by law.

24 That is the reason it was written in that
25 way.

1 Senator Javits. You have two exceptions.
2 If you first decide what you want to accomplish, and
3 then write the language to suit it, that is all I
4 have to say, and the district court, unless it has juris-
5 diction over the agency action, is not permitted to tamper
6 with the agency action.

7 Mr. Fascell. We are agreed then. I just
8 wanted to be sure it is covered in the point that
9 the gentleman from California raised.

10 Mr. Flowers. The issue is whether, I
11 think Senator Javits is saying, you do not want violation
12 of the Sunshine law to be the sole cause for setting
13 aside of the agency action.

14 It has to be a valid substantive matter
15 as well.

16 Senator Javits. This can be rewritten.

17 Mr. Flowers. Which is what is written in the
18 House version, if you look on line five of page 13, it is
19 in the House amendment, it is the Senate language about
20 the exception to the extent--

21 Mr. Fascell. I want to be sure my colleague
22 from Florida, and the legal staff on that side are with
23 us so far, before we start putting this together.

24 Senator Javits. That is very accurate, the
25 House side, it says nothing in this section shall confer,
etc.

1 There are some cases in which a district
2 court may review, where it already has jurisdiction, it
3 is not conferred by this section.

4 Mr. Brooks. What is your judgment on
5 that?

6 Mr. Hoff. That is our understanding too.
7 My understanding is consistent with what Senator Javits
8 has been suggesting, and counsel on the other side, I
9 am sure we can put it together.

10 I do not think there will be at all a
11 disagreement on this.

12 Mr. McCloskey. For clarification, if the
13 Senate accepts the House language, as it is written,
14 and then adds to it, the lines 16 thru 21 on page 13,
15 the Senate language, at the conclusion of that paragraph,
16 adds a clear standard, such as in the Administrative
17 Procedures Act, that will not be a set aside, unless it is
18 arbitrary, capricious, or abusive discretion, some
19 kind of language of that kind, that would be perfectly
20 acceptable to me.

21 Senator Chiles. Fine. I think the staff
22 can work it out.

23 Mr. Brooks. Gentlemen, that means we will
24 work this language up, as we agreed in principle, and we
25 will work it up, and when we sign the official report,

1 whether we agree or not, we will hammer that out
2 at that point.

3 The next matter is seven, personal
4 liability of agency members for litigation costs.

5 Senator Chiles. The Senate will recede.

6 Mr. Brooks. The Senate will recede.

7 Is there any objection?

8 Mr. McCloskey. Mr. Chairman, could I
9 raise a point?

10 Mr. Brooks. Yes, Mr. McCloskey.

11 Mr. McCloskey. I think there is an
12 ambiguity in both our language, on line 22,
13 on page 13, we say, we may assess against any party reason-
14 able attorneys fees, and other attorneys fees, and on
15 the next page, we say that costs may be assessed against
16 the plaintiff only.

17 I am afraid costs may be interpreted to
18 include attorneys' fees, because of that definition
19 we used in the first paragraph.

20 Mr. Danielson. I think if we just struck
21 the word other.

22 Mr. Fascell. Where is that?

23 Mr. Danielson. On line 23, both versions, if
24 we just struck other, so we do not get confused.

25 Mr. McCloskey. I think we ought to have an

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explanation in the report what we mean.

Mr. Brooks. Fine.

We will stand in recess for a vote.

(Whereupon, the conference was in short recess.)

AFTER RECESS

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3 Mr. Brooks. The conference will come
4 to order.

5 Mr. Danielson. Mr. Chairman, I do not
6 recall as a matter of practice that attorneys' fees are
7 ever allowed as a cost in a Federal court.

8 If there is an exception, it would have to
9 be a specific one.

10 I have tried a lot of Federal cases, and
11 I do not ever recall attorneys' fees.

12 Marshall fees, notaries, transcripts, etc.,
13 yes.

14 Mr. Flowers. There are all costs included
15 in Federal cases.

16 In a lot of civil rights cases, all kinds
17 of cases like that, there are assessed costs against
18 the United States.

19 Mr. Danielson. They are specifically
20 provided for in the substantive law, but for ordinary
21 civil actions, I do not think there is one.

22 Mr. McCloskey. My understanding of the
23 law is that prevailing party is entitled to
24 costs, but he is never entitled to attorneys fees,
25 unless there is a specific statutory authorization, or
a court has ruled that the plaintiff is acting for the

1 government, and like from the recovery of that Long
2 Beach oil, he was entitled to the fee the government
3 should pay him, because he in effect served as a
4 governmental purpose, but that has been a subject of
5 litigation for ten years.

6 My only concern is that if we do this,
7 let us do it squarely.

8 Let us say we are awarding attorneys fees
9 and costs, not that we are awarding costs, attorneys
10 fees and other litigation costs, which creates a new
11 definition, but as I say, I would like to study it.

12 I had not realized that issue was before
13 us.

14 Mr. Fascell. The word other on line 23,
15 I do not see how you can read it other than to mean that
16 attorneys' fees are included in litigation costs.

17 Mr. McCloskey. I am concerned, because for
18 the first time in history --

19 Mr. Fascell. You make it specific as a means
20 of remedy in this particular sanction.

21 Mr. McCloskey. Then let us do it. We
22 ought to include them as a part of legal costs.

23 Mr. Fascell. You lose me with that
24 statement.

25 I must be dense, but I thought that was what

1 this language did, was to make it specifically clear
2 that court could assess attorneys' fees and other
3 litigation costs against the plaintiff, if the court so
4 determined.

5 Mr. McCloskey. What will you do if the
6 courts now say that Congress in its most recent announcement
7 said attorneys' fees are included in the term other
8 litigation costs?

9 Mr. Fiscall. We are just doing it in this
10 law.

11 Mr. Brooks. We are making it separate.

12 On line 23, it says reasonable attorneys fees
13 and other litigation costs.

14 Mr. Fascell. Which says in this subsection
15 G or H.

16 Mr. Flowers. That might be a problem.

17 Mr. Brooks. I was thinking this certainly
18 relates back to costs.

19 Mr. Flowers. You could put such costs at
20 the top of page 14, which would then relate back to the
21 previous, I do not know if that is within the scope
22 of what we can do here or not.

23 Mr. McCloskey. Senator Chiles, let me pose
24 this question to you.

25 In your Senate bill, on line one of page 14,

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you say costs may be assessed against an individual member of an agency.

The guy in the agency might be paying costs and attorneys' fees.

Senator Chiles. We have agreed to strike that.

Mr. McCloskey. But I think that gives us leeway to strike the word other, and then if you wish, to say we want to award costs and attorneys fees against a frivolous plaintiff, that is fine.

Mr. Flowers. You can use the word such reasonable attorneys fees and litigation costs, should be repeated on the second page, like it is on the first page, strike the word other, and then repeat it on the second page, don't you think, instead of just using the word costs on the second page?

Mr. McCloskey. Costs and attorneys' fees.

Senator Chiles. I think our intent was more, when we are getting the frivolous plaintiff, I think we are going toward litigation costs.

Mr. Flowers. I thought we were assessing attorneys' fees too.

Senator Chiles. Look at your act, you say except that costs may be assessed against the

1 plaintiff, etc., primarily for the frivolous purpose.

2 In our other paragraph, you say the court
3 may assess against any person or party substantially
4 prevailing.

5 You still have language there.

6 Mr. Flowers. That is the best reason why
7 we ought to amend it, because we have different standards
8 right here.

9 Mr. McCloskey. I would move to delete the
10 word other at line 23 of the Senate version.

11 Mr. Flowers. Why don't we work off
12 of the House version?

13 Mr. McCloskey. I would move to strike
14 the word other at line 23 of page 13, which would bring
15 it in accord with the language as we understand it.

16 We would strike the word other at line
17 24 on page 13, line 23, I am sorry.

18 Mr. Fascell. Could we just drop this
19 until we check with the parliamentarian, to see since
20 the word is exactly the same on both sides, we might
21 have a problem, we might even get around it.

22 There is no point in creating problems if we do
23 not have to.

24 We will check on it right away.

25 Mr. Brooks. Without objection, we will

1 leave this in abeyance, seven, and go on to our next issue,
2 ex parte communications.

3 Definition of ex parte communications -- The
4 Senate bill prohibits "ex parte communications relevant to the
5 merits."

6 The House bill contains a similar phrase, but in
7 addition specifies that an ex parte communication "shall
8 not include requests for information on or status reports
9 relative to any matter or proceeding covered by this
10 subchapter."

11 The gentleman from New York is recognized,
12 Mr. Horton.

13 Mr. Horton. I yield, Mr. Chairman.

14 Senator Chiles. I would move the Senate recede
15 with an amendment to strike the words information on or.

16 Mr. Brooks. Is there objection?

17 Mr. Horton. Mr. Chairman, Mr. Chiles, as
18 I understood this matter, Mr. Latter, as I understand him,
19 he was concerned about the ability of members of Congress
20 to get information, and I think that is why that language was
21 put in there.

22 Are we attempting to prohibit members of
23 Congress from getting information?

24 Senator Chiles. No, sir.

25 Mr. Brooks. It might be the report would

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make that clear.

Mr. Horton. Could I ask the Senator to explain why he wants to take out information on or?

Is there any reason for removing that?

Mr. Brooks. There is a letter from the American Bar Association, and the Committee that worked on this, they stated as follows:

(The letter follows:)

COMMITTEE INSERT

1 Mr. McCloskey. Why don't we just include,
2 the language the ABA makes, and I would like to know
3 what information about what they are doing, without
4 trying to affect their judgment, so if you take the
5 information out, so they are limited to a status report,
6 I guess I could not ask for it, and they do not seem
7 to worry about Congress or the Executive Branch asking
8 for information.

9 Mr. Flowers. I think the other parties
10 ought to have the same right, that conceivably someone
11 might not want to decide to go thru their congressman or
12 Senator.

13 I hope a lot of people do, but just to
14 inquire of the status of something--

15 Senator Chiles. We did not exempt.

16 I didnot try to strike that out, shall
17 not include requests for status reports, relative to
18 any matter or proceeding covered by the subchapter.

19 Mr. Flowers. I do not think the amendment of
20 the Senator from Florida that he offers would do any
21 violence to what is in this.

22 You do not have to write a letter and say I
23 want a status report, we are not limiting it to that.

24 Mr. Brooks. I think we ought to cover
25 that in the report, make it clear, because people will

1 then otherwise be giving us reports, everytime we write
2 an agency or call an agency.

3 Mr. Fascell. In the colloquy I had on
4 the floor on this issue, we made it quite clear
5 the intention was not to get around the basic thrust of
6 the ex parte communication.

7 We did not want to make it possible to contact
8 either directly or indirectly, without going on record,
9 any person who was involved in a decision-making
10 process.

11 We were simply trying to preserve the right
12 of members of Congress or other people to get routine
13 information from the agency without falling aowl of the
14 law.

15 Senator Chiles. Let us make that clear in
16 the conference report.

17 Mr. Brooks. We will cover that in the
18 report.

19 The Senate recedes with an amendment.
20 The motion is to strike the information on cr.

21 Is there an objection?

22 The Chair hears none.

23 Proceed to 3(b).

24 Senator Chiles. Senator Javits has a
25 provision on the Senate side, and I would like to put

1 in the language, knowingly.

2 Senator Javits. If I may give you my reasons
3 for doing what I did, this section ties into the next
4 point which is 8(c), and we might as well consider
5 them together, because of the heavy penalty imposed
6 on the party to a proceeding, that the ex party communica-
7 tion may be grounds for one, requiring them to show
8 cause, page 16, requiring them to show cause, why his
9 claim should not be dismissed, or otherwise adversely
10 affected, by virtue of such resolution.

11 The courts are given the right to do the
12 same thing.

13 There are certain penalties in the law that
14 is really so severe, they are really criminal penalties,
15 one is that a guy can lose his whole case before an
16 agency, or lose it on review, so I thought at least you
17 ought to have the element of doing something deliberately.

18 The only reason I use the word knowingly,
19 is that it is a very well known legal word,
20 because I thought otherwise we are in danger of
21 serious injustice.

22 Mr. Flowers. I move the House recede.

23 Mr. Brooks. Is there any objection?

24 Mr. Danielson. Not an objection, but a
25 suggestion, knowingly of course describes any act that

1 a person consciously purports.

2 I think all of us are seeking to refer here
3 to something done with a perverse implication.

4 I might suggest the word willfully may be
5 more appropriate.

6 Senator Javits. Highly satisfactory to
7 me.

8 Mr. Danielson. That would imply for a negative
9 purpose.

10 Senator Javits. If it were not for the
11 heavy penalties, I would not have paid any attention
12 to it.

13 Mr. Brooks. Are you suggesting we substitute
14 the word willfully for knowingly in each instance?

15 Mr. Danielson. I am, which would imply,
16 that is that--

17 Mr. Flowers. I accept the gentleman's
18 motion.

19 Mr. Brooks. Your motion is the House
20 recede with an amendment, and your amendment would be
21 to substitute the word willfully in both A, B and C.

22 This is on page six, for knowingly.

23 Senator Chiles. Why did you do that?

24 Mr. Danielson. To change knowingly to
25 willfully. You have to prove it is willful.

1 Senator Chiles. That almost includes a
2 criminal intent, willful, a bad motive.

3 Mr. Danielson. Yes, a bad motive.

4 Senator Chiles. As opposed to knowing what
5 you are doing, as an ex parte communication, and with
6 a fore-knowledge, but it seems like to me that you are
7 really, you go to willfully, you really limit this, or
8 raise the burden of proof tremendously.

9 Mr. Danielson. The burden of proof would
10 be raised considerably.

11 The reason I suggested the amendment, is
12 because almost everyone who commits an act does it
13 knowingly.

14 You might do it knowingly, and innocently.

15 Senator Chiles. It seems to me, what we are
16 trying to get at, we are trying to stop ex parte
17 communications that do not get on the record, and if
18 they are made, we want them on the record, and it
19 seems to me, we want them to be on the record, whether
20 they were done with a fraudulent intent or not.

21 Mr. Danielson. I quite agree, but I
22 think we are dealing with a law which is to enable the
23 public to have an access to what is going on in the
24 government, and an awful lot of the citizens simply will
25 not be aware of some of the provisions of the Sunshine

1 bill, and they might knowingly make an ex parte communication
2 without any intent to violate the law, they are simply
3 innocent of the implications, and that is the reason
4 I suggested willful.

5 Mr. Brooks. If that is done, the only
6 thing that is necessary is that the agency make a notation
7 of it, and that there be a record of it.

8 There is no great severe penalty, but then
9 it allows people to see that that was done, that he did
10 talk to that person, was it off the record conversation,
11 so it seems to me we are not putting great penalties
12 for doing it, it is just a question of bringing it to light
13 that it was done.

14 Mr. Fascell. Let me explore something
15 here, because I am getting a little bit lost on knowingly
16 and willfully or otherwise.

17 The thrust of this section which is not part
18 of the Sunshine Act amends another law, is simply
19 that we do not want, if we are going to twist the arm
20 of the decision maker, in a Federal agency, thru political
21 interference, or otherwise, economic, or outside pressure,
22 thru the means of an ex parte communication, while we
23 are not in the same position as we would be with a
24 judge, who is deciding a case, it is quasi-judicial
25 to that extent, so the theory is, we say okay, you can contact

1
2 the decision maker, if in this particular case, as
3 long as you put it on the record.

4 Now, if you do not do that, and you contact
5 him, then you violated this law.

6 Now, as I understand what the Senate
7 language says, and what we are talking about,
8 that we change that, that we make it if you only
9 violate the law if you knowingly do that, or you only
10 violate the law if you willfully do that, but when you
11 make an ex parte communication, is not that a direct
12 effort to communicate, and if that is the case, whether
13 it is verbal, or written, why do you have to apply a
14 standard to it, of either knowingly about it or
15 being willful about it?

16 The theory of the law is a very simple
17 one, if you make any ex parte communication, relative to
18 the merits of the matter, in the decisional process, you
19 must spread that on the record.

20 Senator Javits. Could I give you an
21 example why I used the word knowingly, say someone writes
22 me a letter, and he complains about a given agency
23 proceeding that he is being hurt.

24 I answer his letter. My secretary instead
25 of just answering the letter sends a copy to the Chairman
of the agency, I have communicated that to the chairman

1 of the agency in accordance with this statute, and I
2 have not done it knowingly, but I have violated this
3 law if we accept your construction.

4 Mr. Fascell. Excuse me.

5 I did not follow that. I had five
6 conversations going on around me at the same time.

7 What happens in your scenario, if the
8 agency puts that in the record--

9 Senator Javits. Why should they put it
10 in the record?

11 I have not tried to influence them in
12 any way, why embarrass me?

13 I have not done it knowingly.

14 Mr. Fascell. Why the embarrassment?

15 Senator Javits. It might be an
16 embarrassment.

17 I had no design to do it. I had no intention
18 to do it.

19 Mr. Fascell. If you had known about it, would
20 you not have contacted them?

21 Senator Javits. Exactly. You get a guy
22 on the phone, the girl makes a mistake with the number,
23 or some other such thing, and you have to say knowingly,
24 because then my design is to talk to the agency guy.
25

1 Mr. Fascell. Why don't we provide it the other
2 way around, following that same scenario, why don't
3 you provide it the other way, which is a penalty, it
4 will apply, unless the violation was inadvertent.

5 Senator Javits. I think that is putting a very
6 undue burden upon me, who did not have any design to do
7 any such thing, not at all.

8 I think that is one of the things wrong
9 about our jurisprudence, when you start to turn the
10 world upside down that way.

11 Mr. Brooks. Gentlemen and ladies, there
12 is some question about whether or not willfully might
13 be beyond the scope of something to consider.

14 Senator Javits. I am satisfied with
15 knowingly.

16 I am just explaining it.

17 Mr. Danielson. I ask unanimous consent to
18 withdraw my amendment.

19 Mr. Fascell. I would suggest the House
20 recede.

21 Mr. Brooks. Mr. Danielson suggests
22 the House recede, and he withdraws his amendment.

23 His amendment was to change knowingly to
24 willfully, and with the acquiescence of Mr. Flowers,
25 we have then pending Mr. Flowers motion that the House

1 recede, both B and C, and accept the Senate language,
2 which does have the word knowingly in it.

3 Is there objection to that motion?

4 The Chair hears none, and we will
5 recede.

6 Senator Chiles. The Chair recedes on
7 D.

8 Mr. Brooks. The Senate recedes on
9 D.

10 Senator Chiles. I would move the Senate
11 recede on 9 too.

12 Mr. Brooks. The Senate recedes on 9,
13 without objection, and, gentlemen, we have one more
14 matter.

15 Senator Percy. On 9, we have NIH obviously
16 very concerned about peer review, and they have objected
17 strenuously in the passage of that of public knowledge
18 of what was said in peer review, when they are awarding
19 and making grants, that this would inhibit the free
20 flow of conversation.

21 Now, I do not know how we can reconcile
22 that, with the fact we are moving in the direction of
23 opening up as much as we possibly can, and maybe we
24 can recede to the House position, but there is some way we
25 can handle this problem with the report language that will

1 not impede what we are trying to accomplish, but which
2 would somehow give them a feeling that we are not
3 scuttling their ability entirely to have objective inhouse
4 discussions where grants depend upon the competence and
5 capability of a professional carrying out those grants.

6 Mr. Fascell. Maybe we could enlarge in the
7 report on the privacy exemption, in those kinds of
8 cases.

9 Senator Chiles. I think we have already
10 got it in there.

11 In Section 3, it covers them, in the bill,
12 on page four, line one, in the Senate version, disclose
13 information of a personal nature, where disclosure
14 would constitute a clearly unwarranted invasion of
15 personal privacy.

16 Mr. Fascell. That is what I was suggesting,
17 in clarifying the issue that Senator Percy raised,
18 specifically with respect to peer review on grant
19 applications, for example, you might work out
20 language, report language to explain at length under
21 Section 3 there.

22 I do not know whether that would do it
23 or not, but that is one way to handle it.

24 Senator Javits. That is correct.

25 Senator Percy. I must frankly say I do not

1 know enough about it to really know whether their concern
2 is justified or not.

3 There are occasions where you want to sit
4 down and talk about people, and if we were to talk about
5 this respective staff on our committee, it would be hard
6 to do it right in front of them all, and their mothers
7 may be here.

8 Mr. Fascell. That is interesting. I
9 just went thru that experience in a commission, that
10 just had its second meeting under a law that was recently
11 passed, and the issue was the appointment and selection of
12 a staff idrector, and while the guy is standing there,
13 everybody took a shot at him in public.

14 Senator Javits. May I make a suggestion, you
15 might conceivably, and I have not thought this thru, so
16 please forgive me, but it is a suggestion, disclose
17 information of a personal or professional nature, that
18 might give you a little more amplitude, engineer, doctor,
19 lawyer.

20 Mr. Fascell. I would rather put it in the
21 report, where a personal nature, something having to do
22 with professional qualifications.

23 Senator Percy. Professional qualifications
24 is really the essence.

25 Senator Javits. Let us say we assume, under

1 the word personal, a person, could we do that?

2 Mr. Fascell. Senator Chiles has got to
3 sweat that one out.

4 Senator Javits. The language in the fact of
5 dealing with professional qualifications, if you are
6 in a profession--

7 Mr. Brooks. Senator Percy, why don't we
8 try to work out some language in that report, which
9 I hope will be helpful to you.

10 I understand your uneasiness about it,
11 your concern.

12 Senator Percy. The last remaining problem,
13 the clinical applicability of research findings, and they
14 are highly sensitive about that.

15 Maybe I could ask counsel to explain the
16 sensitivity.

17 Counsel. Even more sensitive than peer
18 review, when they are doing a five-year study, of
19 whether one drug would be better than another drug, and they
20 have a control group, the question is if the advisory
21 committees that release the data after six months, only
22 a fourth of the way thru the trial of the drug, they have
23 found that some cases data may be different, then they
24 would be at the end, but after six months, one drug, or
25 no drug would look better than another one at the end,

1 which results might be reversed after the total trial.

2 The question is if you release it earlier,
3 thru the Federal advisory committee, does that perhaps
4 destroy the study.

5 Mr. Fascell. In what way?

6 Counsel. By if one drug at that point,
7 seemed to be better than another one, everybody might
8 abandon the study that was in the other control group,
9 whereas at the end of the study, it might prove that the
10 opposite was true.

11 Senator Javits. Gary Klein points out,
12 I am only saying, as he is saying, that on page five, under
13 7, you have to disclose information that may be held
14 secret, to disclose information that must be withheld from
15 the public, in order to avoid premature disclosure of
16 action by any agency where such disclosure would
17 sufficiently frustrate the study.

18 Mr. Brooks. We will take a look in the
19 report.

20 Senator Percy. The other side of the coin,
21 is if a test result is advanced enough to share with the
22 public advisory committee--

23 Mr. Flowers. Right. Let John Q. Citizen
24 have a shot at it.

25 Senator Percy. Not necessarily, but a case

1 can be made it is.

2 Perhaps it should go in the report language
3 to see if there is any way we have not thoroughly
4 researched the technical nature of this, and what the
5 implications would be.

6 Mr. Brooks. We will have the staff
7 do that.

8 That, gentlemen, leaves 9 without
9 objection, and it is approved.

10 We have one thing to go back, to
11 Mr. McCloskey's point, the Parliamentarian feels that
12 the introduction of other, or removal of other, from
13 the language would make the whole thing subject to a
14 point of order.

15 They think it is not in controversy, and
16 it would be beyond the scope of this conference
17 committee.

18 I wanted to report that to you, and I
19 would say, gentlemen, that I would like to move that all
20 of the compromise proposals appearing in Part II of the
21 staff memo, that you have in front of you, be agreed to,
22 except for point 12, which the Senate has receded from
23 on real estate, with which we have already dealt.

24 The staff has worked on this for about a
25 week. They have done a good job on it. I think most

1 of these have been resolved.

2 Is there any objection?

3 The Chair hears none, and so ordered.

4 I would ask unanimous consent that the
5 staff be authorized to make such technical and
6 conforming changes as are necessary, and I would ask
7 without objection, and I would say we have resolved all
8 of the differences, and I want to say I appreciate your
9 cooperation.

10 We can now move on to signature. The
11 signature sheets are ready, and if you would sign
12 them, we would be prepared to move on this.

13 Thank you very much.

14 Senator Javits. Mr. Chairman, in the
15 outside contingency that Senator Percy or I are concerned
16 with the report language, you and Senator Chiles, may
17 I suggest that any change that the conference committee
18 be polled, that it may be unnecessary to have a meeting.

19 Mr. Brooks. Is there is some major
20 problem, certainly we will consider the possibility of
21 polling the conference.

22 We do thank the ladies and gentlemen
23 very much for an outstanding job, and this brings the
24
25

1 conference to a conclusion.

2 The conference stands adjourned.

3 (Whereupon, the conference committee was
4 adjourned at 6:45 o'clock p.m.)
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