

ment, I found no suggestions of that nature, merely that the question of what should be made public is a matter of bureaucratic judgment.

You do not want legislative judgment in this field. You do not even limit the judgment to the President. Presumably it would be bureaucratic judgment, and we would be left with their decision?

Mr. SCHLEI. Well, I think, Congressman, that the points that I would make are, first, that there has to be a residue somewhere for discretion, that it is not possible to create a closed number of categories, any number of specific categories, without the possibility of disastrous oversight; that there has to be a catchall category, if you like, that leaves some discretion.

And I think that, secondly, there has to be a preservation of the constitutional executive prerogative. Now, that does not have to be given to every bureaucrat, as you say. I personally would think that it ought not to be confined by any legislative proposal to the President himself. Perhaps to the heads of departments or agencies.

I would not take the position that the exercise of that discretion could not be confined by legislative enactment to a limited number of officials.

But I think that there has to be a preservation of the constitutional prerogative. Somebody has to have it, retain it. And, secondly, there has to be a preservation of a category that allows a discretionary withholding when it is considered essential in the public interest.

Mr. GRIFFIN. Well, I think it should be registered in the record that there is a good deal of opinion to question whether there is a constitutionally derived Executive privilege. Certainly there is a lot of question about the scope of it. I will not try to argue that here but just register that Executive privilege is not necessarily accepted by all members of this subcommittee, as you might expect.

Mr. SCHLEI. I do understand.

Mr. GRIFFIN. I want to associate myself generally with the opening statement made by the chairman of the subcommittee and express the hope that these hearings will be fruitful in developing good legislation, perhaps improve the bill that I joined in introducing. The legislation should make it possible for the public, and particularly Congress, to get more information about what is going on in our Government.

Thank you, Mr. Chairman.

Mr. MOSS. Thank you.

Mr. SCHLEI, I would like to turn to page 8 of your statement.

Mr. SCHLEI. Yes, sir.

Mr. MOSS. It comments upon the legislative history of the 1958 amendment in a manner which is contrary to my recollection of that history, in which I participated very actively.

You say:

The 1958 amendment was enacted and approved by the President only upon assurances in the House and Senate debates that the amendment did not upset or diminish any power of the Executive which he derived from the Constitution.

I refer to that history in one exchange with Mr. Johansen of Michigan. I will read his question:

May I interrupt the gentleman at this point, because I think in my own mind I now have the nub of the issue. If this bill were adopted, what discretionary authority does the department head have to withhold information where it is