

case the resolution, I think, would be regarded as unsatisfactory by the people who though the Comptroller General was right.

The thing is that when we get these confrontation situations the usual processes for resolving disputes are really not available in our system of government. We have three coequal branches, and when they really are in conflict—it happens very rarely, fortunately—but when they really are in conflict the political process slowly and usually effectively resolves it.

Mr. RUMSFELD. Well, then, just for the sake of clarity in the record, assuming that the proposal before this subcommittee or some similar proposal were to pass the Congress and the opinion of the Justice Department was that it was unconstitutional, it would stand and there would be no way, according to what you have said, that its constitutionality could be tested?

Mr. SCHLEI. Well, that is not accurate, Congressman, because this statute gives rights not just to Congress but to members of the public. And under this statute a member of the public who would presumably seek information and be refused would bring a lawsuit, and he would be separately represented. It would not be the Government suing itself. It would be a member of the public resting his rights on a statute enacted by Congress seeking relief against the executive branch.

And the judiciary would decide that. My own view is that they would decide that by saying that the doctrine of separation of powers prevents them from exercising jurisdiction to compel the executive branch.

Mr. MOSS. I would like to clarify one thing. This is not intended to affect the rights of the Congress. This is dealing with a public right, this proposed legislation.

Mr. SCHLEI. Yes, sir.

Mr. MOSS. Only with a public right. And Congress can, as an equal branch, use its own rights and privileges in seeking to get its information.

This proposed bill does not affect the rights of the Congress.

Mr. SCHLEI. I understand that, Mr. Chairman.

Mr. MOSS. Mr. KASS.

Mr. KASS. Mr. Schlei, has the Supreme Court ever decided that, inherent in the executive branch of the Government, is the constitutional right to withhold information?

Mr. SCHLEI. Well, I believe that there are decisions recognizing that inherent in the authority to execute the laws is the authority to withhold information; yes.

Mr. KASS. Could you give us some citations either now or for the record?

Mr. SCHLEI. I can certainly give them to you for the record.
(The material referred to follows:)

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) appears to be the only case in which the Supreme Court has treated such authority to withhold information in terms of a constitutionally derived discretion in the Executive, in the exercise of which the Executive is accountable only to the electorate. Other cases involving the nonavailability of official information determine the question in the context of evidentiary privilege and the reach of discovery procedures in judicial proceedings, which are matters within the authority of the courts. Three such cases have reached the Supreme Court: *Totten v. United States*, 92