

privilege extends beyond the information itself, to deliberations on the information and conclusions and policy recommendations drawn from the information.

*Machin v. Zuckert* involved a demand for a military aircraft accident report developed from testimony before an Air Force Accident Investigation Board. Apparently, testimony before the board customarily was adduced under promises of confidential treatment. The court acknowledged the appellee's claim that the substantial reduction in aircraft accidents and improvements in equipment over the years depended upon candid testimony concerning aircraft accidents. The privilege was considered necessary to avoid inhibiting future witnesses before such boards and thereby seriously prejudicing the aircraft accident analysis program, and perhaps the improvement of military equipment. The privilege was held not to extend to information the disclosure of which would not inhibit future witnesses before investigating boards, and the district court, rather than the military department, was determined to have authority to decide how much of the information demanded was within the privilege. The inference of the decision is that such authority would be in the Executive if state secrets were contained in the report demanded.

The broad principle on which the decision is founded would seem to be applicable in any case where disclosure would hamper an important governmental function, for example, investigation for purposes of law enforcement or regulation.

Mr. KASS. Thank you.

You spoke of the concept of executive privilege vis-a-vis the courts as compared to the concept of executive privilege vis-a-vis the Congress. Is not this concept vis-a-vis the courts really what this bill is intended to accomplish?

Mr. SCHLEI. Well, it is involved, but basically the courts would not be called upon to decide disputes in which the information is incidentally relevant as evidence. The courts would be called upon really to regulate the relationships of the executive branch and the public with respect to the information wholly apart from any rights and duties, legal rights and duties, any case or controversy, within the concept of article III of the Constitution.

And I think that that is a constitutional infirmity, as a matter of fact, in this proposed legislation. Someone would be seeking information from the Federal Government who has had no jural interest in it, so that there seems to me some question whether a court would be able to assume jurisdiction over the controversy under article III of the Constitution which limits the jurisdiction of Federal courts to "cases and controversies"—a very complicated concept that might not extend to a situation of this kind.

Mr. KASS. Does not a citizen have a jural right to information from the Government—that is, information not within these eight categories?

Mr. SCHLEI. Well, I am not sure. Suppose a member of the press would like to get some information about a prisoner, say.

Mr. KASS. Mr. Schlei, I think you answered Mr. Moss that it is not only the members of the press who are concerned here.

Mr. SCHLEI. Yes, that is true.

Mr. KASS. It is the American Bar Association, the lawyers in general, and everybody else—historians, professors, and so forth, and John Q. Citizen.

Mr. SCHLEI. Well, then, take John Q. Citizen who is just curious about some particular prisoner in the Federal system. He wants to know some information that is not within these exceptions, and he brings a lawsuit, and the court says, "Well, where is your standing to sue? In what way is your ox gored by the refusal of the Federal Government to disclose this information?"