

this, if there is any delay in the progress of S. 1166 in this Congress.

Mr. HANES. Right.

M. BENJAMIN. I mean this accomplishes the major part publication in the Federal Register, rules publication is pretty good as it is now. This is the major change to be accomplished, and I would not want anything we say to act in the slightest as a drag on the progress of this bill either in the House or in the Senate.

Mr. KASS. Mr. Benjamin, one of the reasons that the bill was introduced as an amendment to 5 U.S.C. 22 was that the Foreign Operations and Government Information Subcommittee under the chairmanship of Congressman Moss sent out a questionnaire asking all of the agencies, departments, boards, and commissions in the Government—approximately 102—whether 5 U.S.C. 1002, section 3 of the Administrative Procedure Act was applicable to them. Despite the language of the Attorney General's Manual on the Administrative Procedure Act saying that section 3, the public information section, is applicable to every agency in the Government, many agencies have informed the subcommittee that, since they do not make rules and are not adjudicatory agencies, the section does not apply to them; and, therefore, there is no Federal public records law applicable to them.

Mr. BENJAMIN. Well, I hope that would be changed by the adoption of S. 1336, for example, or a like bill in the House.

Mr. KASS. And this is why the language of H.R. 5012, this present bill, makes it clear that the word "agency" is to include each authority of the Government other than Congress and the courts.

Mr. BENJAMIN. Yes.

Mr. KASS. Mr. Benjamin, 2 days ago the subcommittee took testimony from Assistant Attorney General Norbert Schlei, and he referred to the problem that this bill, in his opinion, was unconstitutional.

Could you comment on that problem?

Mr. BENJAMIN. Yes.

I read Mr. Schlei's testimony. While he talked about the Executive privilege, he also said that the only way it could be really well exercised would be to leave each agency to deal with its own problems because they were the only ones that knew about it.

Now it seems to me that a very important part of this whole question of Executive privilege is the answer to the question who determines when it is to be exercised. Under President Kennedy that was quite clear as the chairman developed in his talk in 1962 to the American Bar Section of Administrative Law; it was the President's decision.

I do not believe there has yet been any announcement by President Johnson about what he is going to do about this. I would hope he would follow the same line.

Certainly it would seem to me that if the President himself exercises judgment on what is an appropriate occasion for the exercise of Executive privilege, it would be most highly unlikely that he would exercise it in any instance that is not in effect covered by these exemption provisions of subsection (c) as they now stand in H.R. 5012. If he did exercise it in a more far-reaching way, it is also perfectly clear to me that then there arises a question for the courts as to where that exercise of Executive privilege stands.