

Mr. KASS. Mr. Benjamin, this bill has removed the criteria that persons must be properly and directly concerned, and substituted for that criteria the nature of the information itself.

Do you agree with this criteria?

Mr. BENJAMIN. No, I agree with the change.

Mr. KASS. With the change?

Mr. BENJAMIN. I think the criterion was a mistake, and in the same general direction we have tried in our legislation, as has the Senate committee dealing with it, to get rid of some of the extremes of the doctrine of standing to sue. I think, generally speaking, the question should be, what are you trying to review and not, who is trying to review it.

You get so caught up in technicalities on finding out who is affected and this and that, that you get again a great waste of time, and second, denial of any relief to somebody who ought to have it.

Mr. KASS. I have no further questions, Mr. Chairman.

Mr. MOSS. Mr. Rumsfeld.

Mr. RUMSFELD. I would like to apologize for my absence during a portion of your testimony because of the debate on the floor of the House, and just make sure that I understand what your previous testimony was.

Is it correct to say that you have indicated your conviction that the bill as before you is constitutional?

Mr. BENJAMIN. I would put it this way: I would say yes, but then I would say that the question of constitutionality is always one of the application of a statute, and it may very well be that something that is not spelled out here may be within the constitutional executive privilege of refusing information. But I think it would be a waste of time to try to forecast what the details of that are, and I think the bill would certainly be constitutional in almost all, if not all, of its applications. And if it is held to be constitutionally inapplicable to a particular attempt of the executive to rely on the executive privilege, that is not a criticism, a legitimate criticism of the bill.

It seems to me any good piece of legislation always presents that possibility around the fringes of its application, and that is quite proper that it should.

Mr. RUMSFELD. I thank you, and I might say I certainly agree with what you have said.

A previous witness indicated that because of this question of executive privilege, that this bill in his words should contain reference to executive privilege.

Now at that time I believe I made the comment that because this concept of executive privilege would flow from the Constitution, I could not see why any such provision should be put in or even would be desirable to have in. Is this your conclusion also?

Mr. BENJAMIN. Yes, I think it is perfectly obvious that the executive privilege is there, whatever the limits are that the courts will set out, and the legislative history will make it clear that the Congress had that in mind. But to try to spell it out any more would be futile, I think.

Mr. RUMSFELD. I quite agree, thank you.

Mr. MOSS. Gentlemen, I want to express my thanks and that of the subcommittee for your very constructive suggestions and your helpful interest in this legislation.