

THE POWER OF THE PRESIDENT  
TO WITHHOLD INFORMATION  
FROM THE CONGRESS

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MEMORANDUMS OF THE ATTORNEY GENERAL

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COMPILED BY THE  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

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PART 2



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## PREFACE

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The study published herein entitled "Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-1953 Concerning the Decisionmaking Process and Documents of the Executive Branch" was submitted by the Deputy Attorney General of the United States to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on August 19, 1958. It supplements the study, Is a Congressional Committee Entitled to Demand and Receive Information and Papers from the President and the Heads of Departments Which They Deem Confidential, in the Public Interest?, previously submitted to the Subcommittee on Constitutional Rights by the Deputy Attorney General and published in part 1 of this compilation of Memorandums of the Attorney General dealing with the power of the President to withhold information from the Congress.

As stated in the prefatory note to part 1, publication of these materials should in no way be construed as approval by the subcommittee of any of the views expressed.

THOMAS C. HENNINGS, Jr.,  
*Chairman, Senate Subcommittee on Constitutional Rights.*

OCTOBER 31, 1958.



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# THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS

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## LETTER FROM SENATOR THOMAS C. HENNINGS, JR., TO ATTORNEY GENERAL WILLIAM P. ROGERS

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
*July 23, 1958.*

Hon. WILLIAM P. ROGERS,  
*Attorney General of the United States,  
Department of Justice, Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: At the time of your appearance before the Subcommittee on Constitutional Rights on March 6, 1958, you stated that the Department of Justice was in the process of preparing a compilation of cases involving the withholding of information from the Congress by the executive branch of the Government between 1948 and 1953. You stated that "in due time" you would submit this compilation to the subcommittee for its consideration.

To date, the subcommittee has not received this material, even though almost 5 months have elapsed. May we expect to receive it soon? We are anxious to obtain it as soon as possible for use in our current study of this highly important subject.

It would be helpful to the subcommittee, too, if you would send us a similar compilation of all such cases of withholding from Congress which have occurred between 1953 and 1958. However, please do not let this latter request result in any further delay in our receiving the compilation covering the years 1948-53.

Sincerely yours,

THOMAS C. HENNINGS, Jr., *Chairman.*

**LETTER FROM DEPUTY ATTORNEY GENERAL LAWRENCE  
E. WALSH TO SENATOR THOMAS C. HENNINGS, JR.**

DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
*Washington, August 19, 1958.*

Hon. THOMAS C. HENNINGS, Jr.,  
*Chairman, Subcommittee on Constitutional Rights,*  
*Committee on the Judiciary,*  
*United States Senate, Washington, D. C.*

DEAR SENATOR HENNINGS: In response to your letter of July 23, 1958, to the Attorney General, requesting a compilation of cases involving the withholding of information from Congress by the executive branch between 1948 and 1953, there are enclosed two copies of a study entitled "Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-53 Concerning the Decisionmaking Process and Documents of the Executive Branch."

Instances of any such withholding of information between 1953 and 1958 are of such relatively recent date that the Department does not presently plan to make a compilation of them.

Sincerely yours,

(Signed) **LAWRENCE E. WALSH,**  
*Deputy Attorney General.*

**LETTER FROM SENATOR THOMAS C. HENNINGS, JR., TO  
ATTORNEY GENERAL WILLIAM P. ROGERS**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS,  
*October 6, 1958.*

Hon. WILLIAM P. ROGERS,  
*Attorney General of the United States,  
Department of Justice, Washington, D. C.*

DEAR MR. ATTORNEY GENERAL: This will acknowledge receipt of two copies of study entitled "Memorandum Reviewing Inquiries by the Legislative Branch During the Period 1948-53 Concerning the Decisionmaking Process and Documents of the Executive Branch," sent to the Constitutional Rights Subcommittee by Deputy Attorney General Walsh on August 19, 1958.

I have read this study, which you volunteered to supply to the subcommittee when you testified on March 6, 1958, regarding the power of the President to withhold information from the Congress, with great interest. It should prove useful to the subcommittee in its work dealing with the important subject of freedom of information.

I am sorry to learn that you do not plan to make a similar compilation of the withholdings of information from the Congress which have occurred since 1953, not only because the subcommittee thereby will be deprived of the benefits of such a compilation, but also because the compilation you already have made, covering the years 1948-53, may be suspect in the minds of some persons as having been motivated by partisan considerations, and its value reduced accordingly.

Sincerely yours,

THOMAS C. HENNINGS, Jr., *Chairman.*



**MEMORANDUM REVIEWING INQUIRIES BY THE LEGISLATIVE BRANCH DURING THE PERIOD 1948-53 CONCERNING THE DECISIONMAKING PROCESS AND DOCUMENTS OF THE EXECUTIVE BRANCH**

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## INTRODUCTION

In 1956 and 1957, the Department of Justice furnished to subcommittees and the Senate Committee on the Judiciary, respectively, of the House Committee on Government Operations a 102-page study, examining every instance from 1792 to 1947 of inquiries by the legislative branch concerning the decisionmaking process and documents of the executive branch.<sup>1</sup> It reviewed the applicable provisions of the Articles of Confederation and of the Constitution and the statutory provisions which play a part in the field, as well as court decisions dealing with the subject. The work of scholars in American history and constitutional law, the Annals of Congress and the Congressional Record, newspapers and legal periodicals were studied. Autobiographical works of officials were also consulted.

That earlier study reached the conclusion that the executive branch, as 1 of the 3 coordinate and coequal branches of the Federal Government under the Constitution, need not furnish information about its decisionmaking process and its documents about which the legislative branch is inquiring when, in the judgment of the executive branch, it would be contrary to the public interest to do so. This study examines similar instances of inquiries by the legislative branch for the period from 1948 to 1953.

In the introduction to the earlier study, the question was put as to what it was in the past that caused some of the bitter contests between Congress and the Executive concerning the availability of information and papers which the former thought it should have and which the President thought it should not. It was pointed out that our form of government permitted the Senate or the House, or both, to be controlled by one of the major parties, while the executive branch was controlled by another political party. In the struggle for political power and supremacy, the House or the Senate had occasionally demanded papers from the Executive which the latter felt it could not give.

The present study supports the view that, even when the political complexion of Congress and of the Executive is the same, sharp clashes over the right of Congress to see executive files may occur. Such incidents did occur in 1950 and in 1951, when Congress and the President belonged to the same party. Professor Corwin bears this out in an article in the New York Times magazine (October 10, 1948), where he states that some of the bitterest feuding between the two branches has often occurred when both were controlled by the same party.

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<sup>1</sup> The study is entitled "Is a Congressional Committee Entitled To Demand and Receive Information and Papers From the President and the Heads of Departments Which They Deem Confidential, in the Public Interest?" It is reproduced in Hearings on Availability of Information from Federal Departments and Agencies Before a Subcommittee of the House Committee on Government Operations, 84th Cong., 2d sess., pt. 12, at pp. 2892-2945 (1957), and committee print, The Power of the President To Withhold Information From the Congress, Memorandums of the Attorney General, Compiled by the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 85th Cong., 2d sess., at pp. 1-72 (1958).

An examination of the history of congressional demands upon the Executive for confidential documents during the past 6 years discloses that more has been said in Congress and the press during this period than in the preceding 60 years. Not since the famous debate in the first administration of President Cleveland, in 1886, has there been such extensive public discussion of this question.

At the outset, it is pertinent to point to one of the salient causes which may have been responsible for the sharp clashes of opinion expressed in the House proceedings in 1948, and in the three Senate proceedings, which are discussed infra.

A reading of these proceedings shows that some of the Members of the House and the Senate may have been led into error by a Senate committee print (80th Cong., 2d sess.), dated January 6, 1947, entitled "Memorandum on Proceedings Involving Contempt of Congress and Its Committees."<sup>2</sup> That memorandum, at the opening page, lays particular stress on the language of Revised Statutes, section 102, providing that it shall apply to "every person" who fails to appear as a witness or produce papers requested by a congressional committee. The memorandum describes section 102 as 1 of the 17 guiding principles which led the authors of the memorandum to conclude that—an officer in the executive branch does not hold the public papers and documents of his office in a private capacity and, accordingly, should be required to submit them to Congress, or one of its committees, upon proper demand (p. 20).

The earlier study traced the history of Revised Statutes, section 102 (2 U. S. C. 192) and demonstrated that it applied to private individuals only and not to the executive departments.<sup>3</sup> Reference was also made to the Senate debates on the issue in 1886 and 1909, when it was freely admitted, by Republicans and Democrats alike, that there was no law in existence at that time which could compel the head of a department to give information and papers to Congress against the President's wishes. Those admissions were made despite the fact that Revised Statutes, section 102 (which is derived from the acts of January 24, 1857, and January 24, 1862) was in existence in substantially its present form in 1886 and 1909.

A second error in the Senate memorandum is its 17th "guiding principle."<sup>4</sup> This quotes section 134 (a) of Public Law 601, 79th Congress, the Legislative Reorganization Act of 1946. That section provides that each standing committee of the Senate, including any subcommittee thereof, is authorized to require by subpea the attendance of witnesses and the production of papers. The debates in the Senate in 1948 and 1950, indicate that some of its leading Members thought that section 134 (a) applied to the executive branch in the same way that it did to private individuals.

It was demonstrated in earlier study through a study of the legislative history of section 134 (a), that that section effected no fundamental change in the right of the executive departments to withhold confidential papers. Senator McClellan, during the Senate debate on the Legislative Reorganization Act of 1946, attempted to have the measure amended to enable a joint committee of the two Houses to

<sup>2</sup>This 44-page memorandum was printed for the use of the Senate Committee on the Judiciary.

<sup>3</sup>Earlier study, pp. 77-78; hearings, supra, first footnote, at p. 2833; committee print, supra, first footnote, at pp. 56-57.

<sup>4</sup>See p. 6 of Senate committee print, dated January 6, 1947, 80th Cong., 2d sess.

subpoena any employee of the Federal Government and to compel the production of papers by Government agencies. The Senate rejected that amendment.<sup>5</sup>

Finally, the Senate memorandum of January 6, 1947, stated that "the secondary function of a congressional investigation of the executive branch is for supervisory purposes."<sup>6</sup> Again it may be noted that the Senate rejected, following debate on the Legislative Reorganization Act of 1946, the notion that the Congress or its committees had the power to exercise a "surveillance" or a "superintendence" over the executive branch. It was Senator Donnell who succeeded in having the Senate substitute the word "watchfulness" in place of the word "surveillance" in section 136 of the act, on the ground that the legislative branch had no power to administer the laws which it passed.<sup>7</sup>

In short, the Senate memorandum was in error in concluding that the Congress had supervisory powers with respect to the administration of the executive branch of the Government. It misread Revised Statutes, section 102, as well as section 134 (a) of the Legislative Reorganization Act of 1946, when it asserted that those sections applied to executive officers. Senator Saltonstall was among those who asserted, during the 1950 debate on the Senate resolution to investigate the loyalty of State Department employees, that the Senate lacked the power under section 134 (a) to compel employees of the executive branch of the Government to produce documents, against the President's wishes, because the section did not cover papers in the executive branch.

It is significant that public opinion on this issue has supported the Executive. In the administration of Presidents Washington, Jackson, Tyler, Cleveland, Theodore Roosevelt, and Truman, public opinion was on the President's side.<sup>8</sup>

The following is a review of the principal instances of refusal of information and papers to congressional committees, by the President, his intimate advisers and the heads of departments occurring between the period 1948—May 1953.

## PART I—INQUIRIES BY THE LEGISLATIVE BRANCH (1948–53)

### (1) THE CONDON INCIDENT

Public opinion was highly aroused in the spring of 1948, over the demand of a congressional committee for a letter relating to an investigation of Dr. Edward U. Condon, Director of the National Bureau of Standards. The Bureau of Standards is a unit in the Department of Commerce. The House Committee on Un-American Activities had released a report impugning the loyalty of Dr. Condon, and it called upon the Secretary of Commerce to make available to it the contents of a confidential report relative to a loyalty investigation

<sup>5</sup> Earlier study, p. 83; hearings, *supra*, first footnote, at p. 2936; committee print, *supra*, first footnote, at pp. 60–61.

<sup>6</sup> P. 18; see also p. 16.

<sup>7</sup> See earlier study, pp. 81–84, hearings, *supra*, first footnote, at pp. 2935–2937; committee print, *supra*, first footnote, at pp. 58–61.

<sup>8</sup> George Washington's administration, Wilson, George Washington (1896), 304–6; the administration of Jackson, Tyler, Cleveland and Theodore Roosevelt, Binkley, President and Congress (1947), p. 166. For the manner in which public opinion supported Presidents Tyler and Cleveland see also, as to Tyler, Fuss, *The Life of Caleb Cushing*, (1923), vol. I, 350–351, and as to Cleveland, Nevins, *Grover Cleveland—A Study of Courage* (1938), 258–261, and Barrows, William M. Evarts (1941), 445.

which had been conducted by the Federal Bureau of Investigation with regard to Dr. Condon. When the Secretary of Commerce refused to make the report available, a subpoena was served upon him by the committee.

On March 4, 1948, the Secretary of Commerce wrote the chairman of the Committee on Un-American Activities. He referred to the subpoena which directed him to appear before the committee and to bring with him a letter of May 15, 1947, from the Director of the Federal Bureau of Investigation, to the Secretary of Commerce, together with all records and files and transcript of hearings of the Loyalty Board pertaining to Dr. Condon. The letter went on to say that the Attorney General had advised the Secretary that under traditional concepts of the separation of powers and responsibilities of the executive and legislative branches, the executive branch was not, as a matter of law, required to furnish information of this kind to a congressional committee, but, on the contrary, had the duty to exercise its own judgment in determining whether the furnishing of the information would be in the public interest (H. Rept. 1753, 80th Cong., 2d sess., p. 21).

It was undoubtedly the Condon episode which culminated in a directive by President Truman, dated March 13, 1948, to officers and employees in the executive branch.<sup>9</sup> The directive provided that any subpoena or other demand for information, reports, or files dealing with the loyalty of a Federal employee was to be referred to the Office of the President and a response made that the data requested would be declined on the basis of the directive. The President stated as justification for the order "the interest of our national security and welfare," and the long-established executive policy to maintain the confidential status of FBI reports and the reports of other investigative agencies of the Government.

Accompanying the President's directive was an explanatory memorandum. This stated that the directive reflected the policy to be applied even where a subpoena or demand had been received by officers and employees in the executive branch:

Subpenas issued by courts and congressional committees were to be "respectfully declined," and were to be referred to the President, who would determine in the public interest the nature of the response to be made in the particular case. The President thus took responsibility for informing the courts or Congress, as the case might be, concerning the extent of the confidential information, if any, which could be properly furnished (H. Rept. 1595, 80th Cong., 2d sess., p. 8).

Professor Corwin published his 1948 edition of *The President: Office and Powers* at about the time that the Condon incident was featured on the front pages of the newspapers of the country.<sup>10</sup> This is what he had to say about it:

The cause celebre to date, however, in this matter is one involving the present director of the Bureau of Standards, Dr. Edward U. Condon. As a physicist of note, Dr. Condon has had an important part in the development of the atomic bomb. Recently the House Committee on Un-American Activities, in rummaging through the files of the Department of Commerce, came upon one in which Dr.

<sup>9</sup> For the text of the directive, see 13 F. R. 1259.

<sup>10</sup> See New York Times, March 16, 1948, p. 30, and article by Jay Walz entitled, "Row Over Loyalty Test Is Nearing Showdown"; N. Y. Times, March 21, 1948, sec. 4, p. ICE. See also New York Times of April 23, 1948, p. 1, article by Wm. S. White: House Bids Truman Yield Condon File; also New York Times article of April 25, 1948, p. 1, by John Morris: Condon File Again Referred to House; Withholding of the FBI Report Moves Martin To Suggest Passing Compulsion Law.

Condon was absolved by the department's loyalty board of being "one of the weakest links in our atomic security" and an associate of "alleged Soviet agents." The basis of the board's finding, it transpired, was an FBI report, and this the Un-American Activities Committee decided that it must see. On March 3, 1945, consequently, after less formal approaches, the committee adopted the extraordinary course of subpenaing Secretary Harriman to produce the file, which, by order of the President, Mr. Harriman refused to do. Logically this re-enforcement on the Secretary's part should have been followed by an order of the House citing him for "contempt," and then his trial under the Act of 1857 in the District Court on the charge of "misdemeanor," unless meantime the President had pardoned him, as he would have been entitled to do. The committee, however, being at this stage in the position of seeking an appropriation from the House for the coming year, decided to proceed more conservatively. The result was that not only did the committee get a handsome appropriation, but on April 22 the House itself adopted a resolution peremptorily ordering the administration to surrender the desired data. Meantime, on March 15, the President had issued a general order forbidding all executive departments and agencies to furnish information concerning the loyalty of their employees to any court or committee of Congress. And so matters stand as this book goes to press (Corwin, *The President: Office and Powers* (1948 ed.), pp. 142-143).

Professor Corwin went on to say that, while no one could question the constitutional right of the House to inform itself on subjects which fall within its legislative competence, "this prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself." He concluded that the President's "freeze order" of March 15, 1948, was necessary and expedient "to prevent the demoralization of the civil service" (*id.*, pp. 142-143).

Part IV of this memorandum will deal with the vigorous but unsuccessful efforts which were made in the House, through House Resolution 522 and House Joint Resolution 342, to compel the executive branch to obey congressional demands for information and papers.

#### (2) THE STEELMAN INCIDENT

In House Report No. 1595, 80th Congress, 2d session, dated March 22, 1948, reference is made (p. 3) to an investigation by a subcommittee of the House Committee on Education and Labor into the manner in which the Taft-Hartley law was being administered. The subcommittee caused subpenas to be served upon Dr. John R. Steelman, a confidential adviser to President Truman. The subpenas directed him to appear before the subcommittee on two separate occasions. The report stated that he had failed to appear on either occasion, though personally served. He—

returned the subpenas to the chairman of the subcommittee with a letter stating, among other things, that "in each instance the President directed me, in view of my duties as his assistant, not to appear before your subcommittee" (p. 3).

A minority report, which appears at pages 6 to 13 of House Report No. 1595, answers the majority concerning Dr. Steelman's failure to appear as follows:

Again, the majority report refers to certain subpenas served upon Hon. John R. Steelman, the assistant to the President. Here, again, although I was not directly concerned in the matter, enough has appeared from published reports to indicate quite plainly that the purpose of the subpoena on Mr. Steelman was to obtain from him the contents of any oral or written communications which had been made to him by the President with reference to the strike prevailing in the restaurants maintained by Government Services, Inc. I cannot believe

that any congressional committee is entitled to make that kind of investigation into the private conferences of the President with one of his principal aids. I cannot conceive that the views of a Senator or Congressman on a pending bill may be extracted by a court or by a congressional committee by subpenaing the Senator's or [sic] Congressman's administrative assistant or any other assistant, secretary, or confidential employee. Likewise, I regard it as a direct invasion of the Executive's prerogative to invade the work and time of his assistant in this manner. Dr. Steelman I think acted with the utmost propriety in referring the matter to the President. The Chief Executive very naturally and properly directed Dr. Steelman not to appear before the subcommittee (p. 12).

Dr. Steelman did not appear before the subcommittee. Unlike President Roosevelt who finally permitted Jonathan Daniel, one of his confidential assistants, to testify before a Senate committee in February 1944, President Truman did not permit Dr. Steelman to testify. See articles by Arthur Krock in the New York Times, March 1 and 10, 1944.

### (3) WILLIAM W. REMINGTON

On August 5, 1948, the Attorney General wrote Senator Homer Ferguson in response to the latter's request, on behalf of the Senate Investigations Subcommittee, that it be furnished with letters, memorandums, or other written notices which the Department of Justice might have furnished to other Government agencies concerning William W. Remington, after Elizabeth Bentley had made accusations to the Federal Bureau of Investigation against Remington in the fall of 1945. The Attorney General replied that the material requested fell within the scope of the President's directive of March 13, 1948. On the basis of that directive, the Attorney General declined to respond to the request and stated that he had referred it to the Office of the President, "for such reply as may be in the public interest under the circumstances."

Senate Report 1775, 80th Congress, 2d session, is entitled "Investigation of Federal Employees' Loyalty Program." This was an interim report of the Investigations Subcommittee of the Committee on Expenditures in the Executive Departments pursuant to Senate Resolution 189, 80th Congress. The report was dated September 4, 1948, and was submitted by Senator Ferguson, chairman of the Investigations Subcommittee.

While recognizing that the Federal Bureau of Investigation and other investigating agencies "must protect their confidential sources of information and their investigative techniques or find them valueless," nevertheless, the subcommittee also recognized the difficult position in which loyalty boards and agency heads were placed in attempting to determine the loyalty of Federal employees "without being permitted to question witnesses and determine their credibility, evaluate sources of information, and to make firsthand examination of all the facts" (p. 19).

Under conclusions and recommendations the subcommittee report stated:

9. The present policy of the executive branch of the Government of refusing to furnish information to this subcommittee concerning the handling of loyalty cases has made our task most difficult. If the subcommittee is denied the right to examine the facts in specific cases where there appears to be a break-down in the loyalty program, it cannot make a complete appraisal of the program. The subcommittee will continue its efforts to obtain that information which it

believes to be essential to the furtherance of this investigation" (S. Rept. 1775, 80th Cong., 2d sess., p. 22).

(4) THE SENATE JUDICIARY COMMITTEE AND ASSISTANT SECRETARY OF STATE PEURIFOY

A subpoena duces tecum was directed to Assistant Secretary of State Peurifoy by the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee, returnable June 1, 1949. It ordered Mr. Peurifoy to appear before the subcommittee and bring with him the files of the Department of State concerning more than 160 persons named in a list attached to the subpoena.

The Acting Secretary of State wrote Senator McCarran that, in the opinion of the Secretary of State, disclosure of materials contained in the Department files of the type in question would be contrary to the public interest and detrimental to the conduct of the foreign relations of the United States.

The letter to Senator McCarran also stated that the files contained extensive data that had been obtained by United States diplomatic and consular establishments abroad from confidential sources. The disclosure of such materials and their sources would hamper future work of the missions abroad and place many of the sources "in personal jeopardy." The Acting Secretary pointed to title 5, United States Code, section 22, and to an April 1941 opinion of Attorney General Jackson as authority for the refusal. The letter closed with the statement that the President of the United States had given specific approval to the refusal to permit disclosure.

(5) THE SENATE JUDICIARY COMMITTEE AND THE ATTORNEY GENERAL

On June 1, 1949, the Attorney General wrote Senator McCarran, as chairman of the Subcommittee on Immigration and Naturalization of the Senate Judiciary Committee in response to a subpoena dated May 20, 1949, directing the Attorney General to produce before the subcommittee on June 1, 1949, the files of the Department of Justice in the cases of 168 persons whose names appeared on a list attached to the subpoena.

The Attorney General refused to comply with the subpoena. He stated that the persons listed were, for the most part, officials or employees of the United Nations or of foreign governments; that the treatment of persons in that category involved both the conduct of our foreign relations and the maintenance of the internal security; that he had conferred with the Director of the Federal Bureau of Investigation, and had concluded "that it is not in the public interest that they may be produced." After giving the historic position of the executive department as it had been asserted by former Presidents, the Attorney General referred to the fact that it had been reported in the press that Senator McCarran intended to "release certain confidential information contained in your files relating to internal security matters." The Attorney General cautioned that the Federal Bureau of Investigation was charged with protecting the internal security

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<sup>11</sup> Senator Hoey agreed to the filing of the report but he did not concur with that portion dealing with "nondisclosure of policy of the executive branch on loyalty information." All of the other members of the subcommittee unanimously agreed to filing the report: Senators Bricker, Thye, Ives, McClellan, and O'Connor.

of the United States and he, therefore, urged upon Senator McCarran that before—

such information is made public the matter be cleared with this Department. If you have any information which you believe should be furnished to the Federal Bureau of Investigation, I should be glad to receive it for appropriate action.

The letter closed with the statement that the President had reviewed the matter and had not only concurred in the Attorney General's position but directed him to take it.

(6) STATE DEPARTMENT LOYALTY FILES (1950)

The outstanding incident of 1950 was the refusal of the President, on the advice of the Attorney General, to furnish to a Senate subcommittee, pursuant to Senate Resolution 231, certain files of the Federal Bureau of Investigation. The debate in the Senate on the resolution is reported infra in this study.

The events leading up to the President's refusal of the documents are briefly as follows:

On March 17, 1950, the Attorney General prepared a memorandum for the President which referred to the fact that the Department of State had asked the Attorney General for permission to reveal to a subcommittee of the Senate Foreign Relations Committee, established under Senate Resolution 231, 81st Congress, the contents of the investigative files concerning those persons against whom Senator McCarthy had preferred charges before the subcommittee.

The Attorney General stated that there was no question as to the President's authority to withhold those files from the subcommittee. The only question was whether, as a matter of policy, the President deemed it advisable to make the files available. After referring to the President's directive of March 13, 1948, supra, the Attorney General stated that unless there were special reasons (of which he was not aware) "existing at the present time" which compelled a different course, the confidential nature of loyalty files should be preserved. He felt that any deviation from that policy, even under the conditions outlined by the Department of State, would create an unfortunate precedent and would do more harm than good. The Attorney General mentioned nine reasons, which had been given by the Director of the Federal Bureau of Investigation against disclosure.

As an alternative to permitting the subcommittee to inspect the files, the Attorney General suggested, in the interest of making it clear to the public that there was no desire on the President's part to withhold the information, the transmission of the files to the Loyalty Review Board. He further suggested that the Board be requested by the President to review the files and report its findings with respect to each person against whom charges had been brought, in the light of the factual evidence which had been adduced before the subcommittee. The Attorney General stated that the composition of the Loyalty Review Board and its record were such as to merit the confidence of the public and the Congress in the integrity of its operation.

The memorandum closed with the recommendation that if the President decided to make the files available to the subcommittee, and in order to minimize the harm to the public interest, no file should be made available unless and until the subcommittee had advised the President in writing that Senator McCarthy had made out, to the

satisfaction of the subcommittee, a prime facie case of disloyalty with respect to the particular individual whose file would be thus made available.

On March 28, 1950, the President wrote Senator Tydings. He recited, inter alia, the objections of the Director of the Federal Bureau of Investigation to public disclosure of FBI reports, and stated that the question raised by the Senator's request for the production before the subcommittee of the investigative files was one of grave concern. The President stated that the single most important factor in an effective and just loyalty program was the preservation of all files in connection therewith in the strictest confidence. Disclosure would seriously prejudice the effectiveness of the Federal Bureau of Investigation and result in embarrassment and danger to confidential informants, and in injustice and unfairness to innocent individuals. The President closed his letter by stating that in order to give the most thorough and complete investigation of the charges which the subcommittee was considering, he had asked the Chairman of the Loyalty Review Board to have the Board arrange for a detailed review of all cases in which charges of disloyalty had been made. The President further stated that he had asked the Board, after such review, to give him a full and complete report in each case.

On the same day, the President wrote the Chairman of the Loyalty Review Board requesting him to take the steps specified in his letter to Senator Tydings. These letters were published in the New York Times on March 29, 1950, and on the same day an editorial appeared in the Times supporting the President's position.

On March 27, 1950, the Director of the Federal Bureau of Investigation and the Attorney General appeared before the Senate subcommittee. Each read a statement for the record giving their respective views. The Director's statement dealt with the practical objections, while the Attorney General's statement dealt with the historic objections, as voiced by past Presidents, to the disclosure of investigation files. The Attorney General pointed out that since the State Department loyalty files chiefly involved investigations which had been conducted by the Federal Bureau of Investigation, the "loyalty files, therefore, are for all practical purposes FBI files."<sup>12</sup>

The statement of Mr. Hoover is significant. It marshaled all of the facts and salient considerations which had made the Federal Bureau of Investigation a successful investigating agency for over 26 years. Mr. Hoover stressed the obligation of the FBI not only to protect the rights, lives, and property of our citizens, but also to protect the confidential relationship of the citizen who serves his country by providing information essential to our security. Mr. Hoover's statement closed with these words:

FBI reports set forth all details secured from a witness. If those details were disclosed, they could become subject to misinterpretation, they could be quoted out of context, or they could be used to thwart truth, distort half-truths, and misrepresent facts. The raw material, the allegations, the details of associations and compilation of information in FBI files must be considered as a whole. They are of value to an investigator in the discharge of his duty. These files were never intended to be used in any other manner, and the public interest would not be served by the disclosure of their contents.

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<sup>12</sup> P. 9 of the Attorney General's statement before the Subcommittee of the Senate Committee on Foreign Relations, March 27, 1950.

In taking this stand, I want to reiterate a principle is involved. I would take this same stand before the Attorney General, as I already have, or before any other body. The fact that I have great respect, confidence, and a desire to be of assistance to a committee of distinguished Senators, however, in no way detracts from a principle. I say this because I do not want any misinterpretation of my remarks, nor do I want it said that this and other committees of Congress do not have my respect and confidence. I would be derelict to my duty, untrue to my conscience, and unworthy of my trust to take any other position.

The press promptly responded by commanding editorially the stand which had been taken by the Director of the Federal Bureau of Investigation and by the Attorney General.

#### (7) STATE DEPARTMENT EMPLOYEE LOYALTY INVESTIGATION

##### (a) *Senate Resolution 231*

On February 22, 1950, the Senate adopted Resolution 231 reading as follows:

*Resolved*, That the Senate Committee on Foreign Relations, or any duly authorized subcommittee thereof, is authorized and directed to conduct a full and complete study and investigation as to whether persons who are disloyal to the United States are or have been employed by the Department of State. The committee shall report to the Senate at the earliest practicable date the results of its investigation, together with such recommendations as it may deem desirable, and if said recommendations are to include formal charges of disloyalty against any individual, then the committee, before making said recommendations, shall give said individual open hearings for the purpose of taking evidence or testimony on said charges. *In the conduct of this study and investigation, the committee is directed to procure, by subpea, and examine the complete loyalty and employment files and records of all the Government employees in the Department of State and such other agencies against whom charges have been heard.* [Emphasis supplied.]

As originally introduced, the resolution did not contain the last sentence. That sentence was offered as an amendment by Senator Ferguson. Its purpose was to enable the committee to procure loyalty and employment files and records of Government employees in the Department of State and other agencies.

The debate which led to the adoption of Senator Ferguson's amendment set out the views of those who favor and those who oppose measures intended to compel procurement from the executive branch of confidential files. The resolution was offered on February 21, 1950, following charges which were made by Senator McCarthy that there were Communists in the State Department (96 Congressional Record 6246-6258).

Senator Ferguson asserted on February 21, 1950:

\* \* \* that an iron curtain has been lowered around the files with regard to the loyalty to the United States Government of its employees. Certainly unless that curtain can be raised, I think there will be no real investigation into this matter (96 Congressional Record 2064).

Accordingly, he proposed that upon orders from the Senate, the resolution should recite, both in effect and in words, that the investigation should be complete, "in that all files should be delivered to the committee, so that a complete investigation could be had" (*ibid.*).

Senator McCarthy stated that, unless the Senate provided that whatever committee was given the task should have the right to subpoena records from the State Department, the investigations would be meaningless. However, he also stated that the Senate committee

should not ask the Federal Bureau of Investigation or any other investigative agency to disclose the source of their information.

Senator Brewster stated that the investigation might prove to be historic, in view of the conflict of opinion which had been developing in recent years concerning the respective rights of the executive and the legislative branches of the Government. He noted that within the last few years the issue had become more acute, as a result of the position of the Executive, "particularly the present President, in ordering executive departments not to permit evidence to be disclosed" (96 Congressional Record 2065).

On February 22, 1950, the Senate resumed debate on the resolution. The following actively participated: Senators Lucas, Morse, Knowland, Saltonstall, Ferguson, Hickenlooper, Thye, Mundt, Lehman, Wherry, Aiken, Ives, McCarthy, Brewster, Holland, McMahon, Tobey, George, and Magnuson (96 Congressional Record 2129-2150). Three additional Senators spoke, after passage of the resolution; they were: Senators Wherry, Donnell, McMahon (96 Congressional Record 6259-6261). In all, 22 Senators participated in the debate.

Senator Morse had this to say:

In regard to the files which would be made available to the Committee on Foreign Relations on this subject, of course the committee has the right to go through the files, and I think it should have that right. I have not shared the view of those who think that when it comes to the matter of protecting the security of the Nation, Government files should be protected from the study and analysis of the people's representatives in the Congress of the United States (96 Congressional Record 2134).

When Senator Brewster raised the question whether the Senate had the right to get the records from the executive department, Senator Morse replied that the Senate had the duty, in protecting the national security, to obtain any evidence that would help in determining whether there are disloyal persons within the Government (96 Congressional Record 2139).

In offering his amendment, Senator Ferguson repeated what he had said in the 1948 debate to override the President's veto of S. 1004: that the War Investigating Committee, headed at one time by then Senator Truman, had issued subpoenas to the Attorney General and that the Attorney General had delivered the papers to the committee.

Senator Wherry stated that under section 134 of the Reorganization Act, a committee had the power of subpoena. He felt, however, that a question arose whether the committee would choose to exercise the power. He therefore joined with Senator Ferguson in the amendment which would in effect instruct the members of the Senate committee to procure the files by subpoena.

Senator Saltonstall observed:

\* \* \* I do not believe we should fool ourselves by what is now proposed to be done. I agree with the principle of what the Senator from Michigan is trying to do, but I call to his attention the fact that the La Follette-McNary Act, in section 134, authorizes the committee to acquire by subpoena or otherwise correspondence, books, papers, and documents.

\* \* \* \* \* But that does not mean papers of the United States Government in the executive department. We want to get those papers. I hope they will be given to us. But we cannot pull ourselves up by our own bootstraps. When the committee issues a subpoena directed to the Department of State, that does not necessarily mean that the committee is going to obtain those papers. We should not fool ourselves (96 Congressional Record 2143).

Senator Knowland said that if the State Department was not going to comply with a subpoena of the Senate, then the Congress—

in the exercise of its responsibilities under the Constitution, may be forced to take such other steps as are necessary with the power it has under the Constitution (*ibid.*).

Senator Lucas asked Senator Ferguson whether the amendment would involve the FBI in any way. Senator Ferguson replied that if the Bureau had files on a State Department employee, the committee would subpoena those files from the FBI. Senator Lucas inquired whether everything in the file, regardless of what it was, would be spread before the committee. Senator Ferguson replied that because of that very reason he had suggested to Senator Morse that the hearings be conducted—

in private \* \* \*, and therefore no harm would be done to those records or to that agency (*id.*, 2144).

Senator Lucas observed that his experience in the Senate taught him that very little privacy resulted from executive sessions of committees. He cautioned against the danger that would come to the public from the disclosure of information which the Federal Bureau of Investigation had gathered under the pledge of maintaining the information on a confidential basis. He said that he knew how Mr. Hoover felt about the disclosure of FBI files at the criminal prosecution of Judith Coplon:<sup>13</sup>

\* \* \* As the Senator from Michigan knows, in that case there was a question of whether all the files would be opened, with the result that a number of innocent persons would be smeared, or whether the files would not be opened, with the result that certain evidence relating to the person on trial might not be developed. The former course was pursued, and the effectiveness of the Federal Bureau of Investigation and certain of its sources of information was destroyed (*ibid.*).

Senator Ferguson replied that the public would never be satisfied that the Senate had done its duty, if the Senate, through its committee, did not look into all pertinent files, including the files of the FBI, in regard to the disloyalty charges which had been brought against State Department employees (*ibid.*).

He urged the Senate to have—

a showdown once and for all as to whether in a matter so important as the one now before the Senate and before this great country, a committee of the Senate can see the records and files and ascertain whether there is disloyalty within our Government (*id.*, 2145).

Senator McCarthy suggested an "easy way" of meeting the objections of Senator Lucas. He stated that the Senate need not inquire into—

sources of information, the tipoffs, within the State Department or anywhere else (*id.*, 2146).

Senator McMahon asked Senator Ferguson this question: Suppose a person is examined in executive session. Ten confidential informants are listed in an FBI file. The file discloses damaging information about the person under examination. Suppose that the net result of the FBI report points to disloyalty on the part of the witness. The

<sup>13</sup> In that case Judge Reeves had directed certain FBI files to be read in open court by agents of the Bureau who appeared as witnesses as a condition to the Government going ahead with the prosecution of the defendant. See *Washington Post*, editorial, *Secret Evidence*, June 8, 1949.

witness is then put "on trial" before the Senate committee in a public hearing. At that point, must the committee direct the FBI to produce the confidential informants for the purpose of making a case against the witness (id., 2146-7) ?

Senator Knowland replied that the committee would consider the relative importance of each case. If, after examination of the records of the FBI, the committee concluded that it had "another Alger Hiss" case, the committees would call Mr. Hoover and say to him that in the interest of the public and because of the paramount interest to the Government of the United States, the confidential informants "should disclose themselves" (id. 2147).

Senator Saltonstall again addressed himself to the power of the Senate to subpoena the records:

I know the Senator disagrees with the point which was made that there is no authority to get records by subpoena from a department official if the President orders to the contrary.

Mr. FERGUSON. That is correct.

Mr. SALTONSTALL. What the Senator is attempting to do by this amendment, and is clearly doing by it, is to put the burden of proof on any department head who refuses to give the Senate committee the records. Is that a fair statement?

Mr. FERGUSON. It is (id., 2147).

Senator Lucas then stated that he had no objection to the amendment proposed by Senator Ferguson. He felt constrained, however, in accepting it, to point out that there had been a conflict between the legislative branch of the Government and the executive branch since the days of President Washington. Senator Lucas reminded Senator Ferguson of a "current event," to show how jealous the legislative branch was of its rights. One Christoffel had been indicted for perjury. The United States district judge had issued a subpoena to the Clerk of the House of Representatives directing him to produce the confidential records of a special committee of the House.

\* \* \* and the House of Representatives on three different occasions voted to tell the judge where to go. By their action they said they were not going to deliver up the secret minutes of the committee which they had in their possession in the House of Representatives. In other words, the House of Representatives flouts the judiciary. That is what has been going on through all the history of this great Republic. The legislative flouts the judiciary. The judiciary flouts the legislative branch. So it goes (id., 2148).

Senator Knowland suggested:

\* \* \* It seems to me that while it is true that historically there has been this difference of opinion, yet in the case of ferreting out those who may be disloyal \* \* \*, the executive branch \* \* \* and the legislative branch \* \* \* should act as members of the same team together. They should not act at arm's length (id., 2149).

Senator Lucas replied that he would do everything within his power as majority leader to cooperate with the committee, "in order to ferret this thing out" (ibid.).

The Senate agreed to the resolution as amended by Senator Ferguson, thus giving the committee the right to procure by subpoena, the files and records of all Government employees, etc. (id., 2150).

Pursuant to the foregoing resolution, a subcommittee of the Senate Foreign Relations Committee was appointed to conduct the investigation, comprised of Senator Tydings, chairman, and Senators Green, McMahon, Hickenlooper, and Lodge.

*(b) Senator Anderson's experience*

On March 4, 1950, Senator Anderson reminded the Senate of his own experience with a congressional subpoena which in 1947 had directed him as Secretary of Agriculture to produce the names of traders in connection with hearings by the Committee on Appropriations of the 80th Congress. Senator Anderson thought he was perhaps the only Member of the Senate who, by reason of his prior experience as a member of the Cabinet, had been served with a Senate subpoena to produce information. Senator Anderson reminded the Senate that the Congress had recognized the correctness of his decision refusing to comply with the subpoena, by passing supplementary legislation "releasing me from the secrecy under which I was then operating and making it possible for me to release the names" (96th Congressional Record 2796).

Recalling the Christoffel case, and the fact that the legislative branch had ignored the judicial branch and had refused to furnish on three different occasions the records of a committee of the House of Representatives, Senator Anderson argued that if the legislative branch was within its rights in refusing to comply with a subpoena of the judicial branch "it confirms the view long held by the executive branch that it may in turn refuse the subpoena of the legislative branch."

*(c) The President directs the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission not to produce loyalty files*

On March 28, 1950, the Tydings subcommittee caused subpoenas to be served upon the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission, calling upon them to produce before the subcommittee all files bearing on the loyalty of some 80 individuals whom Senator McCarthy had charged as disloyal. Those officials declined to comply with the subpoenas, upon instructions of the President (S. Rept. 2108, 81st Cong., 2d sess.). This action precipitated a short and incisive debate, in which Senators Wherry, Donnell, and McMahon participated.

Senator Wherry stated that Senate Resolution 231 was a mandate from the Senate to the subcommittee to get the files from the State Department, "regardless of what may be necessary in order to obtain them" (96 Congressional Record 6260). He added that the subcommittee of the House Appropriations Committee had seen the files relating to many of the persons involved.

He could not understand, therefore, why the Senate was now foreclosed from "seeing the very files which were seen by another committee in 1947."

Senator Donnell asked Senator McMahon concerning the legal power possessed by the subcommittee under Senate Resolution 231 for the production for examination by it of the loyalty and employment files and records of all employees in the Department of State and other agencies against whom charges had been made.

Senator McMahon replied, "I am of the opinion that the Senate cannot enforce compliance with the subpoena. \* \* \*" (96 Congressional Record 6261). The full committee had not yet come to a conclusion on the legal issue.

Senator Donnell observed that he had very great regard for the legal opinion of Senator McMahon (96 Congressional Record 6261). He wanted to know whether Senator McMahon knew of any decision by the Supreme Court holding that a subpoena issued under the direction of such a resolution, or any subpoena issued with due authority from the Senate, required the production of the records of the Department of State or any other executive department (96 Congressional Record 6261).

Senator McMahon replied:

I may say to the Senator that during the 80th Congress the only veto of the President of the United States which was sustained was the veto of a bill introduced by the junior Senator from California [Mr. Knowland] which would have compelled the President to submit, with the nomination of a member of the Atomic Energy Commission, the FBI report. That bill was passed on a voice vote, and the President's veto was sustained in the Senate. During the course of that debate a very extensive argument took place, with the full marshaling of the precedents. I refer the Senator to a reading of that debate. I think it will be most illuminating to him. At least, it was sufficient to convince more than one-third of the Senators of the correctness of the view that we do not have the power.

I am glad to advert to that, because in that debate I made the statement then that I was taking the position that the Senate, as a coordinate branch of the Government, had no legal power to compel the President of the United States to surrender documents in the files of the executive department. I said then, and I reiterate now, that I was making that statement, not because there was a Democrat in the White House, because I said that if he were a Republican, I would take exactly the same position. I merely wanted the Senate to know that my position was made clear, back in the 80th Congress, as to this constitutional question (*ibid.*).

Senator McMahon concluded the debate by referring to the Christoffel case. He pointed out that the House had finally voted to send the records to the court voluntarily, "but it specifically pointed out that it was not complying with any subpoena at all" (*ibid.*).

(d) *Summary of debate on Senate Resolution 231*

The highlights of the Senate debate in 1950, on the right of the Senate to compel production of papers from the Executive may be stated as follows:

(1) The nature of the charges concerning the loyalty of certain employees of the State Department were such that Senator Lucas, who proposed the resolution, felt that the subcommittee appointed to investigate the charges had to see the files in order to find out whether the charges were true or not. The Senate was persuaded, therefore, to give the subcommittee the power, by a specific direction in the resolution, to subpoena the files of the agencies which had investigated and reported on the loyalty of the employees charged.

(2) Despite the power which the Senate vested in the subcommittee, there remained the question of the subcommittee's course of action in light of the President's direction to ignore the subpoenas. On that issue, Senator Donnell and McMahon brought out the fact that the only Presidential veto sustained by the 80th Congress was with regard to the 1948 bill seeking to compel the Federal Bureau of Investigation to investigate and report to a Senate committee concerning Presidential appointments to the Atomic Energy Commission.

(3) The conclusion that may be drawn from the foregoing is that just as in the case of a congressional refusal to comply with a court

subpena for records of Congress, so is the Executive entitled to refuse to comply with a congressional subpoena. That, however, does not end the matter. For, as in the Christoffel case, where the House voluntarily furnished the records which the court wished to have, so in the State Department investigation the President, as will be seen, directed the production of the loyalty files which the Senate committee wished to have.

(4) Finally, and again as in the case of the House, the voluntary compliance by the President, in certain circumstances, with a demand of the Senate would appear to furnish no precedent for a future attempt by the legislative branch to compel the executive branch to produce information.

*(e) Efforts by the chairman of the Senate subcommittee to secure President's consent to exhibition of the files*

The New York Times of March 14, 1950, contained an article by James Reston entitled "Loyalty File Request Puts Hard Decision Up to Truman, by Agreeing He Imperils Data Gathering—Faces 'Cover Up' Charge if He Refuses."

Mr. Reston points up the dilemma of the executive branch. He cited the precedents of Jefferson's refusal to make Cabinet documents available at the trial of Aaron Burr. Mr. Reston noted that while President Truman might take consolation from that precedent, as well as from President Washington's Farewell Address warning each of the departments of the Government against encroachment upon the other departments, the precedents did not solve the problem. There appeared to be only one foolproof way to remove all doubt in the public mind about Senator McCarthy's charges, and that was for the President to open the loyalty files of all those named "in the McCarthy indictment."

Mr. Reston's article concluded with the statement that as a result of the administration's desire not to be charged by the public "with failure to answer Mr. McCarthy's charges," the President had agreed, with reluctance, to permit the investigating committee to "go to the White House and look at the files, but not to take the files away." The Congressional Record shows the efforts of the committee chairman to obtain access to the files.

On April 24, 1950, Senator Morse stated that one of the healthiest things that could happen, because of the doubts and fears which had arisen in connection with the entire investigation, would be for the members of the Tydings committee to sit down with the Federal Bureau of Investigation "and just read the files" (96 Congressional Record, 5577).

Senator Tydings, for the first time, publicly disclosed the following. In desiring to get to the heart of the whole matter, he had seen the President in an attempt to get the files. The President was impressed by his plea for making the files available to the committee. Senator Tydings opined that he did not believe there was any man who wanted to make the files available more than the President "because he told me that in so many words." Senator Tydings discussed the procedures of how this could be done without interfering with the efficiency and fine work of the Federal Bureau of Investigation.

There was one great obstacle. It was this: The Federal Bureau of Investigation, over the years, had gathered information from informers. The FBI—

had told informers [that the information] would never be disclosed to anybody in Christendom except to themselves.

Mr. Tydings then related his next experience, in the office of Attorney General McGrath in the presence of Mr. Hoover. Mr. Hoover stated that he had personally prepared the summary in one particular case, and he gave each member of the subcommittee a copy of the summary which they then and there read. The subcommittee was not given the original files. Mr. Hoover said, in effect, "that it had never been the policy of the FBI to turn files over to anyone, but he would give us a summary in that particular case."

Senator Tydings then asked Mr. Hoover if he would not come before the committee and give an explanation, so that the committee would realize that everything had been done to obtain the files, first by request, second by subpoena, and third by appealing to Mr. Hoover himself. Mr. Hoover came before the committee and testified concerning his position with respect to the files. He said, in substance, that if the files were turned over to the committee—

It would, in part, destroy the investigative system of the FBI. He said he was opposed to it. He is an emphatic man. He gave us his reason for it, which was carried in the press of the country (96 Congressional Record 557S).

Senator Tydings then went back to see the President for the third time. The President said that he did not want to go back on the advice of Mr. Hoover.

Senator Tydings stated that he was afraid that Mr. Hoover would resign. Mr. Hoover, according to Senator Tydings, was—

so intense, and I think with a great deal of reason, in his thought that this would do the Government harm, that a policy he had been following for about 15 years \* \* \* was going to be torn down (96 Congressional Record 557S).

The foregoing is a brief account as related by Senator Tydings, of the President's wish to make the files available and of his reluctant conclusion not to do so because of his desire to respect the judgment of Mr. Hoover and to preserve the integrity of the Federal Bureau of Investigation.

Senator Tydings concluded by stating that he had come to realize, following a study of the subject, that the documents could not be obtained by subpoena. He therefore felt that persuasion was better than a club, and that was the reason that he had visited the President, on three occasions, "to get by diplomacy and courtesy what I felt sure I would not secure by force and insult." At that point in the debate, Senators Morse, Brewster, Ferguson, and Wherry made various suggestions designed to explore the possibility of working out an arrangement whereby the files would be shown (96 Congressional Record 5580-5581).

Senator Wherry stated that there was no precedent to justify the withholding of the files that was applicable to the present situation. He stated that in the interest of the public welfare and in the interest of the security and defense of the United States, he would like to see the President turn the files over to the committee.

Senator Morse spoke at some length on this issue on April 24, 1950, following Senator Tydings' remarks. Senator Morse referred to various provisions of the Constitution, including section 8, article I and the fourth amendment. He felt that under those provisions the Congress was entitled to know the facts before passing proposed legisla-

tion. He stated that in order for the people to be secure in their reputations and in their persons, from any accusation which cannot be substantiated by facts, it was essential that information in the possession of the Government which would clear the innocent and convict the guilty should be made available to the Senate committee. Senator Morse seriously questioned whether in a society of freemen, under our Constitution, any agency of the Government should be given the right to secure information in the name of the Government "with the guaranty to the informer that that information can never be made available under any circumstances to the elected representatives of the American people" (96 Congressional Record 5596). He felt, therefore, that under appropriate safeguards and restrictions, the FBI files should be made available to the Tydings' committee. Senator Morse suggested that the American people needed assurance, either from their elected representatives in the Congress, or at least by the President of the United States, "that they had looked at the alleged evidence \* \* \*." He concluded his remarks with a call upon the committee, the Federal Bureau of Investigation, and the Chief Executive, to get together quickly for a frank discussion of whatever may be within the files (96 Congressional Record 5597).

(f) *Senate Report 2108, 81st Congress, 2d session, July 20, 1950*

A report of the Committee on Foreign Relations, pursuant to Senate Resolution 231, entitled "State Department Employee Loyalty Investigation," is a document of 313 pages. It was signed by Senator Tydings, chairman, and Senators Green and McMahon. The hearings of the committee commenced on March 8, 1950, and ended July 7, 1950. Thirty-five witnesses testified. In addition, a special subcommittee, consisting of Senators Green and Lodge, interrogated 34 witnesses between May 8, and June 9, 1950, both in the United States and abroad. Reference will be made only to those sections of the report dealing with the attempt of the committee to see loyalty files.

The first witness to appear before the committee was Senator McCarthy. The report stated that he had no evidence to submit to the subcommittee concerning the—

so-called 81 disloyal individuals discussed by him in his February 20 speech on the Senate floor. Quite to the contrary, he insisted that the evidence to support the charges concerning these individuals would be found in the loyalty files maintained in the executive branch of the Government (S. Rept. 2108, supra, p. 5).

Following the refusal of President Truman, under his directive of March 14, 1948, to permit the Secretary of State, the Attorney General, and the Chairman of the Civil Service Commission to comply with subpoenas duces tecum which had been served upon them, the report stated that the attacks which had previously been aimed at the committee were shifted to the President. It was alleged—

that the loyalty files contained something sinister and embarrassing, otherwise they would surely be released (p. 6).

The report then disclosed what it called "a startling and amazing situation." In 1947, the House Committee on Appropriations had conducted an investigation of the Department of State; this was prior to the issuance of the President's directive of March 14, 1948. House investigators were given at that time free access to State Department

files, including the loyalty files, and had prepared memorandums containing data extracted from the loyalty files relative to 108 individuals. These memorandums had been made available to the House Appropriations Committee.

When it became evident that the cases with respect to the individuals named by Senator McCarthy were identical with those whose loyalty files had previously been reviewed by four committees of the 80th Congress, the President, on May 4, 1950, agreed to make the loyalty files available for review by the subcommittee—

on the theory that to do so would not establish a precedent for subsequent exceptions in violation of his March 13, 1948, directive. Accordingly, arrangements were made for the review by members of the subcommittee at the White House of the files, concerning the individuals charged by Senator McCarthy in his February 20, 1950, speech on the Senate floor (p. 9).

In its findings and conclusions, the report stated that a review of the files revealed "that they do not contain proof to support the charges; \* \* \*" (p. 154).

An addendum to the report stated that allegations of stripping of Department of State files had been made, but were not proved. A letter dated July 17, 1950, from the Attorney General stated that the FBI had examined the loyalty files made available for review by the subcommittee "and that all loyalty data developed by the FBI and supplied by the State Department appear in the files" (p. 172).

#### (g) *Senate Report 2108, individual views of Senator Lodge*

Senator Lodge, as a member of the Committee on Foreign Relations, filed an individual statement of his views. He stated that the question which the subcommittee had been directed to investigate was whether persons who are disloyal to the United States are or have been employed by the Department of State. After mentioning that there were 13,000 Americans, and (excluding Germany) 3,000 aliens employed by the State Department, he noted that it was a gigantic undertaking—

beyond the practical capabilities of any congressional committee—and the undersigned speaks as one who, on the Senate floor, supported the holding of this congressional investigation (p. 1).

He noted that "the subcommittee's investigation included perusal of the summary of the FBI file on Mr. Lattimore as of March 24, 1950." However, the subcommittee was denied access to the so-called raw FBI file "for reasons which are to me understandable, but it did see a summary" (p. 17).

Senator Lodge devoted several pages to a discussion of "The 81 Loyalty Files." He emphasized that great stress had been laid on the question of access to the files by members of the subcommittee:

It was apparently believed that if only the subcommittee could get its hands on the files the question of past and present disloyalty in the State Department would be speedily cleared up.

But after having read a representative cross section of the 81 loyalty files, the conviction was reached that the files alone did not furnish a basis for reaching firm conclusions of any kind and that to attempt to conclude with respect to an individual case, on the basis of the file alone, would be a most half-baked and superficial procedure, unfair alike to the Government and to the employee in question.

The reasons given by Senator Lodge for the inconclusiveness of the files were as follows: The files which he had read were in an unfinished

state. No one in the executive branch was required to make a final decision based on a file alone, for there was always a chance to question and to interview the subject of the file by those in the executive branch who had to make a decision concerning an individual. He concluded therefore that "Senators cannot be expected to do what is demanded of no one else" (p. 19).<sup>14</sup>

Finally, Senator Lodge noted that the subcommittee had been allowed to see the files only under stringent limitations. The subcommittee was forbidden to discuss any individual case by name outside of the room in the White House where it saw the files. The subcommittee was also forbidden from taking any notes from the White House. Finally, they were categorically denied the help of technical career people, such as FBI men, to help in the interpretation of many technical questions raised by the files (p. 20).

#### (h) Comment

A brief comment may be made on the above report. Both agreed that the result of opening up the loyalty files to the committee were inclusive. A study of the raw files did not prove the charges. A reading of unverified information, containing both good and bad about a person, will not prove that such a person is either loyal or disloyal.

The first point listed by Senator Lodge in his report, under the title "Observations," was (p. 20) :

The files are in such an unfinished state that they reveal nothing definite or conclusive about most of the persons whose names occur in them.

Essentially the same conclusion about the files is contained, as has been seen, in the findings and conclusions of the majority report of the committee (see Findings and Conclusions, par. 9, p. 154).

Thus, it can be seen that after the committee had seen the files the plea of the Director of the FBI against opening the "raw" files to the committee was amply sustained.

#### (i) Conclusions

1. Following extended debate, participated in by 22 Senators, the Senate passed a resolution giving the Senate Committee on Foreign Relations authority to subpoena loyalty and employment files of the State Department.

2. It was clear to many Members who favored passage of the resolution, such as Senators Donnell and Saltonstall, that the Senate was probably lacking in power to compel the production of confidential documents from the executive departments.

3. Following the refusal of two Cabinet members and the head of the Civil Service Commission to obey subpoenas which had been served on them by the subcommittee, special efforts were made by the chairman of the subcommittee to have the files shown to the subcommittee members because there appeared to be no practical alternative to disprove the charges in the public mind except by showing the files.

4. The President was persuaded by the chairman of the subcommittee to show the files to the members of the subcommittee.

<sup>14</sup>The above points to the dangers inherent in the investigation of "raw" investigation files and reports. The reasons which were given by President Jefferson for refusing to the House of Representatives unverified letters, reports, and charges concerning Colonel Burr, in 1807, were substantially the same reasons which compelled Senator Lodge to state in his report that it was a waste of time for a committee of Congress to go through unverified investigation files in a "raw" state.

5. The Director of the Federal Bureau of Investigation cautioned against showing the files because he feared the damage which might be done to the Bureau's future effectiveness.

6. The President, while siding with the Director of the Federal Bureau of Investigation, reluctantly agreed to show the files at the White House to the members of the subcommittee subject to certain restrictions.

7. The subcommittee saw the 81 loyalty files in question and came away with the conclusion, which was shared by the three members of the majority, Senators Tydings, McMahon, and Green, and also by Senator Lodge, that the "raw" files did not prove the charges, for the reason that they were in such an unfinished state that they revealed nothing definite or conclusive about the loyalty of the accused.

8. As to Senator Lodge's statement that the subcommittee was allowed to see the 81 loyalty files under stringent limitations and without the technical help of the FBI, it is noteworthy that on March 10, 1950, the Director of the Federal Bureau of Investigation wrote the Attorney General that he had heard that the subcommittee might request assignment of FBI agents to the committee. The Director strongly urged against assignment of FBI personnel to the Senate committee for the purpose indicated. He gave as his reason the consistent policy of the Department, over a long period of years, not to accede to requests of congressional committees for assignment of special agents of the Bureau to conduct investigations for such committees. Another reason was that if agents of the Bureau should be assigned to such a committee, it would be an indirect way for the committee to get access to the files of the Federal Bureau of Investigation, which, up to that time had consistently been denied to all congressional committees.

#### (8) THE BRADLEY INCIDENT (1951)

The outstanding incident in 1951 was General Bradley's refusal to tell the combined Senate Foreign Relations and Armed Services Committees what he had heard discussed at the April 6, 1951, meeting between the President and a few of his advisers, at which the decision was reached to recall General MacArthur from the Far Eastern Command.

The New York Times, in its issue of May 16, 1951, contained a special article by William S. White, stating that Gen. Omar Bradley had refused in the face of oblique suggestions that a citation for contempt of Congress might conceivably be the consequence, to repeat what had been said privately by the President and his other advisers on April 6, 1951. Mr. White's article further indicated that in declining to quote what had been said by the President and others in the White House conference, General Bradley told his questioner, Senator Alexander Wiley:

At that time I was in a position of confidential adviser to the President. I do not feel at liberty to publicize what any of us said at that time.

General Bradley further stated that any such breach of the President's confidence "would destroy the effectiveness of the Joint Chiefs of Staff and we might just as well quit." Senator Wiley persisted in his questioning. He wished to know not only the outcome of the

White House conference, which had already been described by Secretary of Defense Marshall, but the "personal equation," the "personal animosities," and the "personal feelings" that might have been exhibited there.

General Bradley remained adamant. He said only that he would be willing to put the question of a full disclosure up to the President himself.

Senator Connally suggested that it would not be appropriate for General Bradley to speak to the President and then come back to tell the committee "what the President decided about a purely procedural matter before this committee" (New York Times, May 16, 1951, p. 28).

Senator Connally further stated that he did not think it would be appropriate for General Bradley to go to the President and ask whether or not he should be released "from his obligation not to reveal what was said."

Senator Morse gave his opinion, that following a personal conference on a confidential basis between the President and his military adviser, a court would necessarily rule that the President is protected from legislative interference. The alternative would be that all a Senate committee would have to do would be to station itself in front of the White House and subpoena the persons who went in and out of the White House and ask them questions as to what conversations took place between them and the President.

Senator McMahon brought out that when General MacArthur had testified about his Wake Island conversations with the President, and had been asked about them, he very promptly replied, "That was a private conversation with the President." Senators Hickenlooper, Knowland, Lodge, and Smith suggested that General Bradley's original offer to confer with the President was a sound one.

In a second article by Mr. White on the hearings, he stated that the issue was not whether General Bradley, Chairman of the Joint Chiefs of Staff, would tell the conclusions reached and the actions taken as a result of the April 6 White House conference that led to General MacArthur's dismissal, but whether General Bradley would quote what had been said by the conferees. General Bradley had offered to answer any question that referred to the outcome of the conference as distinguished from its details (New York Times, May 17, 1951, pp. 1, 3). General Bradley again refused to tell exactly what the President had said to him or what had been said to, or about, the other conferees, Secretary of State Acheson, Secretary of Defense, and Mr. Harriman, the President's special adviser in foreign matters. The President's press secretary told reporters that the President was against disclosure of the conversations:

The President made the decision \* \* \* to relieve General MacArthur \* \* \* conversations that led up to it are his business, Mr. Short said (*id.*, p. 3).

General Bradley declined a suggestion that he go today to the President and ask to be relieved of what he considered to be his obligation to keep certain matters in confidence:

In my opinion—

he told the committees—

I should not be placed in the position of going to the President of the United States and asking for a breakdown in this confidential relationship. \* \* \* It had been his own unaided decision—

He said—

to refuse the sort of testimony demanded (*ibid.*).

Mr. White's article goes on to say that the Republicans showed themselves determined not to let General Bradley's refusal become a precedent that might bar them from inquiring into other private conversations, including those between the President and his advisers when the decision was made to intervene in Korea.

On May 18, 1951, the Times reported the following (p. 1) :

General of the Army Omar M. Bradley's refusal to divulge his private conversations with President Truman on the recall of General of the Army Douglas MacArthur was upheld today by his Senate interrogators.

By a vote of 18 to 8, the combined Senate Armed Forces and Foreign Relations Committees sustained in a ruling by their Democratic chairman, Senator Richard B. Russell, of Georgia, that General Bradley had been right in declining to breach a confidential relationship with the President.

(a) *Senator Russell's ruling*

On May 17, 1951, Senator Russell, the chairman of the combined Senate Foreign Relations and Armed Services Committees, made a significant ruling, accompanied by a significant opinion. He ruled that the President and those who advise and consult with him may keep to themselves the confidences which they exchange from time to time, which will add weight to his decision. Eighteen Senators from both parties voted to sustain his ruling, and eight Senators from both parties voted to reverse it (New York Times, May 18, 1951, p. 10).

Senator Russell's opinion thus stated the question before the committee:

Does this committee, or any other agency of the legislative branch of the Government, have the power to compel a witness who is a confidential adviser to the President of the United States to relate the details of private conferences occurring with the President and other confidential advisers in cases where the witness claims immunity?

Senator Russell first described section 211 (a) of the National Security Act of 1947, which provided for the establishment, within the Department of Defense, of the Joint Chiefs of Staff. He quoted that part of the statute which provided that the Joint Chiefs of Staff should perform certain duties under the authority and direction of the President. Included in those duties was the preparation of plans relating to the defense of the country.

The chairman ruled that the statute created a confidential relationship of the highest order between the witness, General Bradley, as Chairman of the Joint Chiefs of Staff, and the President.

The chairman next asserted that the future freedom and security of the country depended as much upon the maintenance of the delicate checks and balances designed by the Founding Fathers, as upon the Armed Forces. Among the most valuable of the checks and balances devised were those which prevented one branch of the Government "from imposing its will upon the other." That was one of the fundamental issues before the combined committees.

The chairman then stated that he had studied the precedents involved and had ascertained that there was not a single judicial exception to the rule—

that protects the confidential communications between the President and the advisers which assist him in the dispatch of his duties.

The chairman recognized that the judicial branch had frequently challenged the power of the President to withhold information or documents on matters properly within the jurisdiction of the courts, but he knew of no occasion where the legislative or the judicial branches of the Government had insisted upon the right to hear the words spoken between the President and his advisers in a highly confidential conference.

The chairman then touched upon the fact that the legislative branch of the Government, itself, had no powers of enforcement against any witness, and that it was compelled to rely upon the courts for vindication. For that reason, the chairman thought that the rulings of the courts, as the only enforcement agency available to the legislative branch, were controlling.

He noted that, from the administration of President Washington down to the time of his opinion, there was no decision in any court of which he had knowledge holding that a witness who was an agent of the President, or a witness who occupied a confidential relationship toward the President, or a witness who was head of an executive department could be compelled by the courts to produce documentary material relating to the exercise of an executive function, without the President's consent. Therefore, a private conversation between the President and an adviser seemed to him to be entitled to an even higher degree of privilege.

The chairman here referred to specific instances of congressional requests for papers and reports extending over a period of more than 150 years, and to the conflicts between the executive and the legislative branches of the Government from time to time, as well as to the decisions of the President in line with his ruling. The chairman made it clear that the issue did not involve the particular person occupying the office of President:

It involves the rights and powers which inhere to the office of the Chief Executive \* \* \*

The chairman closed his opinion by pointing out that General Bradley had offered to relate certain facts and conclusions, but had stood upon his privileges in declining to go into the details of conversations. As to the latter, he was fully within his rights.

The following Senators spoke against Senator Russell's ruling: Senators Wiley, Brewster, Knowland, Hickenlooper, and Fulbright. The latter stated that the only way to minimize the political overtones of the inquiry "is for the courts to decide the matter."

The following Senators spoke in support of the chairman's ruling: Senators George, Connally, H. Alexander Smith, and Morse (New York Times, May 18, 1951, p. 10).

Arthur Krock, the Washington correspondent of the New York Times, who has written much in this field, wrote an article appearing in the May 18, 1951, issue of the New York Times entitled "An 'Issue' That Was Never in Doubt." He made four points which he believed were plain: (1) Although General Bradley was an executive employee and, like other executive appointees, held his position because the Senate had confirmed his nomination, and, although Congress created the agencies in which executive employees served, Congress could not obtain access to the confidential transactions with the President unless the President agreed. (2) The foregoing was a practical fact, even though it caused conflict between the legislative

and executive branches, and Congress might thereby be denied information which it thought essential to carry out its functions under the Constitution. (3) It was useless to resort to the courts because the President could not be judicially compelled to follow any course of action which he held to be an "invasion of his authority, as he interprets it." While the Constitution provided for congressional challenges of executive interpretations of power, it did not directly provide the means, except impeachment, of making such challenges effective, nor did the Constitution give the judiciary the means to enforce its rulings against a President who resisted a congressional demand for information and papers which he believed ought to be kept confidential in the public interest. (4) The only means of resolving the issue, short of impeachment, was the right of the people to vote a President out of office if they felt that he had wrongfully resisted a congressional demand for information and papers.

The New York Times in an editorial on May 19, 1951, entitled "The Presidential Privacy," quoted with approval Senator Russell's opinion that the courts, assuming that they took jurisdiction of the issue, would very likely rule that General Bradley was fully within his rights in refusing to relate what had taken place in conversation with the President. The New York Times editorial observed that the issue was not personal and not political; that it was more important than General Bradley or President Truman:

The principle will still stand after Mr. Truman has stopped being President, after General Bradley has stopped being a general, and after Senator Wiley and his colleagues have stopped being Senators. The issue is simply the ancient one of the separation of powers and of the dignity and independence provided for each division of our Government under the Constitution.

(b) *Comparison of the Bradley incident with the Daniels' incident in 1944 and the Steelman incident in 1948*

The New York Times of February 29, 1944, reported that Jonathan Daniels, an administrative assistant to President Roosevelt, had refused, even under threat of possible imprisonment, to discuss before a congressional committee his purported attempts to force the resignation of the Rural Electrification Administrator. Mr. Daniels informed the Senate Agricultural Subcommittee investigating the REA that his position with the President was of a confidential nature and that he was obliged "in the public interest" to decline answering their questions.

Arthur Krock wrote an article on March 1, 1944, entitled, "Daniels and the Law." It says, "President's 'selfless six' shall 'emit no public statements.'" Mr. Krock pointed out that Congress had created the offices of confidential assistants to the President and had invested those offices with a confidential character and appropriated general funds to maintain them. Mr. Krock then points out the incongruity of Congress threatening legal reprisals when an incumbent of that type of office pleads its confidential nature, a status which Congress had approved.

It is of interest to note that the subcommittee of the Senate had unanimously cited Mr. Daniels for contempt because of his refusal to answer committee questions. Mr. Daniels, as reported by the New York Times of March 5, 1944, thereafter wrote Senator E. O. Smith, chairman of the full committee, that he still believed that a legis-

lative committee could not require either the President or an administrative assistant to the President to testify as to their conversations. However, Mr. Daniels had conferred with the President, and the latter did not think that in that particular matter—

my testimony would adversely affect the public interest. Therefore, I advise you that I am entirely willing to appear before the committee and answer the questions propounded to me \* \* \* with reference to this particular matter.

Mr. Daniels closed his letter with a statement that the President had advised him that there was no statement which the President had made which he would not be willing for Mr. Daniels to repeat to the committee.

In a second article in the New York Times, March 10, 1944, Mr. Krock commented that "neither principal had receded from the basic position each took in the beginning."

In 1948, President Truman took a position different from President Roosevelt, on the occasions when John R. Steelman was subpoenaed to appear before a subcommittee of the Committee on Education and Labor of the House of Representatives. Dr. Steelman failed to appear on either occasion. He returned the subpoenas to the chairman of the subcommittee with a letter stating, among other things, that in each instance the President had directed him, in view of his duties as his assistant, not to appear before the subcommittee. (See H. Rept. 1595, 80th Cong., 2d sess., p. 3.)

#### (c) *Observations and conclusions*

The hearings relating to General MacArthur and American policy in the Far East evoked a great deal of publicity. The New York Times, among other papers, reported the hearings almost verbatim, particularly the rulings of Senator Russell. The Senators who urged full disclosure of the conversations between the President and his advisers, prior to the recall of General MacArthur, gave full expression to their views. The usual arguments were made that the executive departments are creatures of the Congress and that Congress can create a Government department and eliminate a Government department. It was further urged by Senator Knowland that what the Secretary of State had said at the meeting relating to the conduct of the war in Korea, and to the continued prosecution of the war, was pertinent to the committee's inquiry.

Finally, Senator Knowland urged that on the basic question of peace or war, the problem was not one of the constitutional prerogatives of the President "but of the constitutional prerogatives of the Congress of the United States." Senator Knowland stated that he did not want a precedent established that in the future—

this country can be taken into a war in camera, so to speak, where neither the Congress nor the public will know the facts in regard to those who placed our country into war, nor in regard to the basic decisions which are made at such a conference (97 Congressional Record 5544).

In opposition to the views of the minority, Senator Russell gave it as his view that the President could not effectively function under the Constitution without taking his advisers into his intimate confidence. In this way he could trust them with all kinds of information and could expect them to speak to him without any reservations. Such a vital function would be destroyed, and Congress and its committees would become partners in Executive decisions if the President and his

advisers knew that at some time in the future the President's conversations with his advisers would become public information. There was no objection on the part of a majority of the committee to voicing the conclusions which took place at a meeting of the kind which the President had called, in order to decide whether a particular general should continue or should be relieved of his command.

In general, it may be said that the Bradley incident reinforces the long line of precedents under which the President and his advisers may keep to themselves the views which they exchange from time to time concerning top-level decisions, if the President decides such is necessary in the public interest.

(9) JOHN CARTER VINCENT (1952)

On January 31, 1952, William S. White wrote a special article for the New York Times (pp. 1, 5) stating that President Truman had declared that congressional delving into State Department papers could endanger the safety of the United States by making its Foreign Service officers afraid to report objectively what was going on in the world.

The President made it plain—

in the sharpest language he has used on the subject, that such reports would be withheld from Congress so long as he remained in control.

And any other course, the President has asserted, "would create a serious danger of intimidation and demoralization of Foreign Service personnel."

On these grounds President Truman refused to give 32 classes of secret data to the Senate Internal Security Subcommittee. This was disclosed on January 30, when John Carter Vincent appeared before that body to deny under oath charges against his loyalty.

Mr. White's article points out that Mr. Vincent himself, who had been under attack for 2 years in Congress, had joined the subcommittee in requesting the papers.

The President's letter to the Secretary of State of January 24, 1952, was made public by the subcommittee. The President stated—

that he could not permit the disclosure even if an accused person thought it would be helpful toward establishing his innocence.

The President's emphasis upon the overriding importance to the national security of having Foreign Service officers present their reports freely and objectively was thus stated in his letter to the Secretary:

\* \* \* "it is of overriding importance to our national security, internal as well as external, that officers of the Foreign Service are free to present their reports and express their views as to problems of international relations without fear or favor, completely and honestly as they see them and not in anticipation of the possible reaction of some future investigating committee which might hold opposing views" (New York Times, Jan. 31, 1952, p. 1).

Mr. White's article further reported that Mr. Vincent had served in the State Department's Far Eastern Division and was then a diplomatic agent at Tangier. He had served altogether 27 years in the State Department; that since the fall of 1951 he had been seeking a hearing before the subcommittee.

The Internal Security Subcommittee, which was then headed by Senator McCarran, had for months been making an inquiry into the Institute of Pacific Relations, as part of an investigation to determine whether "subversive influences" shaped United States policy in the Far East.

(10) INQUIRY INTO ADMINISTRATION OF THE DEPARTMENT OF JUSTICE  
(1952)*(a) Denial of consent for the conduct of an inquiry exceeding subcommittee's authorization*

On March 4, 1952, Assistant Attorney General Duggan wrote Congressman Chelf, chairman, special subcommittee of the House Judiciary Committee, in response to the latter's letter of February 22, 1952, requesting information from the Attorney General "for the purpose of conducting an inquiry into the administration of the Department of Justice." The subcommittee wished to obtain a list of all cases which had been referred to the Department of Justice or United States Attorneys for either criminal or civil action, by any governmental department or agency "within the last 6 years." The information sought was as follows:

(a) Whenever action had been declined by the Department of Justice, the Department was to list such cases including the reasons for refusal to act;

(b) Where the Department of Justice had returned a case to a Government department or agency for further information, a statement was sought from the Department of Justice showing the subsequent action taken by the Department of Justice;

(c) Where cases had been referred to the Department of Justice and had been pending for more than a year, other than the two categories mentioned, a list of such cases was to be furnished to the subcommittee.

Assistant Attorney General Duggan pointed out that the enabling resolution of the House, constituting the subcommittee, limited the scope of its inquiry—

"to specific allegations and complaints based upon credible evidence as determined by the subcommittee and not based on mere suspicion and rumor to the end that the investigation shall be nonpolitical and nondiscursive in nature."

Mr. Duggan went on to say that the request was outside the scope of the resolution, since it did not seek information based upon specific complaints "supported by credible evidence." It was further pointed out that the request would impose an intolerable burden upon the Department, since it would require an examination of approximately 500,000 cases, thus effectively paralyzing "the Department's efforts to discharge its current duties." Finally, Mr. Duggan stated that the Department was prepared to honor all reasonable requests with respect to definite cases, where specific allegations were supported by credible evidence unless the public interest required otherwise.

On March 5, 1952, Mr. Duggan advised 54 executive agencies, boards, and commissions that he had advised Mr. Chelf of his inability to comply with the latter's request of February 22, 1952. Mr. Duggan gave this reason for refusing the information sought in his letter to the agencies, boards and commissions:

Compliance with this request had been declined on the ground that it constitutes what Mr. Justice Holmes has characterized as a "fishing expedition for the chance that something discreditable might turn up."

*(b) Request of chief counsel, House Judiciary Subcommittee, for inspection of Department of Justice files*

On April 22, 1952, Acting Attorney General Perlman wrote the chief counsel of the House Subcommittee To Investigate the Depart-

ment of Justice, in response to five letters sent by the latter in April 1952 for inspection of Department of Justice files.

Mr. Perlman referred to a memorandum dated April 12, 1952, which the President had sent to the heads of all executive departments and agencies.<sup>15</sup> In order to avoid misunderstanding as to future procedure and the production of additional files which the subcommittee might later seek. Mr. Perlman restated the conclusions at which he and the subcommittee had arrived:

1. Requests involving open cases, either civil or criminal, would not be honored. However, a status report on the cases, orally or in writing, would be furnished.

2. As to closed cases, where the Department had completed prosecution or consideration without suit, the files would be made available.

3. As to all files made available, Mr. Perlman emphasized that the Department would—

withhold from inspection all FBI reports and confidential information, reports of any other investigative agencies, and any other documents containing the names of informers or other data, the disclosure of which would be detrimental to the public interest.

4. Concerning material which was to be withheld from the subcommittee, Mr. Perlman made it clear that if it subsequently appeared that the subcommittee had to have answers to specific questions, the problem would be further considered.

5. As to personnel files, they "are never disclosed," except in cases where Senate committees were considering nominations made by the President. While the rule as to the nonavailability of personnel files was in one instance broken and six files had been furnished to the subcommittee, Mr. Perlman stated that in the future he would adhere to the rule.

6. Except where the public interest might be adversely affected, Mr. Perlman indicated that the subcommittee would be furnished with complete information providing it indicated, without disclosing the source, "merely what the substance of the complaint is."

7. Finally, Mr. Perlman noted the understanding between the Department and the members of the subcommittee that the members thereof and its staff would not disclose, except in public hearings, the names or identification "of persons or cases involved in any files that are being requested." Such disclosure, especially where the Department had decided against prosecution or against the filing of a civil suit, might unfairly damage persons who had been charged with any offense or with failing to meet an obligation. In the event that a member of the subcommittee or its staff violated the foregoing understanding, "I shall feel compelled to terminate our planned cooperation."

Mr. Perlman closed the letter by expressing the thought that there was no disposition to conceal or withhold from the subcommittee "anything that the subcommittee has a right to know, or should know in the course of its investigation of the Department of Justice."

<sup>15</sup>The memorandum referred to the House resolution of January 29, 1952, which had established the House Judiciary Subcommittee to conduct an inquiry of specific allegations and complaints with reference to the administration of the Department of Justice and the Office of the Attorney General. The President stated that it was his desire that the executive branch of the Government should cooperate with the committee, to the end that a fair and thorough investigation might be made.

## (11) REQUEST OF SENATE APPROPRIATIONS SUBCOMMITTEE FOR STATE DEPARTMENT LOYALTY CASE FILES (1952)

On April 3, 1952, President Truman instructed the Secretary of State to withhold from a Senate Appropriations Subcommittee files which it had requested with respect to loyalty and security investigations of employees. The President indicated that he wanted the policy to apply to all executive agencies.<sup>16</sup>

The President wrote the Secretary, in response to the latter's inquiry of March 28, 1952, for guidance regarding the response which the Department of State should make to the requests of members of the Senate Appropriations Subcommittee for detailed information on administration of the Department's loyalty-security program.

The information which the subcommittee requested fell into four categories:

1. Complete files in specified loyalty-security cases; detailed information concerning the substance of investigative reports in additional cases; and the procedural steps taken in the handling of individual cases.

2. The names of all present and former State Department employees who had been investigated under the Federal employees loyalty program or the Department's security program, together with the status or disposition of the cases.

3. The names of all employees who had resigned or retired from the Department while under investigation, or during processing of their loyalty-security cases.

4. The names of State Department officers who sat as members of the Loyalty Security Board on a particular case, and the way each officer had voted.

The President advised the Secretary of State that if all executive agencies were to receive similar demands and were to release information of the nature requested, the result would be to wreck the Federal employees' loyalty program and the reputations of hundreds of loyal Government employees. The entire civil service would be demoralized. The President said:

The information sought by the Appropriations Subcommittee cannot be considered solely from the standpoint of that subcommittee or from the standpoint of the Department of State. If one Department is required or permitted to supply information of the character requested, all other agencies of the Government would have to respond to similar demands from other sources. If all executive agencies were to release information of this nature, I am convinced that the overall result would be to wreck the Federal employees loyalty program. In the process, the reputations of hundreds of loyal Government employees would be pilloried and the entire civil service would be severely demoralized. Accordingly, I must advise you not to furnish the information requested by the subcommittee, for to do so would be clearly contrary to the public interest.

The President's letter further pointed out that the public interest would not be served by releasing the names of individuals determined to be security risks: "Persons discharged as security risks are in a distinctly different category from persons discharged on loyalty grounds." The former were usually employees who could not be trusted with classified information because they had "questionable

<sup>16</sup> See article in the New York Times, April 4, 1952, p. 10, col. 4, entitled "Loyalty Case Files Barred by Truman—President Instructs Acheson Not to Give Inquiry Data to a McCarran Group."

associates, talk too much, are careless, or may be unduly susceptible to outside influences." The President pointed to Public Law 733, 81st Congress, providing for the suspension of employees in the interest of national security. The statute recognized that a security risk "may be a useful and suitable employee in nonsensitive Government positions not involving access to classified information."

The President also thought that a person suspended as a security risk might be an entirely loyal citizen who could render excellent service in private employment. The President did not wish unnecessarily to besmirch their reputations by making their names public.

Concerning the request to furnish the names and the voting record of members of an agency loyalty board, the President said:

If this type of information were divulged freely, the danger of intimidation would be great, and the objectivity, fairness, and impartiality of board members would be seriously prejudiced.

Finally, the President's letter laid down the test furnishing in the future information concerning individual loyalty or security cases in response to inquiries from outside the executive branch. Upon proper inquiry, in writing, replies were to be confined in two categories of information: (1) If an employee had been separated on loyalty grounds, advice to that effect might be given, and (2) if an employee had been separated as a security risk, replies to requests for information about the individual could state "only that he was separated for reasons relating to suitability for employment in the particular agency." No information was to be supplied as to any specific intermediate steps or proceedings or actions taken in processing individual cases "under loyalty or security programs."

The President's letter closed with the statement that there were to be no exceptions to this policy, unless the agency head determined that it would be clearly in the public interest to make specific information available—

as in instances where the employee involved properly asks that such action be taken for his own protection. In all such cases, the requested information shall be released only after obtaining the approval of my office.

The President sent a copy of the letter to the Loyalty Review Board, "implying that the same principles would apply to that agency."<sup>17</sup>

#### (12) RÉSUMÉ

Part I of the earlier study listed the refusals of information by 17 Presidents, beginning with the administration of George Washington. It was said that in the great conflicts which had arisen between the Congress and the Presidents, in the administrations of Washington, Jackson, Tyler, Cleveland, and Theodore Roosevelt, the Executive always prevailed.<sup>18</sup>

History will probably record that the Truman administration must be included among those which bitterly clashed with the Congress on this issue, and which adhered to the traditional view that the President's discretion must govern the surrender of executive papers.

<sup>17</sup> New York Times, April 4, 1952.

<sup>18</sup> See earlier study, pp. 44a, b, c, and d; Hearings, supra, first footnote, at pp. 2914-2915; Committee Print, supra, first footnote, at pp. 30-32.

The major incidents in the Truman administration may be listed as follows:

Date	Type of document refused
Mar. 4, 1948-----	FBI letter report on Dr. Condon, Director of National Bureau of Standards, refused by Secretary of Commerce.
Mar. 15, 1948-----	President issued directive forbidding all executive departments and agencies to furnish information or reports concerning loyalty of their employees to any court or committee of Congress, unless President approves.
Mar. 1948-----	Dr. John R. Steelman, confidential adviser to the President, refused to appear before Committee on Education and Labor of the House, following the service of two subpoenas upon him. President directed him not to appear.
Aug. 5, 1948-----	Attorney General wrote Senator Ferguson, chairman of Senate Investigations Subcommittee, that he would not furnish letters, memoranda, and other notices which the Justice Department had furnished to other Government agencies concerning W. W. Remington.
June 1949-----	Acting Secretary of State Webb refused to furnish Senate Judiciary Committee, State Department files of 160 persons named in a list attached to subpoena.
June 1, 1949-----	Attorney General refused to furnish to chairman of Senate Subcommittee on Immigration files of Justice Department relating to 168 persons whose names appeared on a list attached to subpoena.
Feb. 22, 1950-----	Senate Resolution 231 directing Senate subcommittee to procure State Department loyalty files is met with President Truman's refusal, following vigorous opposition of J. Edgar Hoover.
Mar. 27, 1950-----	Attorney General and Director of FBI appeared before Senate subcommittee. Mr. Hoover's historic statement of reasons for refusing to furnish raw FBI files approved by the Attorney General.
Apr. 4, 1950-----	Attorney General refused to furnish to Senator McCarran loyalty file and records pertaining to a member of the Displaced Persons Commission.
May 4, 1950-----	President agreed to show S1 loyalty files of State Department employees—arrangements for review by Senate subcommittee of the files at the White House under stringent limitations. Senator Lodge and the majority of the Subcommittee reported that the files were inconclusive as to loyalty.
May 16, 1951-----	General Bradley refused to divulge conversations between President and his advisers to combined Senate Foreign Relations and Armed Services Committees. By vote 18 to 8 the committees sustained ruling of Chairman, Senator Richard Russell, that Bradley was right in declining to breach a confidential relationship with the President.
Jan. 31, 1952-----	President Truman directs Secretary of State to refuse to Senate Internal Security Subcommittee the reports and views of foreign service officers.
Mar. 4, 1952-----	Assistant Attorney General, Executive Adjudications Division, refused to House Judiciary Subcommittee list of all cases referred to the Department of Justice, for civil or criminal action, "within the last 6 years."
Apr. 22, 1952-----	Acting Attorney General Perlman lays down procedure for complying with requests for inspection of Department of Justice files by Committee on Judiciary: Requests on open cases will not be honored. Status report will be furnished. As to closed cases, files will be made available. All FBI reports and confidential information will not be made available. As to personnel files, they are never disclosed.

<i>Date</i>	<i>Type of document refused</i>
Apr. 3, 1952-----	President Truman instructs Secretary of State to withhold from Senate Appropriations Subcommittee files on loyalty and security investigations of employees—policy to apply to all executive agencies. The names of individuals determined to be security risks will not be divulged. The voting record of members of an agency loyalty board will not be divulged.

## PART II—COURT DECISIONS

In part II of the earlier study it was stated that it had been established by the courts that information and papers which heads of executive departments considered must be kept confidential in the public interest did not have to be disclosed either to the courts or to congressional committees.<sup>19</sup>

The following is a brief study of the principal court decisions during the period 1948–1953, and of the later decision in *Jencks v. United States*, *infra*, which concerns this privilege.

### (1) THE SECOND CIRCUIT CASES

There is a line of decisions, developed in recent years, in the Second Circuit Court of Appeals. Thus, in a prosecution of a crime involving the very matters contained in the confidential documents, the rule in the Second Circuit is that the trial court should look at the documents and, if it believes them material, it must order disclosure. The principle applied is that when the Government chooses to bring to light the transaction to which the communications relate, it may no longer suppress the communications themselves.

The foregoing principle has been applied in the following cases in the Second Circuit Court of Appeals: *United States v. Andolschek* (142 F. (2d) 503); *United States v. Krulewich* (145 F. (2d) 76); *United States v. Ebeling* (146 F. (2d) 254); *United States v. Beekman* (155 F. (2d) 580); *United States v. Grayson* (166 F. (2d) 863).

Attorney General McGrath stated in a report to the Judicial Conference of the United States:<sup>20</sup>

It is the view of the Department of Justice that the problem of protecting against the disclosure of national security documents or information during the course of criminal trial is not as serious or all-embracing as it is thought to be in many quarters. The Court of Appeals for the Second Circuit has held, and I believe properly, that if a defendant desires the introduction in evidence of a confidential Government document, he must first prove to the satisfaction of the court that the paper is directly material to his defense. Thereafter, the court will permit the introduction of only such part of the document as it deems material, and will exclude and seal all immaterial and irrelevant portions (*United States v. Andolschek*, 142 F. 2d 503; *United States v. Krulewich*, 145 F. 2d 76; *United States v. Cohen*, 145 F. 2d 82; *United States v. Ebeling*, 146 F. 2d 254). It is also the view of the Department of Justice that, consistently with the constitutional requirements of a public trial, even those parts of confidential documents which the judge has ruled material and admissible may be protected from disclosure to the public by limiting their examination and inspection to the judge, the attorneys and the jury. On appeal, the material may be kept under seal and viewed only by the members of the appellate courts. It seems to me that this procedure would adequately take care of a very sub-

<sup>19</sup> See earlier study at pp. 3–4 and 45–65; hearings, *supra*, 1st footnote, at pp. 2893 and 2915–2926, respectively; committee print, *supra*, 1st footnote, at pp. 2–3 and 32–46, respectively.

<sup>20</sup> Delivered on September 22, 1949.

stantial segment of the problem. Perhaps specific legislation is necessary in order to insure uniformity of practices in all the Federal courts.

The Attorney General then pointed to the difficulties which arise in those cases where the information could not be disclosed even to the court:

The real difficulty lies in certain cases where the information is such that it cannot be disclosed even to the court, the attorneys or the jury. In many cases of this type the Department has been compelled to refrain from prosecuting, and known violators of the law remain at large. Very careful consideration, it seems to me, should be given to this aspect of the problem. Within the executive branch of the Government, the problem is important not only to the Department of Justice, but also to the Department of State, the Department of Defense, and the Atomic Energy Commission, among others. \* \* \*

During the first trial of Alger Hiss<sup>21</sup> the court followed the second circuit rule, while District Judge Albert L. Reeves, who tried the Coplon case, infra, ignored the rule by ordering the production of "data slips"—extracts from FBI reports—which had been found in the possession of the defendant Coplon.

#### (2) THE JUDITH COPLON TRIALS

The wide publicity which attended the trials of Judith Coplon in New York and in the District of Columbia merits an account of the facts and holdings in the cases.

On June 7, 1949, in the District of Columbia case<sup>22</sup> Judge Albert L. Reeves, who presided, ruled that 12 "data slips," which were extracts from FBI reports, and which had been found in Miss Coplon's purse at the time of her arrest by FBI agents in New York, had to be disclosed by the Government. Judge Reeves further held that the jury was entitled to have the entire report from which the excerpts had been made. The only choice the Attorney General had was to disclose the "data slips" and the reports, or to move for dismissal of the indictment. Attorney General Clark made the decision to go on with the prosecution.

Judge Reeves' opinion<sup>23</sup> that he had examined the "data slips," and—

They do not suggest danger to our national security or our national defense. The most that could be said of their harmful effect, if any, if they be exposed, is that they would produce irritations and perhaps render nugatory efforts of our Intelligence Service on particular inquiries and maybe endanger individual lives.

The judge went on to say that while the "data slips" would be cumulative as evidence, nevertheless, he felt that—

to withhold them from the jury would be prejudicial to the defendant, as the very action of exclusion itself would carry with it the imputation or suggestion that such data slips were so important that there was danger to the country in exposure. This would lay a heavy weight or burden upon the defendant. It could indicate that her offense was so serious that part of her acts could not be exposed, as being too dangerous to the country. This is a burden she should not have to bear. On the contrary, if as significant as indicated by the Government, then the jury ought to know and be made acquainted with the seriousness of her offense. The jury is entitled to know all of the facts with respect to the contents of the purse at the time of its seizure.

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<sup>21</sup> Criminal No. 128-401 (D. C., S. D. N. Y. (1949)).

<sup>22</sup> In the District Court of the United States for the District of Columbia (Criminal No. 381-49).

<sup>23</sup> The opinion is not officially reported.

The court then turned to the reports from which the data slips had been made up. It held that it must be presumed—

that these reports cover the same subject matter as the excerpt or data, and the jury would be entitled to know what the entire disclosure or report was from which the excerpt was made.

It went on to state:

The Government had indicated that the reports involved "other and unrelated subject matters." The court held that if that were true—this would be unfortunate. Intelligence reports ought to be complete within themselves, and two unrelated subjects ought not to be bound together, and, if so, then, in an important matter such as this, the court ought not to be called upon even to attempt to separate the subjects so as to exclude one part from the jury.

In a criminal proceeding, the trend of the courts, according to Judge Reeves, was to bring to the jury—

a full and complete statement of all the material and relevant facts so that the jury may know and understand exactly what was done.

On July 1, 1949, after the trial had been concluded, Attorney General Clark issued a press release, including the following:

There has been considerable comment about the contents of certain FBI reports which the court permitted to be introduced in evidence. It has been stated that portions of these reports were hearsay and gossip. In this connection, I wish to reiterate that I have adhered to the traditional policy of the Department to the fullest possible extent in keeping FBI reports on a confidential basis. The Department of Justice has always held that investigative reports of the FBI are confidential. The Coplon case presented an unusual situation inasmuch as contents of FBI reports in the Department of Justice files were taken by an employee of the Department. The Department took every possible step to prevent their disclosure. It took the position, and I think properly so, that a question of national security was involved. Failing to gain the court's acceptance of that position, it took the position that the contents of reports were completely irrelevant to any possible defense raised by the defendant on trial. Failing in that, the Department proposed that all names be deleted from reports unless it could be shown that the names were relevant to any theory of defense. And, failing in that, it proposed that these documents be made available only to the defendant, defense counsel, the jury, and the court. The Department could not have taken any other or further position. And, having begun the prosecution of the case, the ruling of the court over the objection of the Department placed the Department in the position of either moving dismissal of the indictment voted by the grand jury or presenting the documents as ordered by the court.

The Attorney General made it clear that, before reaching the decision to disclose the reports, he had discussed the problem with the Director of the Federal Bureau of Investigation. Both had realized the importance of maintaining the long-established policy of protecting the secrecy of FBI reports. Mr. Hoover had agreed that certain reports could be introduced if it became necessary, "while he believed it not advisable to produce others."<sup>24</sup>

The Washington Post, in an editorial dated June 8, 1949, entitled "Secret Evidence," stated that Judge Reeves had taken "what seems to us the only tenable position regarding Government evidence in the Judith Coplon espionage trial." The editorial emphasized that the Attorney General had a great responsibility; while there might be room for a difference of opinion concerning Judge Reeves' view that disclosure of the FBI papers did not suggest "danger to our national security or our national defense," the basic decision was not one for

<sup>24</sup> It will be recalled that, during the Senate debate on S. 231, Senator Lucas had alluded to Mr. Hoover's feelings about Judge Reeves' decision requiring the disclosure of FBI files.

Judge Reeves. It belonged to Attorney General Clark, who had a choice to withdraw the case, if he had thought that disclosure of the secret information would injure the national interest. "Apparently, he determined that the compromise of the FBI was less important than the effort to obtain Miss Coplon's conviction."

Two editorials on the Coplon trial which appeared on June 14 and June 15, 1949, in the Washington Post and the Washington Evening Star concisely analyzed the difficult situation with which the Attorney General was confronted: Whether he should move to dismiss the prosecution or whether he should disclose the information in the FBI files.<sup>25</sup> The FBI was opposed to any such disclosure.<sup>26</sup>

The second circuit, in *United States v. Coplon*,<sup>27</sup> in a unanimous opinion written by Chief Judge L. Hand, reversed the New York conviction of Judith Coplon. She had been tried and convicted of an attempt to deliver defense information to a confederate, Gubitchev. She had also been convicted of conspiracy to defraud the United States by making copies of documents relating to the national defense, by transmitting them to Gubitchev, and by removing and concealing them.

One of the principal points raised on the appeal was whether Miss Coplon was cut short in her effort to prove that telephone talks to which she was a party had been intercepted before the time when the conceded taps began to be made.

All the "taps" had been made at the personal direction of the Attorney General. They were divided into three groups: those of Judith Coplon's home telephone in Washington, those of her office telephone in Washington, and those of her Brooklyn telephone. She had been allowed to examine the recordings by disk or "log" of the "taps" taken at her home, and many of those taken at her office. Nothing in any of these could have constituted "leads" to any of the evidence introduced by the Government at the trial. The trial judge had examined the original disks and logs of the conversations at her office, and, in his opinion, these also could not have been "leads." He refused to let her see these, "because he agreed with the prosecution that their disclosure might be dangerous to 'national security'" (185 F. 2d at 636-637).

The court of appeals stated that the only relevant inquiry was this: Was it error for the judge not to have allowed the defense to see those records which he read in camera and on which he in part based his finding that the "taps" had not "led" to any evidence introduced at the trial?

The court held that it could not see how the trial judge's action could be sustained, stating as follows (pp. 637-638) :

\* \* \* If the prosecution had not had the records and had been obliged to rely upon the testimony of the "monitors" it would certainly have been constitutionally necessary under the Sixth Amendment to examine them openly and in court; even their depositions could not have been used, to say nothing of examining them *in camera*. Unless therefore there is some excuse which will toll this constitutional privilege it appears irrefragably demonstrable that the suppressed records were incompetent.

There certainly is no such excuse. We agree that there may be evidence—"state secrets"—to divulge which will imperil "national security"; and which

<sup>25</sup> The editorials are reproduced in 95. Congressional Record A3757-3758.

<sup>26</sup> See article by Constantine Brown, entitled "This Changing World—FBI Urged Coplon Case Be Dropped in Order to Guard Confidential Data," which is reproduced in 95 Congressional Record A3775. See also Hoover, The Confidential Nature of FBI Reports, 8 Syracuse L. Rev. 2, at 10 (1956).

<sup>27</sup> 185 F. 2d 629 (C. A. 2d, 1950), certiorari denied, 342 U. S. 920.

the Government cannot, and should not, be required to divulge. *Salus rei publicae supra lex.* The immunity from disclosure of the names or statements of informers is an instance of the same doctrine. This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence, and, *toto coelo*, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses. \* \* \*

In sum, the court concluded that the defendant was entitled to be confronted in open court with the data from which the trial court had determined that the evidence introduced at the trial was not based upon the taps of the telephones. The court found no excuse which would do away with the constitutional privilege of confrontation provided by the sixth amendment.

At the same time, the court agreed that there might be evidence of a character which would imperil the national security and which the Government could not and should not be required to divulge. The court cited the Executive privilege which had been successfully urged and upheld in *Boske v. Comingore* (177 U. S. 459) and similar cases (p. 638, footnote 23).

The court also cited *United States v. Andolschek*, *supra*, where it had held that when the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him by introducing relevant but privileged documents. There was this difference between the two cases. In the Coplon case, the privileged documents were in fact introduced in evidence—

and, since we have not seen them and do not mean to look at them, we will assume that they justified the judge's finding that they did not "lead" to any evidence introduced (p. 638).

However, the refusal of the trial court to allow the defendant Coplon to see the documents was a denial of her constitutional right, and there was no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf.

The court recognized that while it might seem to be a "slimy grievance" to deny the defendant the opportunity to argue that the records did "lead" to her conviction or that she suffered in the slightest from the judge's refusal, nevertheless it could not dispense with constitutional privileges, for—

Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens (p. 638).

Finally, there remained the question whether the defense was unduly prevented from learning whether the information which originally "led" to "tapping" Miss Coplon's telephones, to tracking her movements, and finally to detecting the crime, was itself the result of "wiretapping." The prosecution conceded that the FBI had been set upon the trail by a "confidential informant." The trial judge had refused to allow the defense to press the examination of an FBI agent as to the identity of the informant. The court held that the testimony suggested that the confidential informant might have been a wiretapper and if he was, the defendant was entitled to learn whether the informant had been a party to any of the intercepted talks.

The court stated that it did not have to hold, and it did not then decide, whether in trying to prove that defendant's telephone conversations had been unlawfully intercepted, and accused may never be blocked on the fact "that his questions call for answers whose disclosure will be a danger to 'national security'" (p. 640). Since the judge had ended all chance of asserting the privilege by deciding the issue on evidence contained in the files, the conviction had to be reversed.

The court, however, did not dismiss the indictment, because the guilt of the defendant Coplon was plain, and if put to another trial the prosecution might decide to divulge the contents of the taps.

### (3) THE SOLICITOR GENERAL'S POSITION

Beginning with *United States v. Cotton Valley Operators' Committee* (No. 490, October term 1949), in briefs filed in the Supreme Court, the Solicitor General has urged the position of privilege with respect to materials deemed confidential by the Executive, pointing out that the privilege has been consistently and successfully asserted as against congressional demands, and has been honored by the Federal courts since the earliest days of the Republic.

The Cotton Valley case involved a complaint which charged the defendants with engaging in a combination and conspiracy in restraint of trade. The Government sought to cancel certain agreements entered into by the defendants and to enjoin them from engaging in other activities pursuant to the conspiracy. Agents of the Federal Bureau of Investigation had made an investigation which they set out in the form of reports to the Attorney General. The defendants sought to have the Attorney General produce the reports under rule 34 of the Federal Rules of Civil Procedure.

The Government opposed the motion on the ground that the documents were privileged and that it was exclusively for the Attorney General to determine that question. The district court held that the Government must submit the documents to the court so that it could decide which, if any, were privileged and which should be furnished to the defendants. When the Government refused to comply with this directive, the court dismissed the complaint. On direct appeal to the Supreme Court, the Court divided evenly thus affirming the decision below.

The position taken in the Government brief in the Cotton Valley case may be briefly summarized as follows:<sup>28</sup> Relying upon Chief Justice Marshall's views at the trial of Aaron Burr, the Government asserted that Revised Statute 161, vested in the Attorney General the power and duty to determine the privileged character of the documents which the district court ordered produced. Citing *Boske v. Comingore* (177 U. S. 467), and other cases, the Government contended that section 161 reflected the constitutional independence of the Executive. It detailed the history of that section, tracing it to the journals of the Continental Congress.<sup>29</sup> The brief also referred to Chief Justice Marshall's opinion in *Marbury v. Madison* and to

<sup>28</sup> See pp. 29-62, No. 490, October term 1949, in the Supreme Court of the United States, *United States v. Cotton Valley Operators' Committee*. The decision below is reported in 9 F. R. D. 719, affirmed, per curiam by an equally divided court, 339 U. S. 940.

<sup>29</sup> Infra, pp. 93-95.

Attorney General Jackson's opinion of 1941, when the latter asserted that the judiciary had upheld and respected the discretion which was at times asserted against disclosure by the executive branch.

Finally, the Solicitor General urged that the Government, by bringing an action to enforce the antitrust laws, did not waive or abandon its historic privilege. Conceding that if the Government, in a criminal case, possessed information so vital to the defense that its production might exculpate the defendant, due process would require that the information be divulged, the Solicitor General, stated that here the reason for compelling disclosure would be that the defendant's need outweighed the public interest in maintaining the confidential nature of Government papers. Disclosure in such a case would be directed, not because the Government had waived the privilege, but because due process required "a tempering of the absolution of the privilege".<sup>30</sup>

The next case to reach the United States Supreme Court was *United States ex rel. Touhy v. Ragen*.<sup>31</sup> Roger Touhy instituted a habeas corpus proceeding in the United States District Court against the warden of the Illinois State Penitentiary, alleging that he was being restrained in the State prison in violation of the due process clause of the Federal Constitution. He sought, and obtained, an order from the district court directing the production of FBI records which, he claimed, would prove his innocence of the crime for which he had been convicted.

The Supreme Court viewed the question as one concerning the right of a subordinate official of the Department of Justice to refuse to obey a subpoena duces tecum ordering the production of papers in his possession. The refusal was based upon a regulation which the Attorney General had issued under a statute.<sup>32</sup> The Court found it unnecessary to consider the ultimate reach of the authority of the Attorney General to refuse to produce pursuant to court order, Government papers in his possession. This was for the reason that the case did not raise the question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court—only his subordinate was.

The Court expressly held that order 3229, upon which the refusal was based, was valid and that the subordinate had properly refused to produce the papers. The Court also adverted to the large variety of information contained in the files of any government department and the possibility of harm from unrestricted disclosure in court. It recognized not only the usefulness but the necessity of centralizing the determination as to whether subpoenas duces tecum would be obeyed or challenged. It was, therefore, proper for the Attorney General to prescribe appropriate regulations, not inconsistent with law, for the custody, use, and preservation of the records of the Department of Justice. The Court expressly reaffirmed its decision in *Boske v. Comingore* (177 U. S. 459), and stated that there was no material distinction between that case and the present case.

Mr. Justice Frankfurter, in a concurring opinion, said that while he agreed with the decision of the majority, he did not agree that the Boske opinion had decided that the Government could shut off an

<sup>30</sup> P. 62 of Government brief.

<sup>31</sup> 340 U. S. 462 (1951).

<sup>32</sup> 5 U. S. C. 22, formerly Rev. Stat. 161.

appropriate judicial demand for such papers; that the decision and opinion in the Touhy case would not afford a basis for a future suggestion that the Attorney General could forbid every subordinate who was capable of being served by process from producing relevant documents—

and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process.<sup>22</sup>

Justice Frankfurter went on to say that although the Attorney General could be reached by process, what disclosures he might be compelled to make was another matter. The Attorney General would still be entitled to raise "those issues of privilege from testimonial compulsion which the Court rightly holds are not before us now."<sup>23</sup> Justices Black and Douglas thought that the district court decision, adjudging Mr. McSwain in contempt should be affirmed. Justice Clark took no part in the decision.

Acting Attorney General Perlman then asked the President to approve the course which he proposed to take if a subpoena were served upon him personally. In a letter dated April 21, 1952, Mr. Perlman advised the President that on April 9, 1952, counsel for Touhy had caused another subpoena duces tecum to be served on FBI Agent O'Connor, head of the FBI office in Chicago, requiring the production of certain FBI records. On April 17, 1952, Mr. Perlman directed O'Connor to appear in court but to decline production of the records specified in the subpoena. Counsel for Touhy indicated that he would attempt to take Mr. Perlman's deposition in Washington and to obtain the desired records, if O'Connor's refusal to produce the records were again upheld by the courts. Such an attempt would thus raise the question which the Supreme Court had previously left open.

The Acting Attorney General noted that there was a broader principle involved than the effect of disclosure of the particular FBI files. The Government was not a party to the Touhy litigation. In general, the Department's position had been that investigative reports and similar documents in the FBI files were confidential and that their disclosure would seriously prejudice law enforcement and the usefulness of the FBI. Refusal to disclose such information was consistent with the views which had been previously expressed by other Attorneys General. And as illustrative of the President's views on this question, Mr. Perlman cited the President's memorandum of March 13, 1948, to officers and employees in the executive branch. As a basis for his future course of procedure, Mr. Perlman cited Revised Statute 161, Order No. 3229 of Attorney General Murphy, and Attorney General Jackson's opinion of 1941.

Accordingly, Mr. Perlman proposed to decline production of the investigative reports desired by Touhy, or to testify with respect to their contents, if he were served with process, on the basis of the statutory discretion vested in him, and the impropriety of the production or disclosure of these reports at the request or order of any other branch of the Government. Furthermore, this would be the Department's position in every case of similar data requests by the courts, where the Government was not a party, unless the Attorney General deter-

<sup>22</sup> 340 U. S. at 472.

<sup>23</sup> *Id.*, p. 473.

mined that in a particular case the benefits which would follow disclosure would outweigh the evils.

On April 24, 1952, President Truman wrote Mr. Perlman as follows:

I approve of the course you have been following and propose to follow in the Roger Touhy matter.

The Department of Justice, of course, has an obligation to afford suitable protection for the confidential character of FBI investigative reports. As you indicate in your letter, there may be particular cases in which the disclosure of these reports will be in the public interest. But this is a determination of the kind which must necessarily be made by the executive branch. Accordingly, you should not make these reports or their contents available for use in litigation to which the United States is not a party, when, in your judgment, it would not be in the public interest to do so.

On May 5, 1952, the Acting Attorney General advised the Director of the Federal Bureau of Investigation, in discussing the effect of the President's letter of April 24, 1952, that existing Department orders adequately protected the confidential nature of FBI files, and that nothing in the President's letter had the effect of changing those orders in any degree.

It is only when the effort to retain the files in confidence is challenged that it may become important, in my judgment, to determine the precise scope of the President's letter for the purpose of obtaining Presidential substantiation of the Department's position in a particular case.

On November 19, 1952, the United States Court of Appeals reversed the district court for a second time in the Touhy case (200 F. 2d 195). This reversed an order of the district court holding an FBI agent in contempt of court for refusing to produce FBI records. The court stated:

The record discloses that this appeal presents but one question, and that is the same one that was before this court in *United States, ex rel. Touhy v. Ragen*, 180 F. 2d 321, and before the Supreme Court in *United States, ex rel. Touhy v. Ragen*, 340 U. S. 462, wherein it was held that Order No. 3229 entered by the Attorney General, acting under 5 U. S. C., sec. 22, is valid and that a subordinate official of the Department of Justice, in pursuance of that order, acted properly, in refusing to produce certain documentary evidence and was, therefore, improperly found guilty of contempt of court. Here a similar subordinate declined to produce such evidence, acting under the same order and directions from the Attorney General so to do. Inasmuch as the essential question has been authoritatively decided by the Supreme Court, its decision is controlling.

The alleged differences in the present case are of no legal significance.

(4) UNITED STATES DISTRICT JUDGE CAMPBELL REFUSES A MASTER IN CHANCERY'S RECOMMENDATION FOR A CONTEMPT CITATION OF TWO INTERNAL REVENUE AGENTS

*Dormeyer Corporation v. Sunbeam Corporation*<sup>35</sup> is an excellent illustration of the assertion of the right of the Government to be secure in the confidence which informers repose in it. In that case Joseph F. Elward, master in chancery, made a report to the court recommending that two agents of the Bureau of Internal Revenue be cited to contempt for refusing to answer certain questions propounded to them by attorneys for Sunbeam Corp., during the course of an examination before the master. The United States attorney, who represented the Internal Revenue agents, argued that under the provisions of section 1.3, title 31,

<sup>35</sup> District Court of United States, N. D. Ill., No. 47 C. 355 (1951).

Code of Federal Regulations, promulgated by the Secretary of the Treasury, the agents should not be required to answer the questions. The Commissioner of Internal Revenue had refused permission for the agents to answer the questions propounded, citing as authority for his action title 5, United States Code, section 22.

The court in its opinion<sup>36</sup> stated that it would decline to follow the master's recommendation for the reason that information obtained during the course of an official investigation, whether such information was in the form of documents or conversations, even with an informer, "must necessarily be classified as confidential." The information fell in the category of privileged communications. The court concluded its opinion as follows:

The right of the Government to be secure in this confidence with its informers is even more basic than the right of the individual to enjoy the privilege of a privileged communication. The right of the Government in this regard arises out of the very existence of a sovereign body and inures to the continuance of its sovereignty. The prime right and duty of any sovereign is to maintain its existence, and any compromise of confidential information possessed by it is a sure and certain challenge to its present and future life. I cannot, therefore, as a judicial officer of the United States Government, require that Government to surrender up its vitality by means of divulging the information sought here in this private litigation (pp. 6-7).

**(5) BOWMAN DAIRY COMPANY v. UNITED STATES (341 U. S. 214)**

Before a criminal prosecution under the Sherman Act had been set for trial, the defendant moved for discovery under rule 16 and for a subpoena duces tecum under rule 17 (c) of the Federal Rules of Criminal Procedure. Rule 16 provides the only way whereby the defendant so as to inform himself in a criminal proceeding can obtain discovery and inspection of materials obtained from or belonging to the defendant or obtained from others by seizure or process. As an agreed order was entered with respect to inspection of the materials covered under rule 16, its applicability was not before the court.

The motion under rule 17 (c), to which the Government objected, called for it to produce for inspection the following documents which it had obtained by means other than seizure or process.

(1) All documents obtained by Government counsel (with certain exceptions not here relevant), in any manner other than by seizure or process, in the course of the investigation by the grand jury which resulted in the return of the indictment.

(2) Documents which had been solicited by or volunteered to the Government counsel in the course of the Government's preparation for trial, if such documents had been presented to the grand jury or were to be offered as evidence on the trial of the defendants.

(3) All documents and papers relevant to the allegations, whether or not they might constitute evidence with respect to the defendants' guilt or innocence.

The Government attorney admitted that he had the documents in his possession, but respectfully declined to produce them under the instructions of the Attorney General and an Assistant Attorney General. The Government's principal objection was that the subpoena did not

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<sup>36</sup> See Transcript of Proceedings had at a hearing before Hon. William J. Campbell at the courthouse on Friday, October 19, 1951, prepared by Paul A. Rube, official reporter.

protect the voluntary informants who had provided it with material which it wished to exclude from the defendants' view.

The Supreme Court stated that it was not intended to give a limited right of discovery under rule 16, and then by rule 17 to give a right of discovery in the broadest terms. It added that rule 17 (c) was not intended to provide an additional means of discovery, but to expedite the trial by providing before trial for the inspection of subpoenaed material. If the trial court should conclude that the materials sought under the subpoena ought to be produced as evidentiary material—

it should, of course, be solicitous to protect against disclosures of the identity of informants, and the methods, manner and circumstances of the Government's acquisition of the materials (341 U. S. at 221).

The Court also disallowed the request for the production of the third class of documents on the ground that it was "a catch-all provision, not intended to produce evidentiary materials, but is merely a fishing expedition to see what may turn up." As the Court found that the subpoena was in part good and bad, it reversed the contempt citation.<sup>37</sup>

(6) UNITED STATES *v.* REYNOLDS (345 U. S. 1)

This case involved a suit under the Federal Tort Claims Act by the widows of three civilian observers who were aboard a military aircraft which crashed while testing secret electronic equipment. The plaintiffs sought to compel production of the military accident investigation report and of the statements of the three surviving crew members during the investigation. The Secretary of the Air Force filed a formal claim that the data was privileged under Air Force Regulations issued under Revised Statutes 161, title 5, United States Code, section 22, and that the aircraft and its personnel were engaged in a highly secret mission. There was an offer to produce the crew members for examination except as to classified matters.

The district court ruled that the Government's claim of privilege had been waived by the Federal Tort Claims Act which provided that the United States shall be liable in tort claims "in the same manner and to the same extent as a private individual under like circumstances."<sup>38</sup>

The district court ordered the Government to produce the documents in order that the court might decide whether they contained privileged matter. When the Government declined, the court held that under rule 37 of the Rules of Civil Procedure the facts on the issue of negligence must be taken as established in plaintiff's favor.

The Acting Solicitor General, in the brief for the United States, presented to the Supreme Court the following questions, *inter alia*:

1. Whether the Secretary's determination that the documents are privileged can and should, consistently with Revised Statutes 161 and the doctrine of separation of powers, be reviewed by the judiciary.

2. Whether Congress in the Tort Claims Act could or intended to force the executive to submit to judicial review of his determination or suffer judgment to be entered against the United States (pp. 2-3).

<sup>37</sup> As to the limited effect of the holding respecting rule 17 (c) in the *Bouman Dairy* case, see *United States v. Peltz*, 18 F. R. D. 394, and the cases collected therein. See also *United States v. Gogel*, 19 F. R. D. 107; *United States v. Parr*, 17 F. R. D. 512; *United States v. Maryland & Virginia Milk Producers Assn.*, 9 F. R. D. 509.

<sup>38</sup> 28 U. S. C. 2674, see 345 U. S. at 4, footnote 6.

Point 1 of the Government's brief<sup>39</sup> urged that the report of the Air Force Accident Investigation Board and the statements of witnesses before the Board were privileged against discovery; that discovery under rule 34 of the Federal Rules of Civil Procedure was limited to matters "not privileged", and thus excluded material privileged by the Constitution, by statute, or by the common law. Referring to Revised Statutes 161, which the Acting Solicitor General regarded as a statutory affirmation of a constitutional privilege against disclosure, and to *Touhy v. Ragen*, he urged that the decision not to disclose was an administrative decision, delegated to the department heads by Congress in Revised Statutes 161; that the courts should not interfere with policy determinations of an administrator without, at least, a showing that the determination was plainly arbitrary.

Again, as in the Cotton Valley case, the Government brief pointed to the history of Revised Statutes 161. The Continental Congress, in creating the Department of Foreign Affairs, had provided for access to any Member of Congress of all papers of that Department. It was modeled on the British system. The complete change which the Constitution brought about by the establishment of three independent branches was then stressed as the basis for the continuous assertion by the Executive of the right to tell Congress and its committees, in appropriate cases, that certain information it could not have.

The Acting Solicitor General concluded:

Viewed in the light of this long history of executive independence in practice, and of the courts' and Congress's recognition of this principle, R. S. 161 can only be read as a statutory embodiment and recognition of the authority of the department heads to formalize the procedure whereby they determine, in the discharge of their duties, what to disclose and what to withhold. \* \* \* (brief, p. 35).

The Supreme Court placed in juxtaposition the claim of the Government that the executive department heads had power to withhold documents from judicial view, if public interest so required, and the view urged by the plaintiffs that the Government's privilege had been waived by the Tort Claims Act. While both positions had "constitutional overtones," the Court found it unnecessary to pass upon them. There was present a narrower ground for decision.

Turning to the Tort Claims Act, which expressly made the Federal Rules of Civil Procedure applicable to suits against the United States,<sup>40</sup> the Court observed that rule 34 compelled production only of matters "not privileged." The essential question, therefore, was whether there was a valid claim of privilege. "We hold that there was, and that, therefore, the judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act."<sup>41</sup>

The Court made it clear that the words "not privileged," as used in rule 34, meant "privileges" as that term was understood in the law of evidence. By lodging his formal claim of privilege, the Secretary of the Air Force had invoked the privilege against revealing military secrets. Even outspoken critics of governmental claims to privilege had conceded the existence of the kind of privilege which had been invoked by the Secretary.

<sup>39</sup> Pp. 9-12, 15-18, and 19-46.

<sup>40</sup> 28 U. S. C. (1946 ed.) 932.

<sup>41</sup> 345 U. S. at 6.

It is of interest to note the portion of the opinion dealing with American as contrasted to English experience with the assertion of the Executive privilege. In the United States, judicial experience with the privilege which protects military and state secrets has been limited. English experience, while more extensive, was still relatively slight. However, the principles controlling the application of the privilege were clear. The privilege belonged to the Government and, therefore, had to be asserted by it. A private party could neither claim nor waive the privilege. To take advantage of it, there had to be a formal claim of privilege lodged by the head of the appropriate department who had control of the subject matter and who had personally considered it. The court itself was required to determine whether the circumstances were appropriate for the claim of privilege, without disclosing the very thing which the privilege was designed to protect. And while the latter requirement presented difficulty, help was to be found from the analogy presented by the assertion of the privilege against self-incrimination. In substance, the court had to be satisfied from all the evidence and circumstances that a responsive answer would result in injurious disclosure.<sup>42</sup> "If the court is so satisfied, the claim of privilege will be accepted without requiring further disclosure."<sup>43</sup>

Applying this formula, the Supreme Court stated that the courts would not abdicate control of the evidence in a case to the caprice of executive officers. At the same time, courts would not go so far as to say that they would automatically require complete disclosure before the claim of privilege would be accepted in any case. Where the court was satisfied that there was reasonable danger that state secrets would be exposed by compelling disclosure, which in the interest of national security should not be divulged, the court should not jeopardize the security which the privilege was meant to protect. In that type of case, it would be wrong for the court to insist upon an examination of the evidence, "even by the judge alone, in chambers."<sup>44</sup>

Applying the foregoing principles, the Court took judicial notice of the fact that this was a time of vigorous preparation for national defense. Air power and the new field of electronic devices enhanced the necessity of keeping those devices secret. On the record before the trial court, the Supreme Court found that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was a primary concern of the mission."<sup>45</sup> It was apparently impressed by the Government's offer to make the surviving air crewman available for at least limited examination. The Court cited the Totten case as an illustration of instances in which an action had been dismissed on the pleadings, without ever reaching the question of evidence, since it was obvious that in a contract to perform espionage, which was the very subject matter of the action, the plaintiffs' claim "should never prevail over the privilege."<sup>46</sup>

Finally, the Supreme Court distinguished between a civil suit for damages, and the rule in criminal cases discussed supra. The rationale

<sup>42</sup> 345 U. S. at 9.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Id.*, p. 10.

<sup>45</sup> *Ibid.*

<sup>46</sup> See footnote 26, 345 U. S. at 11. *Totten v. U. S.*, 92 U. S. 105 (1875), is discussed in the earlier study, pp. 55-56; Hearings, *supra*, first footnote, at pp. 2920-2921, committee print, *supra*, first footnote, at p. 39.

of the criminal cases is that when the Government prosecutes an accused, it has a duty to see that justice is done, and should not deny the accused anything which might be material to his defense. It would be unconscionable for the Government to undertake prosecution, and at the same time to claim a privilege which would deprive the accused of anything material to his defense.

Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.<sup>47</sup>

A former Government lawyer suggests the following rationale of the Reynolds case and other cases involving executive privilege.

1. Where the Government has consented to be the defendant in a civil suit, it may be compelled to choose between losing the suit and producing an *unprivileged* document. (Emphasis supplied. But it may not necessarily be so with respect to a privileged document.)

2. Where the Government institutes a criminal proceeding, it may be compelled to choose between dismissal and producing a relevant document, even one which is privileged. This may be true when the Government is the plaintiff in a civil action. (Citing *Bank Line v. United States*, 76 F. Supp. 801, 803 (S. D. N. Y. 1948).)

3. The courts have had no occasion and no inclination to attempt other methods of compelling the Government to produce evidence.<sup>48</sup>

#### (7) UNITED STATES *v. RUMELY* (345 U. S. 41)

The earlier memorandum discussed the Daugherty and Sinclair cases which dealt with the refusal of private individuals to testify before Senate committees.<sup>49</sup> Those cases were of interest because of the limitations placed upon the congressional power of inquiry, even when exerted against a private person. In the Sinclair case, the Court stated that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it had to be exerted with due regard for the rights of witnesses, and that a witness might rightfully refuse to answer where the bounds of power were exceeded.<sup>50</sup> The earlier study commented that if private persons were protected by "fundamental law" the rights of the executive branch would likewise be protected by the same fundamental law, the Constitution.<sup>51</sup>

The *Rumely* case (345 U. S. 41 (1953)) is another illustration of an attempt by Congress to compel a private individual to testify, and of the Supreme Court's refusal to permit his punishment for contempt on the ground that the committee was exceeding its powers under the resolution by the character of the information which it sought to compel.

Mr. Justice Frankfurter delivered the opinion of the Court, in which he was joined by three of the Justices. Justices Burton and Minton took no part in the case, while Justices Douglas and Black concurred with the majority, but on grounds different than those stated in the prevailing opinion.

Mr. Rumely was secretary of the Committee for Constitutional Government, which was engaged in the sale of books "of a particular

<sup>47</sup> 345 U. S. at 12.

<sup>48</sup> Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale Law Journal 477 at 483 (1957).

<sup>49</sup> *McGrain v. Daugherty*, 273 U. S. 135; *Sinclair v. United States*, 279 U. S. 263.

<sup>50</sup> 279 U. S. 263, 291.

<sup>51</sup> See earlier study, pp. 86-91; hearings, supra, first footnote, at pp. 2938-2940; committee print, supra, first footnote, at pp. 62-66.

political tendentiousness." He refused to disclose to a House Committee on Lobbying the identity of those who had made bulk purchases of the books for further distribution. He was convicted under Revised Statutes 102,<sup>52</sup> which provided penalties for refusal to give testimony or to produce relevant papers "upon any matter" under congressional inquiry. The court of appeals reversed the conviction, holding that the committee had no authority to compel production of the list of names of the purchasers of the books. The Supreme Court affirmed the reversal.

At the outset, the Court pointed to the fact that it dealt with a resolution of the House of Representatives, and that its problem was the same as that which confronted the Court when called upon to construe a statute. The constitutional questions before the Court were far-reaching, because it was asked to recognize the penetrating and pervasive scope of the investigative power of Congress. Quoting Woodrow Wilson's book, *Congressional Government*, published in 1885, the Supreme Court apparently did not agree that Congress could use every means of acquainting itself "with the acts and disposition of administrative agents of the Government," and that Congress could scrutinize these things and sift them by every form of discussion. Nor did the Supreme Court appear to agree that "The informing function of Congress should be preferred even to its legislative function. \* \* \*."<sup>53</sup> Instead, the Court pointed to Mr. Justice Holmes who had said that all rights tend to declare themselves absolute to their logical extreme, when in fact they "are limited by the neighborhood of principles of policy \* \* \*."<sup>54</sup>

In other words, without minimizing the indispensable informing function of Congress, the Supreme Court refused to be "blind" to the fact, following Chief Justice Taft's admonition, that the inquiring function of Congress was causing "wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation."<sup>55</sup> And so the Court found itself trying to accommodate two contending principles—"the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the first amendment."<sup>56</sup> Victory in the case before it was on the side of the first amendment, which forbade an interference with the efforts of private individuals to influence public opinion through books and periodicals. Giving full scope to the resolution which had authorized the investigation into lobbying activities, the Court would have had to find that a person who influenced public opinion through books and periodicals was exercising a remote influence upon the legislative process. That would have raised doubts of the constitutionality of the congressional effort to conduct a study and investigation of lobbying activities. Avoiding therefore the constitutional question, the Supreme Court held that Congress had not, with a full awareness of what was at stake, unequivocally authorized an inquiry of dubious limits:

\* \* \* Indeed, adjudication here, if it were necessary, would affect not an evanescent policy of Congress, but its power to inform itself, which underlies its policy-making function. Whenever constitutional limits upon the investigative

<sup>52</sup> 2 U. S. C. 192.

<sup>53</sup> Quoting from Wilson, *Congressional Government*, at p. 303. See 345 U. S. 43.

<sup>54</sup> 345 U. S. 44.

<sup>55</sup> 345 U. S. 44.

<sup>56</sup> *Id.*, p. 44.

power of Congress has to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain. \* \* \*<sup>57</sup>

\* \* \* \* \*

Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the first amendment. Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess.<sup>58</sup>

The concurring opinion of Justices Douglas and Black held that Congress had exceeded its power under the Constitution in having authorized the Committee by the resolution to inquire into the very subject matter upon which the witness' refusal and contempt citation were based. Justice Douglas wrote:

"If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship \* \* \* (345 U. S. 57).

\* \* \* \* \*

\* \* \* Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited. Inquiry into personal and private affairs is precluded. See *Kilbourn v. Thompson*, 103 U. S. 168, 190; *McGrain v. Daugherty*, 273 U. S. 135, 173-174; *Sinclair v. United States*, 279 U. S. 263, 292. And so is any matter in respect to which no valid legislation could be had. *Kilbourn v. Thompson*, *supra*, pp. 194-195; *McGrain v. Daugherty*, *supra*, p. 171. Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment (345 U. S. 58).

#### (8) JENCKS v. UNITED STATES (353 U. S. 657)

Although this case was decided after the period included within this review, its discussion of judicial decisions would be incomplete without a reference to this case.

In a criminal prosecution for filing false non-Communist affidavits with the National Labor Relations Board, the defense moved for orders permitting it to inspect reports to the Federal Bureau of Investigation by the Government's two principal witnesses, undercover FBI agents, of their meetings with the defendant. In the proceedings in the district court the Government opposed the motions on grounds other than that of the privilege against disclosure on grounds of national security, the confidential character of the reports, public interest or otherwise. The motions were denied, and the defendant was convicted.

In its brief in the Supreme Court, however, the Government maintained that, in the absence of a showing of contradiction in the testimony of these witnesses, production of confidential Government documents should not be compelled. The Supreme Court observed:

It is unquestionably true that protection of vital national interests may militate against disclosure of documents in the Government's possession.

The Court stated it had been considered in decisions in civil actions construing regulations issued by the head of an executive department under Revised Statute 161, title 5 United States Code, section 22, and

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<sup>57</sup> 345 U. S. 46.

<sup>58</sup> *Id.*, p. 48.

it referred to the regulations of the Attorney General providing that no documents of the Department of Justice may be disclosed without the permission of the Attorney General.

The Court referred to the notice that it had taken in the Reynolds case of decisions of the court of appeals for the second circuit that in criminal proceedings the Government could invoke "its evidentiary privilege only at the price of letting the defendant go free." In its decision in the Jencks case the Supreme Court held that a criminal action must be dismissed when the Government on the grounds of privilege elects not to comply with an order to produce for inspection by the accused and for admission in evidence of relevant statements or reports in the Government's possession of Government witnesses respecting the subject matter of their testimony at the trial. The opinion does not, therefore, in any way deny the privileged character of certain Government documents.

After the decision in this case Congress enacted legislation to amend the Criminal Code to provide the exclusive procedure for handling demands for the production of statements and reports of witnesses in criminal proceedings (71 Stat. 598, 18 U. S. C. 3500).

#### (9) SUMMARY OF COURT DECISIONS

Attorney General McGrath, in 1949, endorsed the second circuit rule before the Judicial Conference of the United States. He stated that where a defendant has first proved to the satisfaction of the court that a paper is directly material to his defense, the court will permit introduction of only such part of the document as it deems material. At the same time, the court will protect from disclosure to the public the documents so introduced by limiting their examination to the judge, the attorneys, and the jury. Attorney General McGrath also pointed to the really difficult cases as illustrated by the Judith Coplon trials in both the District of Columbia and New York. In the former, Judge Reeves ordered FBI data slips and reports to be disclosed. Attorney General Clark reluctantly yielded to the court's direction, since his only other choice was to move for the dismissal of the indictment. Apparently he felt that the public interest was best served by yielding to the court's direction. The court of appeals for the second circuit in reversing the Coplon conviction thought that the trial judge should have allowed the defense to see the records which he had read in camera. The peculiarity of the New York Coplon case was that the privileged documents were in fact introduced in evidence, and it was the refusal of the trial court to allow the defendant to see them which constituted a denial of her constitutional right.

The Solicitor General has formally asserted in the Supreme Court the traditional executive privilege against disclosure in the following cases: *United States v. Cotton Valley Operators' Committee* (339 U. S. 940 (1950)); *United States ex rel. Touhy v. Ragen* (340 U. S. 462 (1951)); *Bowman Dairy Company v. United States* (341 U. S. 214 (1950)); *United States v. Reynolds* (345 U. S. 1 (1953)).

The Department of Justice also asserted the Executive privilege in the brief of the United States in *Jencks v. United States* (353 U. S. 668), and *Allmont and O'Neill v. United States* (177 F. 2d 97 (C. A. 3d, 1949)).

The Touhy, Bowman Dairy, and Jencks cases were criminal matters. In the former, the Government was not a party to the proceeding. In the Bowman Dairy and Jencks cases it was. While the Supreme Court in the Bowman Dairy case and the second circuit in the Coplon case appear to require the Government to make known to a defendant on trial for his life or liberty the evidentiary facts upon which the Government proposes to base a conviction, the rationale of those cases has no application in a civil forum.

In the Reynolds case, which was a civil suit for damages under the Tort Claims Act, the Supreme Court distinguished the rule which applies in a criminal case and held that when the head of a department asserts a formal claim of privilege the court must yield to it where a reasonably strong showing of necessity has been made. Certainly such a rule would apply where the data sought in the civil suit involved secrets closely allied to the national defense.

In matters affecting the national security, or other vital public interests, where the Congress or its committees seek information from the Executive, the latter stands on an equal footing with its coordinate partner. The Constitution places ultimate responsibility in matters of an executive nature in the President and his advisers, just as it places final and complete responsibility for legislation in the Houses of Congress. One writer has put it this way:

The constitutional merits of the quarrel between the House and the administration are easily assessed. No one question, or can question, the constitutional right of the House to inform itself through committees of inquiry on subjects which fall within its legislative competence and to hold for contempt recalcitrant witnesses before such committees, and undoubtedly the question of employee loyalty is such a subject. On the other hand, this prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself. Are, then, communications to the President or to officials who are authorized by him to receive them concerning the loyalty of Federal executive personnel such matters of confidence? The question must certainly be answered in the affirmative \* \* \* (Corwin, *The President: Office and Powers*, 1948, pp. 142-143).

#### (10) THE VIEWS OF COMMENTATORS

In addition to Professor Corwin's recent views, expressed in 1948, there is Prof. Rita Weber Nealon's thorough and comprehensive work, entitled "Contributions of the Attorneys General to the Constitutional Development of the American Presidency."<sup>59</sup> She asks this question: "Does the President's duty to give Congress information concerning the state of the Union imply the duty to give such information in his possession as the houses, or either of them, may desire?" After reviewing some of the outstanding incidents in our national history, where the Presidents or their advisers have refused information to the Congress,<sup>60</sup> Professor Nealon writes:

The Attorneys General have affirmatively espoused the principle of Executive discretion in regard to the importunate requests that Congress has traditionally served on the executive branch. The principle is well stated by Wickersham:

"The President may give to the House Committee on Banking and Currency

<sup>59</sup> Submitted as a doctoral thesis in June 1949 to the Department of Government of the faculty of the Graduate School of Arts and Science of New York University for the degree of doctor of philosophy. Professor Nealon has also written on The Opinion Function of the Federal Attorney General in 25 New York University Law Review 824-843 (1950). See especially pp. 832 and 833.

<sup>60</sup> See vol. 2, pp. 245-251.

information in the possession of the Comptroller of the Currency relative to the operation of national banks if, in his opinion, it is proper to do so; but if, in his opinion, the interests of the Government require that this information be treated as confidential, he has the right to refuse to divulge it" [vol. 2, p. 249].<sup>61</sup>

and adds that the Executive discretion has been repeatedly upheld by the judiciary.<sup>61</sup>

Prof. M. Nelson McGahey has written much in this field. In an article entitled "The Congressional Power of Investigation," published in 1949, Professor McGahey discusses "the power to investigate the executive branch."<sup>62</sup> He states that there is one major exception to the general rule that a committee eventually may obtain the information it seeks from the Executive, and that it has never been settled in this country how far a congressional committee may go in requiring testimony and papers from the executive branch of the Government.

Professor McGahey notes that during the years 1929 to 1939, both Presidents Hoover and Roosevelt and their Cabinet officers, occasionally deemed it "incompatible with the public interest" to comply with a request for papers in a resolution of inquiry. After detailing the instances of refusals to furnish information by Presidents Roosevelt and Truman, including the refusal to submit to the Un-American Activities Committee the FBI letter on Dr. Condon, Professor McGahey concludes:

The alleged power of the Chief Executive to determine whether the revelation of a piece of information is or is not compatible with the public interest, therefore, represents in actual practice an important restriction on the congressional power of inquiry. As long as no changes are made in existing law, the executive branch maintains an effective means of thwarting many congressional investigators.<sup>63</sup> (p. 527).

See also Congressional Investigations: Historical Development, by M. N. McGahey, and Congressional Investigations: Significance for the Administrative Process, by F. M. Marx, in 18 University of Chicago Law Review, pages 438 and 512 (1951).

### PART III—THE CONSTITUTION AND THE STATUTES CREATING THE EXECUTIVE DEPARTMENTS

The earlier study discussed the constitutional provisions relevant to this question, and the statutes creating the various executive departments. The Civil Service Commission, which is not in one of the executive departments, but which is as an independent agency of the executive branch of the Government, was likewise discussed. Reference was made to the authoritative and celebrated opinions of Attorney General Cushing, rendered in 1854, that the heads of departments were subject to the directions of the President, and that no head of department could lawfully perform an official act against the will of the President. It was further shown that the establishment of the 10 executive departments partook of 1. uniform system and function—to enable the President to perform his duties under the Constitution as the Chief Executive Officer of the Nation.<sup>64</sup>

<sup>61</sup> See vol. 2, p. 251, and the cases cited in footnote 27 of Professor Nealon's work.

<sup>62</sup> 28 Nebraska Law Review 516, 524-527 (1949).

<sup>63</sup> See also Congressional Investigations, 45 Illinois Law Review 633, 648 (1950-51).

<sup>64</sup> See earlier study, pp. 67-71; hearings, *supra*, first footnote, at pp. 2926-2929; committee print, *supra*, first footnote, at pp. 47-50.

With the approval of the act of July 31, 1956 (70 Stat. 732), there are now 10 executive departments:

1. The Department of State.
2. The Department of Defense.
3. The Department of the Treasury.
4. The Department of Justice.
5. The Post Office Department.
6. The Department of the Interior.
7. The Department of Agriculture.
8. The Department of Commerce.
9. The Department of Labor.
10. The Department of Health, Education, and Welfare (Rev. Stat. 158, as amended, 5 U. S. C., sec. 1).

(1) THE SOURCE OF DEPARTMENTAL REGULATIONS GOVERNING THE DISCLOSURE OF RECORDS

Title 5, section 22, of the United States Code is identical with section 161 of the Revised Statutes. That section authorized the head of each executive department to prescribe regulations, not inconsistent with law, for the government of his department and for the custody, use, and preservation of the records and papers of such department. The various regulations currently existing in executive departments to centralize in the heads of the executive departments determinations as to whether it would be contrary to the public interest to reveal information in the departmental records, and thus to relieve their subordinates of that responsibility, trace their origin to the power granted to the head of each department in Revised Statutes 161.

(2) THE DEPARTMENT OF FOREIGN AFFAIRS ESTABLISHED BY THE CONTINENTAL CONGRESS

*Accessibility of papers to Members of Congress*

One of the most powerful arguments to be found anywhere for the right of the President and the heads of departments to withhold confidential papers, when in their discretion the public interest requires it, is contained in the history dealing with the creation of the Department of Foreign Affairs by the Continental Congress, in 1782. The journals of that Congress show that the Department of Foreign Affairs, under the discretion of a Secretary, was created by a resolution which stated that the books and records of the Department of Foreign Affairs were accessible to "any Member of Congress."

Furthermore, the same resolution called upon the Secretary of the Department of Foreign Affairs to submit to the inspection of the Congress, for its approbation, letters and instructions to the ministers of the United States or to ministers of foreign powers which referred to treaties.

In a word, under the Continental Congress the Department of Foreign Affairs and its Secretary were completely subject to the directions of the Congress, and every Member thereof was entitled to see anything he wanted to see in the records of that Department.

The striking similarity between the head of the Department of Foreign Affairs under the Continental Congress and a minister of the

Crown in Great Britain is revealed by Prof. Herman Finer of the London School of Economics:<sup>65</sup>

Different, however, was the governmental scheme provided by our Constitution which made the President the head of the executive department and which made those officers who aid him in discharging his Executive responsibilities subservient and responsible to the President.<sup>66</sup> Convincing proof of the fundamental difference between the duties of the "Secretary to the United States of America for the Department of Foreign Affairs" under the Continental Congress, and the duties under the Constitution of the Secretary for the Department of Foreign Affairs, is furnished by a study of the debate in Congress when the Department of Foreign Affairs was created, during the opening session of the Congress on March 4, 1789.<sup>67</sup> Absent from the act creating the Department of Foreign Affairs under the Constitution was any provision entitling a Member or Members of Congress to see secret or confidential papers.<sup>68</sup> Nor can it be said that the failure to provide, as was done under the Continental Congress, for the production of papers of a secret nature to Members of Congress was an oversight. Edmund Randolph, who was Attorney General under President Washington, was a member of the Committee of Three which, in 1782, reported the resolution to the Continental Congress creating the Department of Foreign Affairs. James Madison, who vigorously debated the act creating the Department of Foreign Affairs in the First Congress, was a member of the Continental Congress in 1780-82. Roger Sherman, who participated in the debate with Madison in the First Congress, had also been a member of the Constitutional Convention of 1787. The Members who sat in the new Congress in 1789 could not have been unfamiliar with the fact that during the existence of the Continental Congress its Members had been entitled to see all kinds of secret data. The conclusion is therefore inescapable that the founders of our Government, and those who sat in the First Congress, meant to give no power to the Congress to see secret data in the executive departments against the wishes of the President. That was a power which the Continental Congress had and which the framers of the Constitution meant for the new Congress, created by the Constitution, not to have.

No better proof is needed than the way in which James Madison dealt concretely with this problem. In 1794, President Washington transmitted certain correspondence to the Senate, with instructions that they be received as confidential. His Attorney General, Edmund Randolph, gave this message to the President: Mr. Madison had asked the Attorney General whether an extract could not be given from a letter. The Attorney General answered that there were certain things in the letter which could not be disclosed. Mr. Madison admitted to

<sup>65</sup> Finer, Questions to the Cabinet in the British House of Commons: Their Applicability to the United States Congress, reproduced in Joint Committee Print, 79th Cong., 2d sess., entitled "The Organization of Congress," pp. 49, 53 (June 1946).

<sup>66</sup> See James Madison, Debates in Congress, vol. 1, by Joseph Gales, Sr., p. 450.

<sup>67</sup> See 1 Stat. 28, July 27, 1789, ch. IV, "An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs." Sec. 4 thereof provides: " \* \* \* That the Secretary \* \* \* shall forthwith after his appointment, be entitled to have the custody and charge of all records, books, and papers in the office of Secretary for the Department of Foreign Affairs, heretofore established by the United States in Congress assembled."

<sup>68</sup> See 1 Stat. 28, 1 id. 49; 1 id. 65; 1 id. 68; 1 id. 553; 9 id. 395; 16 id. 163; 17 id. 283.

the Attorney General "that the discretion of the President was always to be the guide."<sup>69</sup>

Again, in 1794, when the House was vigorously debating the Jay Treaty, Madison as a Member of the House supported the resolution which called upon the President to submit to the House certain correspondence. Nevertheless, Madison upheld in the following words the right of the President to withhold such information as his own discretion dictated:

On the first point, he observed, that the right of the House to apply for any information they might want, had been admitted by a number in the minority, who had opposed the exercise of the right in this particular case. He thought it clear that the House must have a right, in all cases, to ask for information which might assist their deliberations on the subjects submitted to them by the constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time. And if the refusal of the PRESIDENT had been founded simply on a representation that the state of the business within his department, and the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it. \* \* \*<sup>70</sup>

After James Madison became President of the United States, he found it necessary to write on August 13, 1814, instructions "for the Department of War":

In general, the Secretary of War, like the Heads of the other Departments, as well by express statute as by the structure of the Constitution, acts under the authority and subject to the decisions and instructions of the President, with the exception of cases where the law may vest special and independent powers in the Head of the Department.<sup>71</sup>

### (3) JEFFERSON'S OPINION ON THE POWERS OF THE SENATE

Thomas Jefferson, while serving as Secretary of State, wrote an "Opinion on the Powers of the Senate," dated April 24, 1790. President Washington sought Jefferson's opinion as to whether the Senate had the right to veto the grade which the President thought it expedient to use in a foreign mission, as well as the person to be appointed.

Jefferson's opinion referred to the constitutional provision which gave the President the right to nominate, and by and with the advice and consent of the Senate, to appoint, ambassadors, other public ministers, and consuls. Jefferson advised the President that the Senate had no right to negative the grade. He discussed the division of the powers of government into three branches, lodging each of the branches "with a distant [sic] magistracy."

Referring to the conduct of foreign relations, Jefferson wrote:

The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly; the constitution itself, indeed, has taken care to circumscribe this one within very strict limits; for it gives the nomination of the foreign agent to the president; the appointment to him and the senate jointly, and the commissioning to the president.<sup>72</sup>

<sup>69</sup> See footnote 8. *Writings of Washington*, vol. 33, John C. Fitzpatrick, editor, p. 262.

<sup>70</sup> Benton, *Abridgment of the Debates of Congress*, vol. 1, p. 697. See also Corwin, *The President's Control of Foreign Relations*, pp. 90, 91.

<sup>71</sup> Madison, *Letters and Writings*, vol. 3, dated August 13, 1814, at p. 417.

<sup>72</sup> Paul Leicester Ford, *The Writings of Thomas Jefferson*, vol. V, p. 161.

Jefferson's opinion also dealt with the appropriate concerns of the Senate:

\* \* \* \* The Senate is not supposed by the constitution to be acquainted with the concerns of the executive department. It was intended that these should be communicated to them; nor can they, therefore, be qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade, more or less marked, which special and secret circumstances may call for. All this is left to the president; they are only to see that no unfit person be employed (p. 162).

(4) ORDERS OF THE PRESIDENT AND OF THE ATTORNEYS GENERAL DEALING WITH EXECUTIVE FILES (1948-53)

It will be useful to review briefly the orders which were issued to the heads of departments by the President and by the Attorneys General governing access to confidential files in the executive departments.

President Truman's memorandum dated March 13, 1948,<sup>73</sup> was addressed to all officers and employees in the executive branch of the Government. They were directed to decline to furnish information, reports, or files dealing with the employee loyalty program. A subpoena or demand or request for information was to be referred to the Office of the President, for such response as the President might determine to be in the public interest in the particular case.

On April 23, 1948, Attorney General Clark advised the heads of all Government departments, agencies, and commissions that Federal Bureau of Investigation reports, which were furnished from time to time by the Bureau, were confidential, and were the property of the Bureau and subject at all times to its control. Any department, agency, or commission receiving such reports or communications from the Bureau was merely a custodian thereof for the FBI, and the documents or communications were subject to recall at any time. Neither the reports and communications nor their contents were to be disclosed to any outside person or source, without specific prior approval of the Attorney General.

If any attempt were made, whether by request or subpoena or court order, to obtain access to such reports or communications, they were to be immediately returned to the Bureau, in order that a decision might be reached by the Attorney General in each individual instance concerning the action which should be taken.

On September 3, 1948, Acting Attorney General Ford issued a memorandum to the heads of all Government departments, agencies, and commissions of the executive branch. After referring to the April 23, 1948, memorandum, Mr. Ford stated that confidential reports of the FBI which were furnished in confidence to department and agency heads, with respect to their personnel, were to be made available upon transfer of such personnel to another agency of the executive branch. Heads of departments and agencies were not to be restricted in the exchange of information with respect to personnel of their agencies. The memorandum also laid down certain rules which were to be observed by the Government departments in disposing of reports of full field investigations from the FBI, regarding persons who were no longer employed by the particular department.

<sup>73</sup> 13 F. R. 1359.

On May 1, 1952, Acting Attorney General Perlman issued supplement No. 3 to Order 3229. He referred to the directive of April 12, 1952, of the President to the heads of all executive departments and agencies. That directive took account of the House Judiciary Committee resolution of January 29, 1952, which established a special subcommittee to conduct an inquiry of specific allegations and complaints with reference to the administration of the Department of Justice. The President issued an Executive order empowering the committee to inspect tax returns under appropriate limitations. The President requested all departments and agencies to cooperate with Chairman Chelf and his committee in its investigation. Acting Attorney General Perlman went on to say in his order of May 1, 1952, that Order No. 3229, dated May 2, 1939, forbade officers and employees of the Department of Justice to furnish official files of the Department except in the discretion of the Attorney General. In accordance with a long-established policy of the Department, therefore, all reports, records, and files of an investigative character, including FBI reports, were to be kept in strict confidence, and any request or demand by subpoena or otherwise for such confidential information was to be referred to the Attorney General. The latter would then determine whether it was compatible with the public interest to release any of the information sought.

On August 20, 1952, Attorney General McGranery issued supplement No. 4 to order No. 3229. In substance, he ordered that testimony of any former officer or employee of the FBI was not to be given in any court of law, except with the approval of the Attorney General, providing that the information which was sought from such former officer or employee had been obtained solely by reason of the office or official position which he had in the Bureau.

On September 22, 1952, Deputy Attorney General Malone addressed a memorandum to all United States attorneys directing them to represent any former officer or employee of the Federal Bureau of Investigation in any court of law who was placed in jeopardy of being held in contempt of court for refusing to testify as to matters within the scope of order No. 3229.

On January 13, 1953, Attorney General McGranery issued an order, pursuant to Revised Statute 161 (5 U. S. C. 22). He revoked order No. 3229, which had been issued in May 1939, and the four supplements thereto, dated 1942, 1947, May 1952, and August 1952, respectively. The order went on to provide that when a United States attorney or other officer or employee of the Department was served with a subpoena or order for the production or disclosure of materials or files of the Department the person so served was to appear and inform the court that he was not authorized to produce or disclose the materials or information sought. The court was to be informed that the matter was being referred to the Attorney General for his decision.

In the event that the court declined to defer a ruling until instructions from the Attorney General had been received, or if the court ruled adversely on a claim of privilege which was asserted by the Attorney General, the person upon whom demand had been made was to decline to produce the material or information sought. *U. S. ex rel. Touhy v. Ragen* was cited in the order as authority for the Attorney General's revised order, which is known as order 3229, revised.

On January 13, 1953, Attorney General McGranery also issued order No. 3464, supplement No. 4 (revised). The order stated that all official files of the Department were confidential, were to be disclosed only in the performance of official duties, and, except upon authorization of the Attorney General, no officer or employee was to furnish to any person outside of the Department any information obtained from the Federal Bureau of Investigation or from any other investigative report. The same prohibition as to disclosure was to apply to any other information in the files of the Department, the disclosure of which might be injurious to the public interest.

By its terms, the order was to extend to any former officer or employee of the Department. Finally, the order stated that "classified security information" was to be handled in accordance with Executive Order 10290 of September 27, 1951. The Attorney General's order was also made subject to the directive of the President dated March 13, 1948.

On January 17, 1953, Attorney General McGranery made a report to President Truman on his administration of the Department of Justice. He stated that one of the major problems which confronted him was the unsatisfactory relationship of the Department with investigative committees of the Congress, particularly the Chelf and King subcommittees of the House and the Smith subcommittee of the Senate. He, therefore, had instituted a program of complete cooperation with the committees and particularly with the Chelf subcommittee, which was investigating the Department of Justice. As a result of that policy, the complete files on all closed cases had been made available to investigators for the committees, except FBI and other investigative reports. As to such reports, if their contents were required in order to arrive at a determination of the issues involved, summaries of the reports had been made available. Mr. McGranery further stated that in addition to the prompt service which he gave to the committees on all requests for files he made special arrangements for the examination of the files in the Department and attorneys having a working knowledge of the cases were assigned to assist House and Senate investigators.

As to pending cases, Mr. McGranery stated that he had to deny to the committees complete access to the files "because of the grave danger of influencing pending litigation, both civil and criminal. \* \* \*" In particular cases, however, exceptions were made to the rule. As to all pending cases, a complete status report was always furnished for the information of the committees.

On March 23, 1953, Deputy Attorney General Rogers issued a memorandum to the heads of all divisions, bureaus or offices of the Department of Justice. It is entitled "Requests of Congressional Committees for Information From Departmental Files." The memorandum laid down the procedure which was to be followed in complying with requests of congressional committees for information from the files of the Department of Justice. In closed cases the Department would make the file available, after first removing therefrom all reports and memorandums of the FBI, as well as investigative reports from any other Government agency.

If the committee stated that it was essential that information from FBI reports and memorandums should be made available, it was to be

advised that the request would be considered by the Department. A summary of the contents of the FBI reports and memorandums was then to be prepared, without disclosing investigative techniques, identity of confidential informants, or other matters which might jeopardize the investigative operations of the FBI. The summary was then to be forwarded to the Federal Bureau of Investigation for advice concerning its availability to the committee. The summary was not to be made available unless the Bureau indicated that it would have no objection. Neither the summary nor other material from the files were to be relinquished from the Department's custody. As to open cases, the committee was to be advised that the file could not be made available until the completion of the case. The status of the case was, however, to be given in as much detail as was prudent in the circumstances of the pending litigation.

The memorandum closed with the assertion of the traditional right of the executive departments—namely, the Department reserved the right to withhold information when the public interest so required.

#### PART IV—THE STATUTES DESIGNED TO COMPEL TESTIMONY AND THE PRODUCTION OF RECORDS IN CONGRESSIONAL INVESTIGATIONS

In the earlier study the following statutes were discussed: title 2, United States Code, section 192, 193, and 194; title 5, United States Code, section 105 (a); and sections 134 (a) and 136 of the Legislative Reorganization Act of 1946 (Public Law, 601, 79th Cong.).

It was shown by appropriate reference to decided cases, and by a study of the legislative history of section 105 (a) and sections 134 (a) and 136, *supra*, that the statutes designed to compel witnesses to testify and to produce records before congressional committees affected only private individuals. They did not cover heads of departments or other executive officials.

The situation today is no different. Strenuous efforts were made during the life of the 80th Congress to pass a legislation designed to compel disclosure of executive files; such efforts failed.

A discussion of the bills and the resolutions which were designed to force disclosure of confidential files follows:

##### (1) HOUSE JOINT RESOLUTION 342, 80TH CONGRESS, 2D SESSION

This was introduced on March 5, 1948, by Congressman Hoffman. The aim of the joint resolution appears from the title of House Report No. 1595, 80th Congress, 2d session, dated March 22, 1948: "Directing All Executive Departments and Agencies of the Federal Government To Make Available to Any and All Standing, Special, or Select Committees of the House of Representatives and the Senate, Information Which May Be Deemed Necessary To Enable Them to Properly Perform the Duties Delegated to Them by the Congress." The report was submitted by Congressman Hoffman from the Committee on Expenditures in the Executive Departments and was signed, in addition to Chairman Hoffman, by 17 members of the committee.

A minority report was signed by Congressman John W. McCormack, who headed the opposition in the House debate, and by five additional members of the committee.

An appendix to the report contains a memorandum prepared by Messrs. F. B. Horne and R. S. Oglebay, Federal Law Section, Library of Congress, addressed to Representative Hoffman. It is entitled "A Statement Supporting the Right of the Congress To Require Information From the Executive Department."

On March 30, 1948, Representative Hoffman prepared an answer to the minority report on House Joint Resolution 342.<sup>74</sup>

The crux of the argument presented by the majority of the House committee is perhaps contained at page 6 of Mr. Hoffman's answer to the minority report:

\* \* \* The Executive Office is created by the Constitution. Over the Executive himself and his acts, while within the limits of his constitutional power, the Congress has no jurisdiction. It seeks none. The executive departments, which were created by some [sic] act of Congress, which depend for their continued existence upon legislative appropriations, are in an entirely different category. It is axiomatic that that which the Congress creates, it may destroy or regulate.

The resolution was vigorously debated for 2 days, and reported favorably by the Committee of the Whole to the House of Representatives. It was passed by the House on May 13, 1948, and referred to the Senate Committee on Expenditures in the Executive Departments on May 14, 1948, where it died.<sup>75</sup> It is evident from a reading of the majority report that the President's directive of March 13, 1948, to all officers and employees in the executive branch, concerning the preservation of all loyalty files and reports in the employee loyalty program on a confidential basis, was perhaps in large measure responsible for the vigor with which House Joint Resolution 342 was pushed and debated in the House.

As will be noted in part V, the St. Louis Post-Dispatch wrote editorials on May 10, 1948, and May 16, 1948, entitled "A Police State Law" and "The Hoffman Bill," which were sharply critical of the bill:

The immediate occasion is an unhappy strife between a Republican Congress and Democratic President, but it is also part of a very old, recurrent contest for power between Congress and President, which is quite apart from partisan division. The Hoffman bill, and some other moves in the current quarrel, seek to do something that the authors of the Constitution expressly wanted to avoid. The bill asserts a dominance of Congress over the Presidency, in contrast with the great constitutional design in which three equal branches of government check and balance on another to serve the common cause of representative democracy (editorial of May 10, 1948).

#### (2) HOUSE RESOLUTION 522, 80TH CONGRESS, 2D SESSION

On April 7, 1948, Representative Thomas, of New Jersey, introduced the following resolution:

*Resolved*, That the Secretary of Commerce is hereby directed to transmit forthwith to the House of Representatives the full text of a letter dated May 15, 1947, written by J. Edgar Hoover, Director of the Federal Bureau of Investigation, and addressed to W. Averell Harriman, Secretary of Commerce, relating to Doctor Edward U. Condon, Director of the National Bureau of Standards.

On April 19, 1948, Mr. Wolverton, from the Committee on Interstate and Foreign Commerce, submitted a 37-page report bearing No.

<sup>74</sup> See H. R. Rept. No. 1595, pt. No. 2, 80th Cong., 2d sess.

<sup>75</sup> For the legislative history of the resolution, see The Power of the Congressional Committees of Investigation To Obtain Information From the Executive Branch: The Argument for the Legislative Branch, by Philip R. Collins, 39 Georgetown Law Journal 583, 574-586.

1753, 80th Congress, 2d session, to accompany House Resolution 522. The first seven pages of the report dealt principally with the events leading up to the demand for the Condon FBI file and to its refusal. There is a section devoted to the "Power of the House of Representatives."<sup>76</sup>

In support of the asserted power of the House to call for confidential files in the executive departments, the Federal Law Section of the Legislative Reference Service again submitted a copy of the memorandum referred to above. It states, in the main, the same views which are to be found in the Senate committee print, 80th Congress, 2d session, entitled "Memorandum on Proceedings Involving Contempt of Congress and its Committees," to which reference has been made in the introduction of this memorandum.

The assistant to the Attorney General wrote Chairman Wolverton by letter dated April 12, 1948, giving the reasons why, under the decisions of the Supreme Court, House Resolution 522 should not be favorably reported.<sup>77</sup> Finally, at pages 28-31 of the report are the constitutional objections to House Resolution 522, citing appropriate constitutional provisions as well as court decisions which, in the judgment of the Attorney General, showed that the resolution was an encroachment by the legislative branch upon the executive.

#### (3) S. 2077, 82D CONGRESS, 1ST SESSION

On October 15, 1951, Senator Johnston, of South Carolina, from the Committee on Post Office and Civil Service, submitted a report entitled, "Transfer of Responsibility for Conducting Personnel Investigations" (S. Rept. 950, 82d Cong.). The opening paragraph of the report reads as follows:

The Committee on Post Office and Civil Service, to whom was referred the bill (S. 2077) to provide for certain investigations by the Civil Service Commission in lieu of the Federal Bureau of Investigation, and for other purposes, having considered the same, report favorably thereon, with amendments, and recommend that the bill, as amended, do pass.

On February 28, 1952, Report No. 1449, 82d Congress, 2d session, was submitted by Mr. Murray, of Tennessee, to accompany S. 2077, 82d Congress, 1st session. It recommended passage of the bill, with amendments. Of interest here is the Bow amendment, which was agreed to on the floor of the House on March 11, 1952. That amendment read as follows:

All findings, records, and reports made or compiled by the Civil Service Commission under this Act shall be made available to the committee of the Congress upon the request of such committee.

On March 20, 1952, the Washington Post wrote an editorial entitled "Personnel Quiz." It stated that Representative Bow, of Ohio, had succeeded—

in tacking a most mischievous amendment onto a simple piece of legislation designed to relieve the Federal Bureau of Investigation of certain preliminary investigative chores in connection with Government personnel clearance.

The legislation had been passed by the Senate, pursuant to a recommendation of FBI Director Hoover. Its effect was merely to transfer

<sup>76</sup> Pp. 7-16 of the report.

<sup>77</sup> See pp. 23-25 of the report. Attorney General Jackson's opinion dated April 30, 1941, is quoted at pp. 25-28 of the report.

to the Civil Service Commission the responsibility for the initial inquiry into the records of applicants for jobs in those agencies where Congress had stipulated that the investigation should precede employment. Representative Miller of California expressed opposition to the Bow amendment, on the ground that it constituted "an encroachment on the administrative branch of the Government." The editorial went on to say that the effect of the amendment would have been to "strip the loyalty-security program in these cases of the secrecy intended to protect innocent persons from unjust accusation"; that the raw files of the Civil Service Commission investigators would have been exposed to the public "at the whim of any congressional committee."

The Post expressed the hope "that the Senate will stand firm against this dangerous amendment when the bill goes to conference."<sup>78</sup>

On March 26, 1952, the House of Representatives approved without objection and sent to the Senate a conference report on S. 2077, deleting the Bow amendment.<sup>79</sup>

#### (4) H. R. 7249, 82D CONGRESS, 2D SESSION

On March 26, 1952, Congressman Bow introduced a bill to provide that all data, records, findings, and reports relating to civilian personnel in the executive branch of the Government should be made available to committees of Congress. On June 20, 1952, the Deputy Attorney General wrote the chairman of the Committee on Post Office and Civil Service, stating that the Department of Justice was opposed to this bill, "as its enactment would be contrary to certain of the basic principles upon which the Government of the United States is predicated—the separation of the powers of the judicial, legislative, and executive branches."

#### (5) S. 2255, 82D CONGRESS, 1ST SESSION

On March 20, 1952, the Attorney General wrote Senator McCarran, chairman of the Committee on the Judiciary, as follows:

This is in response to your request for the views of the Department of Justice relative to the bill (S. 2255) to provide that records made by public officers and employees shall be the property of the people and making unlawful failure or refusal to open such records to the public and the American press.

The bill would add a new section, "2077. Public character of records," to chapter 101 of title 18, United States Code, which section would make it a felony for any officer or employee of the United States, or any other person whose compensation is in any part paid from the Treasury of the United States, to willfully fail or refuse to open to the public or to the American press any records made in his official capacity or in connection with his official duties, except as Congress shall have otherwise specifically provided by law. A maximum penalty of a \$5,000 fine and imprisonment for not more than 2 years would be prescribed.

Enactment of this measure would authorize undue interference with the conduct of the routine business of Government, jeopardize the conduct of the foreign affairs and international relations of the country, and threaten its national security.

There was no further action on the bill.

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<sup>78</sup> See also New York Times, March 12, 1952, p. 20, col. 4, news item entitled "House Votes To Force Truman To Free Data."

<sup>79</sup> New York Times, March 27, 1952, p. 26, col. 6.

## (6) SENATE RESOLUTION 15, AND S. 524, 83D CONGRESS, 1ST SESSION

Senate Resolution 15 was introduced by Senator McCarran on January 7, 1953. It was not reported out by the Rules Committee. It provided that, when the chairman of a standing committee of the Senate certifies that two-thirds of the members of the committee have voted to require production of specified books and papers in the custody of an officer of the Government of the United States, the President of the Senate shall direct the Sergeant at Arms to obtain the books and papers specified by the chairman. In the event of refusal of such officer to deliver the books and papers, the Sergeant at Arms is then directed to take him into custody and to bring him before the bar of the Senate, where he would be required to answer questions as to his refusal.

S. 524 was introduced on January 16, 1953, by Senator Dirksen. No action was taken on this bill. In substance, the bill provided that any officer or employee in the employ of the Federal Government, in any department thereof, who wishes to make his personnel and confidential files available to a congressional committee, for the purpose of refuting any rumor or charge against him, may, in writing, request the head of the department or agency to release his personnel file to the committee. The head of the agency must, upon receipt of the request from the employee, make the file available to the appropriate committee of Congress.

## (7) S. 1004, 80TH CONGRESS, 2D SESSION

S. 1004 was introduced on January 30, 1948. The bill passed the House and Senate, and was sent to the President. On May 15, 1948, the President returned the bill to the Senate with a veto message stating that the bill was an unwarranted encroachment on Executive authority.

The issue, vigorously debated for 2 days in the Senate, was whether a Senate committee could constitutionally be empowered to request and receive from the Federal Bureau of Investigation investigation reports on Presidential appointees to the Atomic Energy Commission, prior to voting confirmation of such appointees. The purpose of the bill was to give such a power to the Senate section of the Joint Committee on Atomic Energy. Senators Knowland and Hickenlooper led the debate for the proponents of the bill. Senator McMahon led the forces which urged its unconstitutionality. On May 21, 1948, the Senate failed to pass the bill over the President's veto by a vote of 47 to 29.

This was the first major Presidential veto to be sustained in the 80th Congress, 2d session. More than half of the southern Senators voted with the President. The New York Times, in a feature article on the front page of its issue of May 22, 1948, by S. A. Tower, noted that the decisive margin was supplied by several Senators from the solid South.

In view of the large number of Senators who participated in the debate, and the clash of opinion concerning the constitutionality of an attempt by Congress to compel an investigating arm of the Government to give it data and reports concerning Presidential appointees, the following summarizes what took place in the Congress.

S. 1004, as passed by the House and the Senate, read as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That section 15 (e) of the Atomic Energy Act of 1946 is amended by inserting at the end thereof the following: "The Senate members of the joint committee, as a committee, hereafter referred to in this subsection (e) as the Senate committee, and independent of the similar power included in the broader authority of the joint committee as specified in the preceding sentence, may, prior to the giving of advice and consent or refusal to advise and consent by the Senate to any appointment by the President under this Act that requires such advice and consent, direct the Federal Bureau of Investigation to investigate the character, associations and loyalty of any such appointee. The Director of the Federal Bureau of Investigation shall cause such investigation to be made and, upon completion thereof, shall report to the Senate committee, in writing, setting out the information developed by such investigation and shall thereafter furnish such amplification or supplementation thereof as the Senate committee may direct."

Senate Report 851, which was submitted by Senator Hickenlooper from the Joint Committee on Atomic Energy, stated that, as it stood prior to its amendment by S. 1004, section 10, paragraph (b) (5) (B) (ii), provided that—

Except as authorized by the Commission in case of emergency, no individual shall be employed by the Commission until the Federal Bureau of Investigation shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual.

However, this provision is interpreted as not being applicable to Presidential appointees to the Atomic Energy Commission.

Paragraph (2) of section 2 (a) provides only that in submitting any nomination to the Senate, the President set forth the experience and qualifications of the nominee.

The report stated the purposes of the bill as follows:

The purpose of the bill is to provide that an investigation be made by the Federal Bureau of Investigation before such person appointed as a member of the Atomic Energy Commission or as General Manager of such Commission takes office.

In justification of the bill, the report stated that while persons employed by the Atomic Energy Commission were covered by the existing Atomic Energy Act, no mandatory investigation by the FBI was required of Presidential appointees. In view of the grave responsibility resulting upon members of the Atomic Energy Commission in the vital field of security, the Joint Committee on Atomic Energy thought that it would be wise to apply to members of the Commission and the General Manager the same investigation procedure applicable to employees of the Commission. The committee, therefore, recommended the enactment of S. 1004.

The President's veto message pointed to *Humphrey's Executor v. United States* (295 U. S. 602, 629), which stated the fundamental necessity of maintaining each of the three general departments free from the control or coercive influence of either of the others. In the opinion of the President, S. 1004 permitted an unwarranted encroachment of the legislative upon the executive branch, since five Senators would be authorized to direct the FBI, a Bureau of the Department of Justice, to make investigations for them. The independence of the executive branch required that it alone have authority over the officers whom he appointed.

Chief Justice Marshall's statement in *Marbury v. Madison* (1 Cranch 137, 164) was also cited by the President for the proposition that in the sphere of political powers and in the exercise of those powers the

President was accountable only to his country in his political character and to his own conscience. Officers whom the President, under the Constitution, was authorized to appoint, performed acts which were really "his acts." No other power could constitutionally control the Executive discretion in the performance of the duties by appointees of the President, even though the judiciary or the legislative branch may have different views from the Executive as to the proper exercise of that discretion.

The veto message also pointed out that the President in the exercise of his constitutional duty of appointment sought to find out all relevant facts about a person nominated to serve as a member of the Atomic Energy Commission. In the exercise of that duty, he had facilities for investigation, including those performed by the Federal Bureau of Investigation. The information thus placed before the President included material which, in the public interest, had to be kept confidential.

The President concluded as follows:

The most reliable information is that which is obtained by the executive branch prior to nomination. This information is frequently of a category which cannot be made public without damage to the national interest. Although I have no desire to keep from Congress information which it should properly have, I must emphasize that the provisions of this bill are completely incompatible with the necessities of the operation of our Government and with the national security.

The Senators who participated in the original debate on the bill were Senator Knowland, who sponsored S. 1004, Senators Pepper, Vandenberg, Hill, Gurney, Johnson of Colorado, Bridges, Hickenlooper, McMahon, Stewart, McKellar, Lucas, Connally, Overton, George, Holland, Magnuson, Hatch, Morse, and Wherry (94 Congressional Record 1766, 1861-1869, 4247-4251, 4301-4311, 6190-6202).

The bill was passed in the Senate on April 12, 1948 (94 Congressional Record 4311).

Following receipt of the veto message Senator Knowland led the attempt to persuade the Senate to pass the bill over the veto. Additional Senators who actively participated in the debate, for or against the bill, were Senators Lucas, Hickenlooper, Smith, Pepper, Taft, Tydings, Cordon, McMahon, Barkley, Wherry, Langer, Hatch, Johnston of South Carolina, Malone, Connally, Donnell, and McFarland (95 Congressional Record 6245, 6247-6264).

All together, 31 Senators participated in the original debate and in the debate to override the veto.

#### (a) *Historical background of S. 1004*

It will be useful in understanding the debate to briefly state the historical background for the bill. The bill had originally been introduced on March 31, 1947, immediately following the debate on the confirmation of the members of the Atomic Energy Commission. Senator Knowland had introduced the bill because there had been no FBI investigation of the members of the Commission and of its General Manager, and there was no power in the Senate committee to have the Federal Bureau of Investigation make such an investigation. Senator Hickenlooper stated that the bill was not directed at present members of the Commission. Senator Knowland wished the bill to become law prior to any new appointments or nominations to the Commission.

which would thereafter come before the Senate (94 Congressional Record 4302).

Senator Hickenlooper brought out that the Atomic Energy Act provided that every employee of the Commission under the General Manager, and every person employed by contractors operating under a contract with the Commission, should be investigated by the Federal Bureau of Investigation prior to such person's clearance for access to restricted data.

Senator Hickenlooper made it clear that the Federal Bureau of Investigation did not pass upon anyone or approve anyone. It investigated the facts as it found them, gathered the information pro and con, and submitted its report to the person or the body required to make the decision.

Finally, Senator Hickenlooper stated that the Senate had no facilities to do an adequate investigating job itself; that it was unthinkable for anyone to argue that the Senate and its committees, who were charged with making investigations, should be denied the use of an able and efficient arm of the Government which lived by authority of the Congress and whose duty it was to serve the public.

The overall duty of the Federal Bureau of Investigation is not to serve the Executive; it is not to serve any particular group. Its basic duty is to serve the public of the United States (94 Congressional Record 4302).

As to the constitutionality of the authority provided by the amendment, Senator Hickenlooper stated that if the Congress could not affirmatively direct the action of an administrative body of Government in a case like this, then there was no regulatory power; there was no power that the Senate could exert over any administrative body after it was once used. He continued:

To carry the argument to its logical conclusion, one might say that under this theory all the Congress can do is to establish an administrative agency, and then not regulate it in any way or prescribe its duties. I submit that if this provision is unconstitutional then every provision in section 15 of the Atomic Energy Act is also unconstitutional so far as that section prescribes the responsibilities of the Atomic Energy Commission or other branches of the Government toward this committee (94 Congressional Record 4303).

Senator Morse spoke briefly against the bill. He believed that it was "clearly unconstitutional." He said:

I care not in what terms of emergency the Senator from California discusses the bill, even the atomic bomb cannot bomb out the Constitution of the United States, so long as we have a country. Our Supreme Court has held many times that no emergency in any way changes the Constitution of the United States.

I wish to say \* \* \* that it is my honest judgment that the effect of this bill is to infringe upon the appointive power of the President of the United States. The Supreme Court is going to pierce the veil of the Senator's bill and to look to the end sought by the bill; and the end sought is to lay down, not the qualifications of an appointee to a particular position—which is within the power of the Senate of the United States—but to dictate to the President of the United States, when he exercises his appointive power, the procedure he shall follow in making the appointment (94 Congressional Record 1807).

Senator Morse added that he thought it was a violation of the principle of the separation of powers and also of the provisions of the Constitution governing appointments by the President, if the Senate dictated to the President the procedure which he was to follow before sending an appointment to the Senate. Finally, Senator Morse added

that if the Congress by legislation made a report of the Federal Bureau of Investigation a condition precedent to an appointment by the President for any office, no matter how important—

\* \* \* we shall hear the criticism arise, beyond the rumble it now is, that the FBI is becoming a Gestapo, and that something must be done to preserve the liberties of the American people from the development of such an organization (94 Congressional Record 1867).

While praising the magnificent job of the Federal Bureau of Investigation in the past, Senator Morse feared for its future if the bill became a law.

Senator Ferguson joined the debate and said that the proposed amendment did not attack the appointing power, and that it dealt only—

\* \* \* with the right of Congress to have the Federal Bureau of Investigation, which is a creature of Congress, perform a function for Congress; and it provides that Congress may use the FBI report as a basis of consideration as to whether or not the nomination of a particular person should be confirmed by the United States Senate (94 Congressional Record 4303).

Senator McMahon answered Senator Ferguson on the constitutional question involved. He stated that the best statement in the cases on the point at issue was to be found in *Kilbourn v. Thompson* (103 U. S. 168, at 190), where the court dwelt on the chief merits of the American system of a written constitution, which divided the powers of Government into three grand departments. The functions appropriate to each of the departments of Government were vested in a separate body of public servants, and the perfection of the American system required that the lines dividing the departments should be properly and clearly defined. Essential to the working of the system, according to the Kilbourn case, was that the persons entrusted with power in one of the branches should not be permitted to encroach upon the powers confided to others (94 Congressional Record 4303). At that point in the debate there was revealed what may perhaps be considered the crux of the argument as to the power of Congress to provide by statute for the utilization of the services, facilities, investigation files, and reports of an executive arm of the Government.

Senator Knowland answered Senator McMahon's quotation from the Kilbourn case. He pointed to the language of the Atomic Energy Act, in the writing of which Senator McMahon had a considerable part.

Paragraph (e) on page 20 of Public Law 585, enacted by the 79th Congress, provides as follows:

The Committee [meaning the Joint Committee on Atomic Energy consisting of Members of the House and the Senate] is authorized to utilize the services, information, facilities, and personnel of the departments and establishments of the Government.

Senator Knowland stated that, in his opinion, there might be in the section just quoted sufficient power for the Joint Committee to get the type of information which the Senate needed. The difficulty arose from the fact that in performing its constitutional duty as the Senate of the United States, the House Members had no part in the function in passing upon Presidential appointees. The Senate Members acted as the Senate section of the Joint Committee.

We want to make it perfectly clear that the powers which we feel the Congress has already given to the Joint Committee shall also vest in the Senate Members

of the committee sitting as the Senate section, when we are endeavoring to carry out our constitutional responsibility of passing upon appointments (94 Congressional Record 4303).

Senator Knowland emphasized that in the field of atomic energy Congress had created an agency with more power than it had given to any other agency in the entire history of the Republic, for the reason that Congress was dealing with an unprecedented force, which, for good or evil, could affect not only the destiny of America but of the world. For that reason, he urged that—

\* \* \* we should not have an iron curtain lowered so that we may not have all the facts which we need in discharging our responsibilities (94 Congressional Record 4303).

Replying to Senator Knowland, Senator McMahon likened himself to a parent who hesitated to find fault with his own child. However, occasional small defects needed pointing out. There was a defect, he felt, in the quoted portion of the Atomic Energy Act which authorized the members of the Joint Committee to utilize the services and facilities of the executive arm of the Government. Senator McMahon stated that, as a lawyer, he would have difficulty—

\* \* \* in defending or attacking that provision. I point out to the Senator that it makes no difference in what unmistakable terms we write a provision in the law, or how vigorously or insistently we say that the executive department shall do this, that, and the other; there is still resort to the Constitution and to the Supreme Court and its decisions. \* \* \*

I do not believe that the Congress can say to the President of the United States, "We are bypassing you. We are not going to talk to you. We are not going to talk to the Attorney General, who is one of your Cabinet officers and is responsible to you. We are going to reach over both of you and tell a bureau chief that he shall do this, that, and the other thing, and report to us." It is my contention that the Constitution will not permit the Congress legally to do such a thing (94 Congressional Record 4303-4304).

Senator Ferguson answered that the question of separation of powers was not involved; that the Senate and the House were policy-making bodies, and that they had a right to obtain the facts in order that they might legislate properly. Likewise, the Senate had a right to obtain facts in order that it might approve or decline to approve nominations of ambassadors and other public officers as provided for in the Constitution.

Senator McMahon replied that Senator Ferguson's remarks were "directly in the face of the law" (94 Congressional Record 4304). He read from Attorney General Jackson's opinion (40 Op. Atty. Gen. 45 (1941)), and continued as follows:

I say to the Senator that much though he might desire an investigatory report on the part of the FBI, if the Attorney General refused to give it, it is my prediction that the Senator would find that the Supreme Court would uphold the right of the Attorney General to decline to produce the report. The cases are too clear to admit of question. The Senator may not like the proposition. He may not like it because he is in the Senate. If he were connected with the executive department he might take another view. But that happens to be the law. What I contend is, when we know it is the law, we ought not to pass a bill which flies directly in the face of constitutional provision (94 Congressional Record 4305).

Senator Ferguson argued that Attorney General Jackson's opinion involved a situation where the executive branch had taken action within its admitted constitutional competence in the field of foreign relations. It did not involve the question of the power of Congress to create an agency such as the Federal Bureau of Investigation and

to confer authority upon that agency to make an investigation for the Congress (94 Congressional Record 4305).

Senator McMahon then presented the cases which supported his constitutional law argument:

To assert, as the Senator from Michigan did, that it would be possible to call upon the director of the subsidiary bureau to produce a report in the face of the constitutional argument that is made in *Marbury v. Madison* (1 Cranch 137, 164, 1803), in the later *Kilbourn* case (103 U. S. 168, 190), in the recent *Meyers* case (272 U. S. 52, 132-133, 134), the *Humphrey's* case (295 U. S. 602, 629-630), and also a Federal Trade Commission case, the title of which escapes me at the moment, is to deny plain English in the reports of those cases (94 Congressional Record 4307).

Senator McMahon concluded by inserting in the record the complete opinion of Attorney General Jackson dated April 30, 1941, and he added these words—

Furthermore, Mr. President—and let this be in the Record—if perchance there should be a change in the Executive at 1600 Pennsylvania Avenue at any time while I sit as a Member of this body, the position I take today will be exactly the position I shall take then upon any attempt to destroy what I regard as a very essential provision of the Constitution. Let me say to Senators who are present that there is no provision of the Constitution the religious observance of which is better calculated to insure justice and liberty to the people of the United States than the provision that judges shall judge, legislators shall legislate, and executives shall execute (94 Congressional Record 4311).

Senator Ferguson concluded the debate for the proponents of the amendment by stating that everyone was familiar with Justice Jackson's opinion which he had rendered when he was Attorney General. Senator Ferguson recalled that the Senate had faced the same issue in the Joint Committee To Investigate the Pearl Harbor Attack.

We were unsuccessful at that time in our efforts to obtain records (94 Congressional Record 4311).

He criticized the fact—

\* \* \* that all the information is not disclosed to the public, nor is it disclosed to the Senate and House. It seems to me that much of the information in the executive branch is withheld in order that it may later be used in the writing of memoirs and similar books. So I think someday soon we should face this issue of the right of Congress to inquire and to ascertain what is taking place, so that we may legislate properly.

I hope we may get this issue into the courts very soon, and that there may be a decision by the Supreme Court upon the issues. Therefore, I think it is well to have the opinion by Mr. Justice Jackson in the Record (94 Congressional Record 4311).

The bill passed the Senate on April 12, 1948 (94 Congressional Record 4311). On May 15 the President returned the bill without his approval, and with a veto message (94 Congressional Record 5895).

On May 20 and 21, 1948, there followed what the New York Times has described as "2 full days of sharp and acrimonious debate," on Senator Knowland's motion to override the veto. Nineteen Senators participated in the second debate.

(b) *Senate debate to override the veto*

At the start of the debate, Senators Knowland and Hickenlooper stated that they had been shocked to learn from the President and the Director of the Federal Bureau of Investigation, after the Senate had confirmed the appointment of the Chairman and members of the Atomic Energy Commission, that the President had had no investi-

gation made by the Federal Bureau of Investigation of the Chairman and members of the Commission.

Senator Knowland once again urged that in the specialized field of atomic energy, and in that field alone, the Senate should have access to investigations and reports made by the Federal Bureau of Investigation of members of the Commission and of the Chairman thereof.

Senator Pepper observed that the result of the proposed bill would be to make the Department of Justice—

\* \* \* an agent and a functionary of the Committee on Atomic Energy, a subsidy of the Senate itself (94 Congressional Record 6194).

Logically and legally, if one committee of the Senate had that power, every other committee of the Senate should have similar power, as well as every committee of the House, because the Constitution did not recognize the Atomic Energy Commission as being in a class by itself.

Senator Taft took a hand in the debate as follows: He stated that in confirming Presidential appointees the Senate was not performing a legislative duty. The Senate was acting as a part of the executive department—

\* \* \* and participating in an executive function \* \* \* (94 Congressional Record 6194).

Senator Taft said that there were no closed compartments in the Government. The Senate created many commissions which had legislative power, judicial power, or mixed legislative and judicial powers.

There are no partitions between the various departments (94 Congressional Record 6194).

Since the Senate was performing, in Senator Taft's opinion, exactly the same function which the President performs when he nominates someone, namely, an executive function, it seemed reasonable to him that whatever agency served the President in performing that function should also serve the Senate when it performed a similar function. As to the argument that there was an infringement on the executive department by the legislative branch, Senator Taft felt that the Senate was entitled to the same advice which the President received from an agency which happened to be operating in that field. He concluded as follows:

If that is not good constitutional law, and if the Congress were to establish its own bureau of investigation, that would be a pure duplication of functions (94 Congressional Record 6194).

Senator Pepper answered Senator Taft by first assuming that Senator Taft was correct in his theory. He carried the logic of Senator Taft's argument into the treaty-making field. Suppose, he said, that a treaty is negotiated by the President and submitted to the Senate—

Would the Senator from Ohio claim that we have the right to request the disclosure of all the confidential information which the President may have obtained in respect to the negotiation of a treaty, because our ratification of the treaty is required in the exercise of the coordinate function of the Senate (94 Congressional Record 6195).

Mr. TAFT. My answer is "Yes." I think we are entitled to every bit of such information (94 Congressional Record 6195).

Mr. PEPPER. I daresay that history will not confirm insistence upon such right of inquiry (*ibid.*).

Senator Lucas stated that he would never admit that the Senate had no capacity or power to make its own investigation of the members of the Commission prior to approving Presidential appointees. He felt that the power to make investigations (which the Senate felt were essential to the exercise of its constitutional duties) should remain in the Senate where they belonged and should not be transferred to an agency such as the Federal Bureau of Investigation, which was a part of the executive branch.

Senator McMahon then took a hand in the debate and pointed out that the Senate appeared to be proceeding on the theory—

\* \* \* that the legislative branch of the Government is supreme over the executive branch of the Government. That is not so. The executive and legislative branches of the Government are coequal and coordinate. Of course, this contest we are talking about now has been going on for 150 years. It has been tested time and time again. If the Executive were to give up any of the power he legally has under the Constitution, he would be betraying the people of the United States whom he also serves in his constitutional capacity (94 Congressional Record 6199).

Senator Hickenlooper stated that he agreed about executive supremacy in certain areas, but he did not agree—

\* \* \* that whenever the Congress creates an executive agency it cannot modify, change, or direct its actions when it is acting for the Congress or the people (94 Congressional Record 6199).

Senator Ferguson answered Senator McMahon by stating that Congress could pass a law authorizing the President—

\* \* \* to use the clerks of a committee. That is the test here. We are passing this law authorizing the Congress to use his aids. We could pass a law to authorize the President to use the aids employed by the Congress (94 Congressional Record 6199).

Senator Barkley answered briefly, as follows:

There is quite a difference. We are not proposing here to authorize a committee to use the facts which are gathered by an executive agency or appointee. We are authorizing a committee to command that executive appointees shall be the servants of a committee, and, if we can do that with respect to the Atomic Energy Commission, we can do it with respect to postmasters, district attorneys, United States judges, and even members of the Cabinet, because they are creatures of the Congress. There is not a Cabinet member whose office is not created by the Congress, and if we could take this action with regard to the Atomic Energy Commission—which has no particular magic, so far as the law is concerned—we could provide that the FBI could be the agent of the Committee on the Judiciary to investigate every judicial appointment sent to the Senate by the President of the United States. Does the Senator deny that? (94 Congressional Record 6199.)

Senator Tydings stated that Congress could use the Federal Bureau of Investigation, could use 4,000 agencies, but had—

\* \* \* to use them through the executive branch. That is how the 300 agencies to which the Senator [Hickenlooper] referred are used. They are used through the executive branch of the Government (94 Congressional Record 6199).

Senator Hatch stated that he was concerned with a philosophy of Government involved in measures of the kind proposed by S. 1004. He stated that—

\* \* \* throughout all the world there is a most dangerous trend and tendency to elevate, exaggerate, and give absolute control to agencies of government called police agencies (94 Congressional Record 6254).

Senator Hatch granted that Mr. Hoover and the Federal Bureau of Investigation had a remarkable reputation for ability, but he objected

to broadening the duties of the FBI so as to include the performance by it of the duties and responsibilities of the Senators. It was the duty of the Senate to make its own investigations and not to turn the making of investigations over to the FBI "and thus giving control to the police, just as the people of Czechoslovakia did."

Oh, Mr. President, these are not idle words. I am arguing for the presentation of the fundamental principles upon which this Government is founded and which, if lost, would mean the destruction of our Government and the liberties of our citizens (94 Congressional Record 6254).

Senator Ferguson pointed to title 5, United States Code, section 105a, and asked why the House Committee on Expenditures in the Executive Departments had not been using that section to obtain certain information from the executive departments. He also stated that on two occasions, in his presence, and while President Truman was a Senator, he signed a subpoena directed to the Attorney General to bring to the committee information in the hands of the Attorney General, and in each case the Attorney General had complied. He thought that, in order to avoid section 105a, information and papers from the executive bureaus had been placed in the personal custody of the President of the United States (94 Congressional Record 6257). Senator Ferguson disagreed that there was any desire to create a Gestapo through the use of the Federal Bureau of Investigation. He pointed to the fact that the FBI was not only doing work for the executive branch, but was also doing work for the judicial branch, since the work of the FBI was being used in that branch of the Government. His closing remarks on the effect of the bill were these: After an investigation had been made by the Attorney General—after the appointments by the President had come to the Senate, then, and only then, was the Joint Committee on Atomic Energy empowered to use an agency of the executive branch to make an investigation of the appointees for the Joint Committee. He urged the Senate to override the veto (94 Congressional Record 6257).

Senator McMahon concluded the debate against the motion to override. If the President could refuse to supply confidential papers and documents in his possession, he certainly could see to it that an arm of the executive branch did not furnish the papers, at the behest of the legislative branch, which the latter had no right to have in the first place. He urged that, in the judgment of the Attorney General and of every single one of his predecessors, and in the judgment of the Director of the Federal Bureau of Investigation, the release of reports to congressional committees by the FBI would lessen the effectiveness of the Federal Bureau of Investigation.

Senator McMahon emphasized that the issue was not new; that there had been a long struggle, beginning with George Washington's time and continuing from Washington to Jefferson, to Jackson, to Buchanan, to Polk, to Andrew Johnson, to Grover Cleveland, to Wilson, Coolidge, and Franklin Roosevelt.

Senator Knowland, in concluding the debate, recognized that there was an honest difference of opinion as to constitutionality. He believed that the bill was a constitutional use of power by the Congress. However, he felt that there was only one way in which that question could finally be determined—

\* \* \* and that is for the United States Supreme Court to pass upon the question if the law is ever challenged (94 Congressional Record 6263).

Concerning the objection that the bill would confer upon the Joint Committee the power to seize any existing records of the President, he stated that all the bill provided was that, in this limited field, in the unprecedented field of atomic power, and only in that field, the Senate should have the right, in exercising its constitutional responsibility of confirming or refusing to confirm, to call upon one of the agencies of the Government created by the Congress to obtain information which the Senate needed. Finally, he urged upon the Congress the example in Canada, which was faced with a very serious spy situation. Russia had sent agents into Canada, and Russian agents had penetrated high places in the Government of Canada. The Russians had stolen a sample of uranium. They had stolen other information in the atomic field. It was, therefore, desirable and necessary "to try to close the loophole" (94 Congressional Record 6263).

Senator McMahon made a brief reply, which closed the debate. The situation before the Senate highlighted the Biblical injunction—

\* \* \* that man cannot have two masters. He cannot serve both the President of the United States and the Senate members of the Joint Committee on Atomic Energy (94 Congressional Record C263).

He agreed that Congress could establish bureaus, could abolish bureaus, could appropriate for departments or deprive them of appropriations—

But we cannot conduct them in their daily operations. That is what we would attempt to do if we were to enact this bill (94 Congressional Record 6263).

And as to the Canadian spy case, Senator McMahon pointed out that if the bill were enacted the Congress would tear down the efficiency of the Federal Bureau of Investigation and deprive it of the ability to detect the very kind of thing which Senator Knowland had pointed out to the Senate.

#### (c) *Summary of debate to override veto*

Summarizing the debate, those who urged the Senate to override the veto stressed the unprecedented problems posed by the competition between the United States and Russia in atomic research and development. The atom raised new problems of defense for the United States. Congress was faced with these problems. The Atomic Energy Commission was given unprecedented authority. Its members and General Manager had to be persons of outstanding qualifications and unquestioned loyalty to the Government and its institutions. The Senate was entitled to every particle of available information concerning Presidential appointees to the Commission. Therefore, the times called for close cooperation between the two branches of the Government, the executive and the legislative. Practical necessity favored a power in the Senate to call upon the executive branch or an arm thereof, the Federal Bureau of Investigation, to furnish the Senate with its investigative reports on Presidential nominees to the Atomic Energy Commission. In that way the Senate could vote intelligently to confirm or reject such nominees.

As to the constitutionality of the bill, since Congress created departments and bureaus of the executive branch, Congress could direct a bureau of the Government to furnish it with information in this one field, namely, the atomic energy field. To call upon the Executive to furnish the Senate with information on nominees acquired prior to

submission of the names for approval to the Senate was not a trespass upon Executive power or authority, nor an infringement thereof.

On the other side, those who voted to sustain the President's veto cited the precedents, from Washington to the present time, over a period of more than 150 years, where both Republican and Democratic Presidents had been obliged in certain situations affecting the country's welfare to deny to the Congress and its committees investigation reports. While cooperation between all branches of the Government was ideal and desirable, each of the three branches was constitutionally supreme in its own sphere of activity. No one branch under the Constitution could dominate or dictate to another branch in a matter which was peculiarly the business of the other branch. The business of gathering information by the Federal Bureau of Investigation was that of the Executive, under the direction of the Attorney General, who alone could determine how to evaluate or to use the information after it was gathered. The Senate had its own ways and means of securing information. Nor was it lacking in power to make any investigation it wished of a nominee. While it might appear that the Senate was seeking to utilize an executive arm of the Government to help it reach a conclusion on confirmation or rejection, the precedent thus established might well lead ultimately to the domination of the Executive by the Congress.

The debate was full and interesting. It was participated in by almost a third of the 96 Senators. Apparently the Senate was unwilling and was not yet ready to abandon the authority of the precedents accumulated in a period of over 150 years, namely, that the President and the heads of departments need not furnish investigation reports if in their judgment it is against the public interest to do so.

#### CONCLUSIONS

In part I are recited the details of 14 refusals of information or documents by the executive branch of the Government to the Congress over a period of approximately 5 years.

The most celebrated incident of 1948 was the Condon incident. It led to the promulgation of President Truman's directive of March 13, 1948. The statement of policy for refusing loyalty files and reports of Federal personnel contained in that directive has formed the basis for refusals of information to at least three congressional investigating committees, in the opinion of Professor McGahey.<sup>50</sup>

The outstanding incident of 1950 related to the State Department loyalty files. That was the investigation by a subcommittee of the Senate Foreign Relations Committee under a Senate resolution which authorized the committee to procure original investigative files concerning the loyalty of some 81 persons employed in the State Department. While Senator Wherry pointed to section 134 of the Reorganization Act as the source of power in a Senate committee to compel production by subpoena of investigation and other files in the executive departments, Senator Saltonstall observed that the Senate should not fool itself into thinking that section 134 was directed to the executive department of the Government.

<sup>50</sup> Congressional Investigations: Historical Development, by M. N. McGahey, 18 University of Chicago Law Review, 425, 438 (1950-51).

Senator Tydings, chairman of the Senate subcommittee loyalty investigation in the State Department, disclosed the struggle which went on in the executive branch of the Government concerning the files. Although the President was desirous of showing the files to the committee, Mr. Hoover, Director of the Federal Bureau of Investigation, strenuously objected and won his point, at least temporarily.

The most interesting part of the State Department loyalty episode and the subcommittee investigation was this: the three members of the majority and Senator Lodge's individual report demonstrated that although the President finally yielded and permitted the subcommittee to see the FBI files, under stringent limitations imposed by the White House, the files were in such an unfinished state that they revealed nothing definite or conclusive, thus more than sustaining the judgment of the Director of the Federal Bureau of Investigation. More importantly, the decisions on loyalty were not made solely on the basis of raw files, but after hearings.

The outstanding incident of 1951 was the refusal of General Bradley to tell to a combined Senate Foreign Relations and Armed Services Committee what he had heard discussed at the April 6, 1951, meeting between the President and his advisers. A decision was reached at that meeting to recall General MacArthur from the Far East command. By a vote of 18 to 8 the combined committee sustained the ruling of the Democratic chairman, Senator Richard B. Russell, that General Bradley was right in declining to breach a confidential relationship with the President. Senators from both parties voted to sustain and to reverse Senator Russell's ruling.

Chairman Russell read for the record a formal opinion. In it he stated that no decision in any court of which he had knowledge had held that a witness who was an agent of the President, or a witness who occupied a confidential relationship with him, or a witness who was head of an executive department, could be compelled by the courts to produce documentary material relating to the exercise of an Executive function, without the President's consent. Therefore, a private conversation between the President and an adviser stood on an even higher plane of immunity.

The outstanding incident of 1952 was the John Carter Vincent case. Mr. Vincent appeared before the Senate Internal Security Subcommittee. He joined the subcommittee in requesting that the files which the committee wanted should be shown to it. President Truman instructed the Secretary of State not to show the files, because he feared that there would be created a serious danger of intimidation and demoralization of the Foreign Service personnel, if the reports and views of the Foreign Service officers were made available to the committees of Congress.

The discussion of the court decisions, in part II, noted in particular those cases of both a criminal and civil nature which reached the United States Supreme Court in the past 5 years. Also noted were the Coplon trials and decisions in the District of Columbia, and in the district court and the circuit court of appeals in New York. It appears that in criminal cases the Government will be obliged to make known to a defendant on trial for his life or liberty the evidentiary facts upon which the Government proposes to base a conviction. The Supreme Court has held, however, that the rationale of the criminal cases has no application in a civil case, and that in a civil suit for

damages under the Tort Claims Act, when the head of a department has asserted a formal claim of privilege, the court must yield to it where a reasonably strong showing of necessity has been made. Such a rule would certainly be applied by the Supreme Court where the data sought in the civil suit involved secrets closely allied to our national defense or military advantage or necessity.

The discussion of the Constitution and the statutes creating the executive departments, in part III, pointed to the origin of the regulations promulgated by the executive departments governing the disclosure of records. It was shown that the Constitution made a radical change from the form of government that had prevailed under the Continental Congress. The framers and those who sat in the First Congress meant to give no power to the Congress, under the Constitution, to see secret data in the executive departments against the wishes of the President. James Madison, who "is rightly called the 'Father of the Constitution,'"<sup>81</sup> is frequently cited by the United States Supreme Court for the authoritativeness of his views on the meaning of the Constitution.<sup>82</sup> It was Madison who first upheld the right of the President to keep from the Congress matters which, in the judgment of the President, required secrecy. That was Madison's view, despite the fact that he was one of those in the House of Representatives who had urged that President Washington show to the House certain correspondence relating to the Jay Treaty.

During the past 11 years, two executive departments were created, the Department of Defense and the Department of Health, Education, and Welfare. Both of those Departments partake of the same uniform system and function which is a characteristic of the other eight executive departments—to enable the President to perform his duties under the Constitution as the Chief Executive Officer of the Nation.<sup>83</sup>

In 1814, while he was President of the United States, Madison issued rules and instructions for the Department of War. He stated that the Secretary of War, like the heads of the other departments, both by statute and by the structure of the Constitution, acted under the authority and was subject to the decisions and instructions of the President; that in cases of a higher character and importance—

involving necessarily, and in the public understanding, a just responsibility of the President, the acts of the Department ought to be either prescribed by him or preceded by his sanction.<sup>84</sup>

Senator Russell, as chairman of a combined Senate committee, gave his views in 1951 concerning the National Security Act, which provided for the establishment, within the Department of Defense, of the Joint Chiefs of Staff. Quoting from the provision that the Joint Chiefs of Staff should perform certain duties under the authority and direction of the President, including the preparation of strategic plans relating to the defense of the country, Senator Russell ruled that under the statute there was created by the act a confidential relationship of the

<sup>81</sup> 18 *The Encyclopedia Americana*, p. 99 (1944 edition).

<sup>82</sup> *McGrain v. Daugherty*, 273 U. S. at p. 161 (1926) and *Myers v. U. S.*, 272 U. S. 52 at p. 174 (1926), which held: "• • • This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions. • • •" (p. 175).

<sup>83</sup> See the earlier study, p. 71; hearings, *supra*, first footnote, at p. 2929; committee print, *supra*, first footnote, at p. 50.

<sup>84</sup> 3 *Madison, Letters and Other Writings*, p. 417.

highest order between the Chairman of the Joint Chiefs of Staff and the President of the United States. He asserted that the future freedom and security of the country depended as much upon the maintenance of the delicate checks and balances designed by the Founding Fathers, as upon the armies, navies, and the fleets of airplanes; that among the most valuable of the checks and balances devised were those which prevented one branch of the Government from imposing its will upon the other.

With respect to the powers of the Senate in the field of foreign relations, reference has been made to Jefferson's classic opinion, rendered when he was Secretary of State, in 1790:

The transaction of business with foreign nations "is executive altogether: it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly; \* \* \*."

A review of the statutes designed to compel the testimony of witnesses and the production of records in congressional investigations, in part IV, shows that there is no statute which compels disclosure of information or the production of documents by executive officials, against the wishes of the President or the head of a department.

In 1948, the House made a strenuous effort to pass House Joint Resolution 342, which would have directed all executive departments and agencies of the Government to make such information available to the Congress. While the resolution passed the House, it never reached the Senate.

The most serious effort which Congress made to compel the production of documents, was in connection with its attempt to amend the Atomic Energy Act of 1946, so as to provide for an FBI investigation and report to a Senate committee concerning presidential appointees to the Atomic Energy Commission. The 80th Congress passed S. 1004, but the President vetoed the bill, on the ground that it would have permitted an unwarranted encroachment of the legislative upon the executive branch.

Concerning the constitutionality of the bill, those who were in favor of overriding the President's veto argued that since Congress created departments and bureaus of the executive branch, it could command a single bureau of the Government to furnish it with information in the one field of atomic energy. Those who voted to sustain the President's veto cited the precedents, from Washington to the present time, where both Republican and Democratic Presidents had been obliged to deny to the Congress and its committee investigation reports. They further urged that the gathering of information by the Federal Bureau of Investigation was an executive function, to be performed under the direction of the Attorney General, who alone could determine how to evaluate or to use the information after it was gathered.

Almost a third of the 96 Senators participated in the Senate debate prior to and after receipt of the veto message. The Senate failed to override the veto.

*United States v. Rumely*, decided by the United States Supreme Court in March 1953, is an illustration of a House attempt, by resolution, to compel a private individual to give testimony concerning matters which were held to be protected by the first amendment. Five members of the Court, without going into the question of constitutionality, held that the committee of the House exceeded its powers

under the resolution when it sought to find out from Rumely the names of those who made bulk purchases of books for distribution. The concurring opinion of Justices Douglas and Black held that Congress could not by law compel the kind of testimony which the committee was authorized to obtain by the resolution, since the power of investigation was limited. Inquiry into personal and private affairs was precluded.

"And so is any matter in respect to which no valid legislation could be had".<sup>85</sup>

It may be reasoned from the Rumely decision that if Congress were to pass a law, over the President's veto, compelling the heads of departments to yield papers or information to it, despite the President's wishes, that it would be an unconstitutional assertion of power which the President might choose to ignore, or to test in the courts. Such a test has thus far been avoided in our history.

A survey of the editorial views of newspapers in the United States has brought convincing proof that the President and the heads of departments may expect overwhelming support whenever an issue arises concerning the refusal of the Executive to furnish FBI files or other files of an investigative nature to the Congress.

Thus, the New York Times on March 25, 1953, termed the attack on Mr. Bohlen—

an attack on the integrity of the executive branch; and it is also, another characteristic effort of a small but extremist group of Senators to humiliate the administration \* \* \*

It pointed out that unscrupulous persons could make political use of raw personnel files and for that reason it regretted that Senator Taft—

with the best will in the world, thought it necessary to suggest and the administration to accept the proposal that two selected Senators have a look at a summary of the "raw file" in order to appease the extremists who are clamoring for more.

The New York Herald Tribune expressed substantially the same opinion.<sup>86</sup>

Similarly, the Providence Journal and the Evening Bulletin on February 9, 1953, backed the Department of State and the Federal Bureau of Investigation who—

very properly acting under division of powers refused to open their files for the legislators. They were fortified in their position by security reasons and by the President's stand upholding them.

Attorney General Brownell, after referring to refusals by Presidents Washington and Theodore Roosevelt of confidential information which was sought by the committees of the House and Senate, respectively, has recently stated the position of the Department of Justice:

Thus, as a matter of principle, the personnel files of its employees are the exclusively responsibility of the executive branch of the Government, to be made available as the public good, as the first President rules, might be served. Where loyalty or security is involved, there are additional reasons of a most practical nature, particularly where FBI reports are involved. \* \* \*<sup>87</sup>

The Attorney General quoted Secretary of State Dulles to the effect that the executive branch of the Government did not consider that

<sup>85</sup> See 345 U. S. 58.

<sup>86</sup> See editorial page, March 24, 1953.

<sup>87</sup> See Secrecy of FBI Files, remarks of Senator Williams, of Delaware, April 8, 1953, 99th Congressional Record, 83d Cong., 1st sess., p. A1919, who quoted an interview and statement which appeared in Newsweek magazine, April 6, 1953, p. 24, under the title: "Attorney General Brownell: What and Why of the Files."

permitting Senators Taft and Sparkman, of the Senate Foreign Relations Committee, to look at a summary of an FBI report on Mr. Bohlez would constitute a precedent, but rather a desire to recognize the bipartisan approach to foreign-policy matters. The Attorney General continued:

How important is this whole question of inviolability of personnel files in the pattern of the American system of protecting the individual?

It is of extreme importance, not only to the individual, but for the general welfare of all our people. Every American has a right to have confidence in his Government and, in addition, the confidence of his Government. This is of greater import in this generation than in any other, because the underworld empires of subversion are of this generation. It is better for this Nation for any person having facts, fears, or suspicions which bear upon the security of the Nation to be able to lay these before his Government with the confidence that they will be carefully sifted and investigated where necessary by the trained and experienced special agents of the FBI, rather than be tempted to discuss his suspicions with others and start a chain reaction of the projection of rumors.

The views of Attorney General Brownell can find no better support than the pithy and clear statement to President Washington of Edmund Randolph, the first Attorney General. It appears that the President had made certain documents available to the Senate, but had withheld others, "for public consideration." Madison wondered whether a certain letter could not have been shown. When Attorney General Randolph informed him that it ought not to be promulgated, "he [Madison] admitted, that the discretion of the President was always to be the guide."<sup>88</sup>

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<sup>88</sup> See 33 Writings of Washington, John C. Fitzpatrick, editor (printed April 1940, p. 282, footnote 8).

