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REMARKS

OF

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As you know, a Subcommittee of the Senate Foreign Relations Committee has been conducting hearings on charges that persons who are disloyal to the United States are or have been employed in the Department of State. In the course of those hearings, the question has arisen whether there should be released to the Committee the confidential loyalty files relating to person against whom charges have been made. This problem is obviously of great public importance. It has been dealt with at great length on the radio and in the press, and many persons have spoken to me about it. I am satisfied, however, that relatively few people have a real understanding of the important and fundamental issues involved. It is for that reason that I thought I would talk to you briefly about this problem tonight.

Some people have said to me that, in their opinion, the Senate Committee has no right to ask for those files. Some of these people apparently believe that this is the first time a committee of the Congress has asked the executive branch of the Government to furnish it with information which the executive branch has in its possession. This, of course, is not so. Day in and day out the executive departments and agencies provide the Congress with reports, information, and records relating to the operations of the Government. It is an everyday occurrence for Government officials to testify before congressional committees. That is the manner in which our form of government functions--in a spirit of cooperation between the branches of our Government. The mere fact that files have been requested is nothing novel.

Other people have stated to me that if the Senate Committee wants the files, it ought to have them--if the individuals involved are innocent, the files ought to be made available and that would end the matter. Furthermore, they say, the executive branch of the Government is always reporting to congressional committees and is always supplying them with information. The

executive branch, according to this reasoning, has no power to refuse any information in its possession which the lawmaking branch of the Government desires. These people have the impression that this is probably the first time that a congressional request for files, papers, or other information is not being readily complied with. This, too, is not so.

Last Monday, Mr. J. Edgar Hoover, the Director of the Federal Bureau of Investigation, and I had the privilege of appearing before the Senate Subcommittee, and, together, we pointed out what we thought were the real problems involved in the controversy over the release of loyalty files. I reviewed for the Committee the constitutional history of the problem. It is an interesting story, and I would like to outline it to you. Many of you will undoubtedly be surprised to learn that the history goes back, not five or ten or fifty years, but indeed to the administration of our first President.

In March of 1792, the House of Representatives adopted a resolution establishing a Committee to inquire into the causes of the failure of the expedition under Major General St. Clair, and empowering that Committee to call for such papers and records as might be necessary to assist the Committee in its inquiries. The House based its right to investigate on its control over the expenditure of public money. When the Committee asked the President for the papers relating to the campaign, President Washington called a meeting of his Cabinet. Present were Thomas Jefferson, Secretary of State, Alexander Hamilton, Secretary of the Treasury, Henry Knox, Secretary of War, and Edmond Randolph, the Attorney General. The President stated that he had called his Cabinet together because this was the first demand on the Executive for papers within his control and he desired that insofar as the action taken would constitute a precedent, it should be rightly

conducted. President Washington readily admitted that he had no doubt of the propriety of what the House was doing, but he did conceive that there might be papers of so secret a nature that they ought not be given up. The President and his Cabinet came to the unanimous conclusion that the Executive ought to communicate only such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public.

The precedent there set by President Washington and his Cabinet was followed again in 1796 when he refused to comply with a resolution of the House of Representatives which requested him to lay before the House a copy of the instructions to the United States Minister who negotiated a treaty with Great Britain, together with the correspondence and documents relating to that treaty. In declining to comply, President Washington stated: "As it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the various departments should be preserved, a just regard to the Constitution and to the duty of my office ***forbids a compliance with your request."

Later, our second President, Thomas Jefferson, refused to allow two members of his Cabinet to supply documents at the trial of Aaron Burr. In 1825, President Monroe declined to comply with a request of the House of Representatives to transmit to the House certain documents relating to the conduct of naval officers. In 1833, President Jackson refused to comply with a Senate request that he communicate to it a copy of a paper purported to have been read by him to the heads of the executive departments relating to the removal of the deposits of public money from the Bank of the United States.

In 1835, President Jackson declined to comply with a Senate resolution requesting him to communicate charges which had been made to him against the official conduct of Gideon Fitz, the Surveyor-General, and which caused his removal from office. The resolution stated that the requested information was necessary in connection with the action the Senate proposed to take on the nomination of a successor to Fitz, and in connection with the Senate investigation then in progress relating to frauds in the sales of public lands. President Jackson stated that in his judgment the information related to subjects exclusively belonging to the executive departments, and the request encroached on the constitutional powers of the Executive. In 1886, President Cleveland supported his Attorney General's refusal to comply with a Senate resolution calling for documents and papers relating to the removal of a district attorney. Similarly, in 1843, a resolution of the House of Representatives called upon the Secretary of War to communicate to the House the reports made to the War Department by Lt. Col. Hitchcock relative to the affairs of the Cherokee Indians, together with all information communicated by him concerning the frauds which he had been charged to investigate. The Secretary of War advised the House that he could not communicate information which Col. Hitchcock had obtained in confidence, because it would be grossly unjust to the persons who had given the information. The House, however, claimed the right to demand from the Executive and heads of departments such information as may be in their possession relating to subjects of deliberations of the House. President Tyler, in a message dated January 31, 1843, said in part:

"And although information comes through a proper channel to an executive officer, it may often be of a character to forbid its being made public. The officer charged with a confidential inquiry, and who reports its result under the pledge of confidence which his appointment implies, ought not to be exposed individually to the resentment of those whose conduct may be impugned by the information he collects. The knowledge that such is to be the consequence will inevitably prevent the performances of duties of that character, and thus the Government will be deprived of an important means of investigating the conduct of its agents."

President Tyler also declined to comply with a resolution of the House of Representatives which called upon him and the heads of departments to furnish information regarding such members of the 26th and 27th Congresses as had applied for office in the executive branch. In so refusing, President Tyler stated:

"Applications for office are in their very nature confidential, and if the reasons assigned for such applications or the names of the applicants were communicated, not only would such implied confidence be wantonly violated, but, in addition, it is quite obvious that a mass of vague, incoherent, and personal matter would be made public at a vast consumption of time, money, and trouble without accomplishing or tending in any manner to accomplish, as it appears to me, any useful object connected with a sound and constitutional administration of the Government in any of its branches.

"In my judgment a compliance with the resolution which has been transmitted to me would be a surrender of duties and powers which the Constitution has conferred exclusively on the Executive, and therefore such compliance can not be made by me nor by the heads of Departments by my direction."

These are only a few of the precedents to be found in the constitutional history of our country; many more could be referred to. I should like to mention to you particularly, because of its pertinence, the refusal, in 1941, of Attorney General Jackson, at the direction of President Roosevelt, to furnish the Chairman of the House Committee on Naval Affairs with certain reports of the Federal Bureau of Investigation. The reasons given by Attorney General Jackson for his refusal are worth repeating here;

"Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

"Disclosure of the reports at this particular time would also prejudice the national defense and be of aid and comfort to the very subversive elements against which you wish to protect the country. For this reason we have made extraordinary efforts to see that the results of counter-espionage activities and intelligence activities of this Department involving those elements are kept within the fewest possible hands. A catalogue of persons under investigation or suspicion, and what we know about them,

would be of inestimable service to foreign agencies; and information which could be so used cannot be too closely guarded.

"Moreover, disclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants--sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.

"Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation."

Almost every President has found it necessary at some time during his administration to decline, for reasons of public policy to furnish confidential papers to congressional committees. This historical precedent is so well established that the principle is no longer open to question. The courts have recognized this constitutional prerogative of the Executive and the great constitutional scholars uniformly agree that it is for the President to determine what papers and information must be retained in

confidence in the public interest. One of the greatest of these scholars, William Howard Taft, following his term as President and prior to his appointment as Chief Justice summarized the situation succinctly and accurately when he wrote in his book, entitled The Chief Magistrate:

> "The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest."

Indeed, the same view has been held even in the legislative branch of the Government. In 1879, by resolution of the House of Representatives, the Committee on Expenditures in the State Department was in charge of an investigation of the official conduct of George F. Seward, a former consul-general of the United States in China. In the course of the investigation, the Committee served a subpoena duces tecum on Seward commanding him to produce before the Committee the books kept by him while consul-general. Upon Seward's refusal to produce the books, the matter was referred to the House Judiciary Committee. In a report the Judiciary Committee had the following significant remarks to make with respect to the matter (H. Rept. 141, 45th Cong., 1st sess., pp. 3-4):

"* * * But it may be asked, cannot the House direct a subpoena to any executive officer of the departments to produce any books actually in his possession in the course of official duty, and bring them before the House for the purpose of information or to aid an inquiry? Certainly that can be done, and, in proper cases, ought to be done; but in the contemplation of law, under our theory of government, all the records of the executive departments are under the control of the President of the United States; and although the House sometimes sends resolutions to a head of a department to produce such books or papers, yet it is conceived that, in any doubtful case, no head of department would bring before a committee of the House any of the records of his office without permission of, or consultation with his superior, the President of the United States; and all resolutions directed to the President of the United States to produce papers within the control of the Executive, if properly drawn, contain a clause, 'if in his judgment not inconsistent with the public interest.' And whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either House of Congress as either House of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

"The highest exercise of this power of calling for documents, perhaps, would be, in the course of justice, by the courts of the United States, and the House could not for one moment permit its journals to be taken from its possession by one of its assistant clerks and carried into a court in obedience to a subpoena duly issued by the court.

"The mischief of the House calling for documents might easily be a very great one. Suppose the President is engaged in a negotiation with a foreign government, one of a most delicate character, upon which peace or war may depend, and which it is vitally necessary to keep secret; must he, at the call of the House, or of any committee of the House, spread upon its records such state secrets to the detriment of the country? Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interest."

The reference in the above report to the refusal of the House to permit its journals to be taken from its possession in obedience to a court subpoena has proved to be an accurate prophecy. The position taken by the House Judiciary Committee in the Seward case remains the position of the House today. The House has recently so ruled in connection with subpoenas issued by the District Court of the United States for the District of Columbia directed to the Clerk of the House of representatives in the case of United States v. Christoffel.

The foregoing historical survey discloses that the problem of what documents the President may refuse to deliver to Congress is not a new one. It first arose in the administration of our first President. It has recurred ever since. The principle is now settled beyond any doubt, that it is the President who has the final authority to determine what papers in the executive branch may be delivered to the Congress and what papers will be denied to it in the public interest. As history shows, the question arises in a variety of circumstances and each decision must be made in light of the particular facts. The most important fact of all is, of course, the nature of the papers requested.

With this background in mind, we are better able to appreciate what is involved in the situation that is being publicized today. What are the documents that the Senate Committee desires? What are the issues involved in such documents being made available?

As you know, by Executive Order 9835, the President on March 21, 1947, established the Employee Loyalty Program to insure that employees and officials in the executive branch of the Government were completely loyal to the United States. It is unnecessary that I detail for you here how the Loyalty Program operates. Suffice it to say that, in general, an investigation is made concerning the loyalty of employees in the executive branch, and persons found to be disloyal are discharged from the Government service. The FBI conducts the investigations under the Loyalty Program and makes reports on those investigations available to the Executive departments and agencies concerned. In essence, therefore, information in loyalty files is information contained in FBI reports.

In March of 1948, the President issued a directive to all officers and employees in the Executive branch of the Government relating to the Employee Loyalty Program. That directive stated:

"The efficient and just administration of the Employee Loyalty Program, under Executive Order No. 9835 of March 21, 1947, requires that reports, records, and files relative to the program be preserved in strict confidence. This is necessary in the interest of our national security and welfare, to preserve the confidential character and sources of information furnished, and to protect Government personnel against the dissemination of unfounded or disproved allegations. It is necessary also in order to insure the fair and just disposition of loyalty cases."

All employees and officers of the Executive branch of the Government were forbidden by the President's directive to disclose the contents of any loyalty file, even in response to a subpoena.

These are the files that the Senate Committee is seeking to obtain -- the very files which the President had previously determined should be retained in the strictest confidence. It must be remembered that when the President in 1948 determined that these files were to be kept secret, he did so after giving careful thought to all the considerations of public policy which were involved. It must be further emphasized that the President adopted his policy long before the Subcommittee which now seeks the files was even in existence.

Sound reasons exist for keeping these files secret. I have already referred to Attorney General Jackson's opinion setting forth many of these reasons. They were specifically referred to by the President when he adopted his directive of March 1948 with respect to the files here involved.

I am sure that you would be interested in knowing the views of Mr. J. Edgar Hoover, the Director of the Federal Bureau of Investigation, on this subject. When Mr. Hoover appeared with me before the Subcommittee last Monday, he emphasized the sound reasons of public policy which require that reports of the Federal Bureau of Investigation should remain confidential. I know of no person whose views on this subject are entitled to greater weight. Mr. Hoover stated:

> "The disclosure of the contents of the files of the FBI would reveal confidential procedures and techniques. If spread upon the record, criminals, foreign agents, subversives, and others would be forewarned and would seek methods to carry out their activities by avoiding detection and thus defeat the very purposes for which the FBI was created. Each exception undermines this principle, establishes a precedent, and would inevitably result in a complete collapse of a traditional policy which has proven its soundness.
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> "A disclosure of FBI reports would reveal the identify of confidential sources of information and, if it did not place the lives of such persons in actual jeopardy, it would certainly ruin their future value and effectiveness.
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> "The disclosure of FBI reports would make otherwise patriotic citizens reluctant to furnish information. Already, as a result of some unfortunate disclosures of our files in court proceedings, our Special Agents frequently are being told by persons from whom they seek information that they will decline to be interviewed for fear the information will be misused by some agency other than the FBI.

"In the conduct of official investigations, information of a highly restricted nature having a direct bearing upon national security often finds its way into the files which, if disclosed, would be of considerable value to a foreign power. Increasingly, we have observed efforts of a foreign power to seek intimate personal details concerning many of our leaders in Government and industry. They should not be aided by having these details made public for their use and advantage, thereby crippling the important work of the FBI.

"So far, I have directed my remarks against a disclosure of FBI files on security grounds. There are other compelling reasons why the files of the FBI should remain inviolate. For the want of a more apt comparison, our files can be compared to the notes of a newspaper reporter before he has culled the printable material from the unprintable. The files do not consist of proven information alone. The files must be viewed as a whole. One report may allege crimes of a most despicable type, and the truth or falsity of these charges may not emerge until several reports are studied, further investigation made and the wheat separated from the chaff.

"I,for one, would want no part of an investigative organization which had the power of discretion to decide what information would be reported and what would be omitted. An item of information which appears unimportant today may provide the solution of a case when considered with information received at a later date, or it may later establish the innocence of the accused.

"Should a given file be disclosed, the issue would be a far broader one than concerns the subject of the investigation. Names of persons who by force of circumstance entered into the investigation might well be innocent of any wrong. To publicize their names without the explanation of their associations would be a grave injustice. Even though they were given an opportunity to later give their explanation, the fact remains that truth seldom, if ever, catches up with charges. I would not want to be a party to any action which would 'smear' innocent individuals for the rest of their lives. We cannot disregard the fundamental principles of common decency and the application of basic American rights of fair play.

"The FBI has the obligation, within the scope of Federal law, not only to protect the rights, lives and property of our citizens, but also to protect the confidential relationship of the citizen when he patriotically serves his Government by providing information essential to our security.

"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."

I would like to emphasize that the problem which you are reading about in the papers is not a new one. It is a recurring problem, not peculiar to any particular President, nor is it confined to the particular subject of loyalty. It is a problem of government which arises from time to time under the system established by our great Constitution. It is a problem that has to be worked out with meticulous care and cautious judgment in each case. The responsibility on the Chief Executive is a serious one. Presidential decisions in this field are not little ones, nor are they easy to make. The President must determine a course of action which is not obstructionist, but which at the same time will not result in the destruction of our tripartite form of government as we know it, by permitting an encroachment by the Congress on the Executive branch of the Government.

In closing, I should like to point out that our first President felt called upon in his Farewell Address to caution against the dangers resulting from such an encroachment:

> "It is important likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. * * * * * *
> If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular

wrong, let it be corrected by an amendment in the way which the constitution designates. - - But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."