Department of Justice

FOR RELEASE ON DELIVERY

STATEMENT

BY

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ON

INQUIRY BY THE LEGISLATIVE BRANCH
CONCERNING THE DECISION MAKING PROCESS AND
DOCUMENTS OF THE EXECUTIVE BRANCH

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of the

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I appreciate the opportunity of appearing before this Senate Committee to present my views as to the extent of the inquiry which can be made by the legislative branch of the Government concerning the decision making process and documents of the executive branch. As might be expected from the division of our Government into three separate branches, this question has arisen from time to time from the very earliest days of our national government.

I. Current Principles and Practices

In the Justice Department over a period of time we have made a very careful study of numerous incidents which have occurred and which illustrate many facets of the problem. Before getting into a discussion of historical precedents and principles, however, I would like to acquaint the Committee with my general views and with the particular practices we have followed and are following in the Department of Justice.

We live in a democracy in which an informed public opinion is absolutely essential to the survival of our nation and our form of government. It likewise is true that Congress must be well informed if it is to do its legislative job realistically and effectively. The vast majority of requests by Congress for information from the Executive Branch as you know are honored quickly and complied with fully. The furnishing of such information is beneficial to Congress, the Executive Branch, and to the people themselves. In the Department of Justice we strive to furnish Congress with the requested information, and to make public that part of

our activities which would be of interest to the public and which properly can be disclosed without interfering with the discharge of our duties and responsibilities or which might be improper or violate the canons of ethics.

With reference to the right of the public to know generally as distinguished from the legislative branch, it seems to me that there are four principles which it is well to keep in mind:

> "1. While the people are entitled to the fullest disclosure possible, this right like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest.
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> "2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process.
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> "3. A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying non-disclosure no longer pertain.
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> "4. Non-disclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal or pecuniary reasons."

All persons agree that information which would adversely affect our national security should not be disclosed. Then too there are compelling reasons for non-disclosure in the field of foreign affairs, in the area of pending litigation and investigations which may lead to litigation,

information made confidential by statute, investigative files and reports, and, finally, information relating to internal government affairs. President Eisenhower's letter of May 17, 1954 to the Secretary of Defense concerns this last category of information.

With reference to this last category, at Marquette University two years ago I stated my views on this subject and they have not changed:

> "* * * Just as no private citizen or business entity can conduct its business under constant public scrutiny, so judges, legislators or executive officials cannot conduct all public business at every step of the way in public.
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> "A considerable part of Government business relates to the formulation of policy and to the rendering of advice to the President or to agency heads. Interdepartmental memoranda, advisory opinions, recommendations of subordinates, informal working papers, material in personnel files, and the like, cannot be subject to disclosure if there is to be any orderly system of Government. This may be quite frustrating to the outsider at times. No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. Here, however, the question is not one of non-disclosure as to what was done, but rather whether the preliminary and developmental processes of arriving at a final judgment needs to be subjected to publicity. Obviously, it cannot be if Government is to function." 1/

This question was discussed about a year ago by a former government lawyer who wrote:

> "There are serious weaknesses in the assumption * * * that public policy ought to draw a sharp distinction between 'military and diplomatic secrets' on the one hand and all other types of official information on the other, giving Congress free access to the latter. * * * The executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberation incidental to the making of policy decisions. Undoubtedly the official who makes such a decision should be answerable to Congress for its wisdom. But the subordinate civil servants who advise him must be answerable only to him * * *.
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> "It is one thing for a cabinet officer to defend a decision which, however just, offends the prejudices of a powerful Congressman and, very probably, a highly vocal section of the public; it is quite another thing for a middle aged, middle-ranking civil servant, who needs his job, to do so. The Secretary's own responsibility to Congress for wrong decisions is a sufficient guarantee that he will not long tolerate incompetent or disloyal advisers; and he is certainly in a much better position to detect such undesirables than is any member, or even any committee of Congress." 2/

Jenkin Lloyd Jones, Editor of the Tulsa Tribune and formerly President of the American Society of Newspapers Editors, in delivering the William Allen White Lecture at the University of Kansas last month had this to say:

> "Many of my colleagues in the newspaper business have leaped to the conclusion that all public affairs, not directly connected with national defense, must be conducted

in the open. * * * I disagree. I think that much of the important business in a Republican form of government will be carried on behind closed doors. I see few dangers in that. I see many advantages. For it is only behind closed doors * * * that most politicians--yea, even statesmen--honestly express their views and try to get at the meat of the question.

"I don't mean to imply that legislative voting should not be in the open, nor that the public should be denied the right to appear before all committees, nor that any legislator should be excused from explaining why he voted as he did. But I do mean that * * * in the National Capitol, the White House, and various Washington departments no sound policy is decided upon without frank exchange of views. And a frank exchange of views is rarely reached with the public and the press looking over the shoulders of the policy makers.

"The Government of Athens was an absolute and complete democracy, with all deliberations carried on in a goldfish bowl of open debate. But Athens became smothered with oratory, paralized with demagoguery, and finally wound up with such an unstable mobocracy that nearly every able Athenian was banished from the land."

In the Department of Justice we have in the last few years taken certain steps to make available more information about our daily operations than was available before. For example, we have now the practice of making all pardons and commutations of sentences a matter of public record. Thus in the event a question arises as to the propriety of a pardon, any interested person may examine the record, which now includes the names of all persons who interceded on behalf of or expressed interest in the convicted person. Similarly, at the conclusion or settlement of any type of case in the Department, where otherwise there would be no public record of the proceeding, our practice now is to make all the pertinent facts available.

We in the Department of Justice as the attorneys for the Executive Branch of government have a special obligation with regard to litigation. This is well expressed in the Canons of Professional Ethics of the American Bar Association. Canon 37 provides in pertinent part:

> "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of those confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. * * *."

On May 17, 1954, President Eisenhower in a letter to the Secretary of Defense set forth basic policies which I would like to discuss in detail later. However, let me say now that this letter imposes no barrier to the disclosure of any official action. The end product of advice may be produced, where otherwise permissible, in response to an appropriate request for information as to what official action has been taken by the Executive Branch. This is a sound rule based upon his duty and authority under the Constitution; it is supported by the precedents in our national history; and it is in accord with the judicial decisions that our Federal Government is composed of three equal and coordinate branches, and that no one of the three branches shall encroach upon another.

Now let me turn to the historical precedents and then discuss the fundamental principle of separation of powers, and lastly some specific legislative proposals which have been made.

II. Precedents and Principles

Let us start by noting the action of the Continental Congress under the Articles of Confederation which preceded the adoption of the Constitution. On February 21, 1782, some 176 years ago, the Continental Congress passed a Resolution creating a Department of Foreign Affairs under the direction of a Secretary to the United States of America for the Department of Foreign Affairs. The Resolution provided:

> "That the books, records and other papers of the United States, that relate to this Department be committed to his custody, to which and all other papers of his office, any member of Congress shall have access; provided that no copy shall be taken of matters of a secret nature without the special leave of Congress."

Moreover, the same Resolution also provided:

> "That letters /of the Secretary/ to the ministers of the United States, or ministers of foreign powers which have a direct reference to treaties or conventions proposed to be entered into, or instructions relative thereto, or other great national objects, shall be submitted to the inspection and receive the approbation of Congress before they shall be transmitted." 3/

In short, under the Continental Congress, the Department of Foreign Affairs and its Secretary were almost completely subject to the directions of the Continental Congress. Every member of the Continental Congress was entitled to see anything in the records of the Department of Foreign Affairs, including secret matters. Indeed, he could make a copy of anything, except secret matters.

Much has been written of the inadequacies of that prototype of our national government. I do not propose to review those writings or to comment on those inadequacies.

Suffice it to say that it came increasingly to be recognized by the leaders of our country then that the design of that pilot plant had grave and serious defects which made it incapable of serving adequately as the engine of the national government. The designers so discovered by practical experience with its shortcomings.

Finally, at the Constitutional Convention in Philadelphia in 1787 that prototype was redesigned as the engine of government which is still operating today. As we all know, it was designed on the principle that our Federal government is divided into three equal departments or branches, a political innovation not included in the older Articles of Confederation.

Now let us see what action the opening session of the first Congress of the United States took when it came to create the Department of Foreign Affairs under the Constitution. Section 4 of the Act of July 27, 1789, establishing an Executive Department, to be denominated the Department of Foreign Affairs, 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." 1 Stat. 29.

Compare this language with the resolution creating the old Department of Foreign Affairs under the Articles of Confederation. Here is no

language which makes the books and records of the Department of Foreign Affairs virtually the books and records of Congress; here is no language which requires that the Secretary of this department shall submit his correspondence to Congress before transmittal. The difference is obvious and fundamental. Under the Constitution the first Congress was creating a Foreign Affairs Department of the Executive Branch, pursuant to the grand design of the new Constitution based on the political principle of separation of powers.

The difference in the language of the old resolution and the new statute under the Constitution is no matter of legislative oversight. Many of the men who sat in that first Congress had served earlier in the Continental Congress where they had the right of access to the papers of various departments, because those departments were in legal effect merely creatures of the Congress. In the light of their knowledge of the earlier practice, it can only be concluded that they deliberately recognized that the continuance of that former privilege was incompatible with the grand design of the Constitution for the separation of powers between the three Branches.

The question of the production of documents before Congress arose in George Washington's first term as President. The first investigation by the Legislative Branch of the administration of governmental affairs by the Executive Branch was an investigation of a military expedition led by

General St. Clair under the direction of the Secretary of War. When the congressional committee called for the papers pertaining to this campaign, President Washington convened his Cabinet, because it was the first instance of a demand on the Executive Branch for papers, and so far as it should become a precedent he wished it to be right.

Washington did not question the propriety of the investigation, but said that he could conceive that there might be papers of so secret a nature, that they should not be given up. He and his Cabinet came to a unanimous conclusion:

> "First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President."

Having formulated these principles, the Cabinet agreed, however, that "There was not a paper which might not be properly produced," 4/ It is, of course, well known that acting on the same principles Washington later refused to lay before the House a copy which it had requested of instructions to the United States Minister who negotiated a treaty with the British Crown. In declining to do so, because of the secrecy required in negotiations with foreign governments, Washington referred to his constitutional oath to "preserve, protect, and defend the Constitution," and to his belief that

"it is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request." 5/

Thus there was established four principles:

1. That the Constitution fixes boundaries between the three branches of the Government: Legislative, Executive, and Judicial.

2. That the documents of the Executive Branch are within the control of that branch, not of all branches.

3. That the Legislative Branch can make inquiry of the Executive for its documents, but in response to Congressional requests for documents, the Executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest.

4. That the authority of the President for the conduct of foreign affairs does not oblige him to produce the instructions which had been given to his representatives in negotiating a treaty. It seems clear that they constituted advice within the Executive Branch on official matters. The official action of the Executive was embodied in the Treaty which was submitted to the Senate for its advice and consent.

So were the basic principles fixed in the Administration of our first president when both the Executive and Legislative Branches were comprised of many men who had served in the Continental Congress, who had participated in the Constitutional Convention, and who successfully assisted in achieving the ratification of the Constitution.

Jefferson, who had participated in the formulation of these principles as Secretary of State, was also confronted with the same question during his presidency, when the Burr conspiracy was stirring the country. By Resolution the House asked for any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching certain matters related to the Burr conspiracy, although it was not so identified. Jefferson gave certain information, but declined to give certain other information as being ex parte and uncorroborated and delivered in some instances under the restriction of private confidence.

Thus two additional principles were established:

1. That documents containing information of uncertain reliability apparently reflecting adversely on individuals should not be disclosed.
2. That documents containing information given in confidence to the Executive Branch should not be disclosed by that Branch.

Some 40 years later, the House of Representatives was conducting an investigation of the administration of Cherokee Indian affairs. In a special message dated January 31, 1843, President Tyler vigorously asserted that the House of Representatives could not call upon the Executive for information, even though it related to a subject of the

deliberations of the House, if, by so doing, it attempted to interfere with the discretion of the President. 6/

President Tyler's refusal established additional principles:

1. That it would be contrary to the public interest for the Executive Branch to produce documents which might affect its settlement of pending claims against the United States.

2. That it would be contrary to the public interest for the Executive Branch to produce documents on official matters before they had been embodied in official actions.

In addition, it reaffirmed the principle that it would be contrary to the public interest to produce ex parte documents which apparently reflect adversely on individuals.

Again some forty years later, in challenging the attitude that because the executive departments were created by Congress, the latter had any supervisory powers over them, President Cleveland declared:

> "I do not suppose that the public offices of the United States are regulated or controlled in their relations to either House of Congress by the fact that they were created by laws enacted by themselves. It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation." 7/

Thus was emphasized the fact that the separation of powers applies to all agencies of the government, whether created by the Constitution or by Congress. To hold otherwise would be to destroy the entire basic principle of separation itself.

In 1909 the Senate passed a resolution directing the Attorney General to inform the Senate whether certain legal proceedings had been instituted against United States Steel Corporation, and, if not, the reasons for non-action. President Theodore Roosevelt replied, refusing to honor this request upon the grounds that "Heads of the Executive Departments are subject to the Constitution, and to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever." 8/

This refusal reiterated the principle that the Executive Branch will maintain the inviolability of documents in official files containing information from private sources which has been communicated to it in confidence.

Incidents in more recent times are relatively well known and need not be detailed here. However, let me turn your attention for illustrative purposes to two such incidents in the Truman administration. One incident involved the request of a congressional committee for the loyalty-security file with respect to Dr. Condon, then the Director of the National Bureau of Standards of the Department of Commerce. On March 3, 1948, the Committee adopted the extraordinary course of issuing a subpoena to

Secretary of Commerce Harriman to produce the file, which by order of President Truman Mr. Harriman refused to do. 9/

On March 13, President Truman issued a directive to all officers and employees in the Executive Branch, forbidding the disclosure of loyalty files and directing that any demand or subpoena for such files from sources outside the Executive Branch should be declined and the demand or subpoena referred to the Office of the President. 10/ On April 22, the House of Representatives adopted a resolution peremptorily ordering the Secretary Harriman to surrender the desired data respecting Dr. Condon. 11/ Citing the President's directive, the Acting Secretary wrote the Clerk of the House that he respectfully declined to transmit the requested document and that in accordance with the directive, he was referring the matter to the President. 12/ President Truman had earlier stated that he would not accede to the House Resolution. 13/

In connection with the Condon incident there was introduced on March 5, 1948, a resolution which would have directed all executive departments and agencies to make available to any and all Congressional Committees information which may be deemed necessary to enable them to properly perform the duties delegated to them by Congress. 14/ With respect to this bill, the St. Louis Post-Dispatch on May 10, 1948, made the following observations:

> "Even without the penalties for disclosure, Congress should not assert absolute rights to presidential information. It should

have full access to records needed for forming policy, but the executive branch also possesses administrative records in which Congress has no valid interest. The presidency is an equal branch of government, with constitutional rights and mandates separate from those of Congress. Its right to withhold certain kinds of information from Congress, and the public interest in having such information withheld, has been successfully defended since the time of President Jefferson.

"No Congressman would think of demanding conference transcripts, personnel records or any other private papers from the Supreme Court, the third equal branch of government. The President cannot demand the records of private congressional committee sessions. The Supreme Court makes no such demand on either Congress or the President. No more should Congress try to destroy the President's right to a reasonable and necessary privacy in his department.

"The founding fathers expected Congress and Presidents to minimize their rivalries by the exercise of reasonable confidence and give-and-take. It needs that spirit to make the American system of government succeed * * *."

The resolution passed the House on May 13, 1948, and was referred to the Senate. On May 16, 1948, the St. Louis Post-Dispatch published another editorial on the bill. The second editorial said:

"Congress is entitled to any record it needs to formulate public policy. Other records, however, such as personnel files, are the property of the executive branch. To reveal them to Congress might seriously endanger governmental administration.

"For example, sound executive decisions are usually reached through an exchange of views among various officials. Naturally, these views differ, and some of them are rejected before the official decision. But the * * * bill would empower Congress to drag out and harp on the rejections. With such a threat over their heads, officials would fear to commit their views to writing; and the quality of decisions would suffer accordingly."

The Joint Resolution was referred to the Senate Committee on Expenditures where it died.

So we see that from the beginning of our government the position of the President and the Executive branch has been that while no one could question the constitutional right of Congress to inform itself on subjects falling within its legislative competence, yet, as Professor Corwin puts it:

> "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." 15/

The constitutional authority of the Chief Executive over the Executive Branch is illuminated by the ultimate fate of a proposed amendment to the Atomic Energy Act of 1946. It provided that where the appointment of members or personnel of the Atomic Energy Commission is subject to Senate confirmation the Senate members of the Joint Committee on Atomic Energy may direct the FBI to investigate the character, associations and loyalty of any such appointee, and that the Director of the FBI should file a written report of any such investigation and thereafter should furnish such amplification or supplementation as the Senate Committee may direct. 16/

Senator Morse opposed the bill as "clearly unconstitutional" as an infringement on the appointive power of the President. A proponent of the

bill argued that it did not attack the appointive 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." 17/

The late Senator McMahon of Connecticut, who had served earlier as Assistant Attorney General in charge of the Criminal Division, answered this contention. He declared that the best statement in the cases on the point at issue was to be found in Kilbourn v. Thompson, to which I shall refer later. There then ensued the crux of the argument as to the power of Congress to provide by statute for its utilization of the services, facilities, investigative files and reports of a unit of the Executive Branch. Because of the wide power conferred upon the Atomic Energy Commission it was 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." 18/

Senator McMahon answered:

> "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 who 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."

With reference to a contention that the Senate and House are policy-making bodies with a right to obtain the facts in order that they may legislate properly, and in the case of the Senate to advise and consent to nominations, Senator McMahon replied that this contention was "directly in the face of the law." He added:

> "I say to the Senator that much as he might desire to obtain an investigatory report on the work 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 any 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 the constitutional provision. 19/
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> "To assert, as the Senator * * * 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, in the later Kilbourn case, in the recent Meyers case, the Humphrey's case, 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." 20/
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> "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." 21/

The bill was passed by the Congress, but was vetoed by the President. 22/ In the Senate debate as to whether the veto should be overridden or sustained, Senator McMahon observed 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. 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." 23/

A Senator who was in favor of overriding the veto argued that it was wrong to say --

> " * * * that whenever Congress creates an executive agency it cannot modify, change, or direct its actions when it is acting for the Congress or the people."

Senator Barkley answered:

> " * * * 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. 24/

Senator McMahon concluded the debate against the motion to override by saying

> " * * * 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." 25/

In the end the Senate failed to override the veto. 26/

Congressional efforts to obtain loyalty-security files respecting various individuals continued into President Eisenhower's administration. An editorial in the Washington Post & Times-Herald for March 10, 1953, made the following observations:

> "So far as executive files are concerned, President Eisenhower would do well, we believe, to follow the example of almost every earlier occupant of the White House. 'Full cooperation' /a phrase used by the State Department officer in charge of such investigations/ means, among other things, that no congressional committee should claim what it has no right to receive."

A year later at the height of the McCarthy-Army controversy the President issued his letter of May 17, 1954, to the Secretary of Defense stating:

> "It has long been recognized that to assist the Congress in achieving its legislative purposes every Executive Department or Agency must, upon the request of a Congressional Committee, expeditiously furnish information relating to any matter within the jurisdiction of the Committee, with certain historical exceptions--some of which are pointed out in the attached memorandum from the Attorney General. This Administration has been and will continue to be diligent in following this principle. However, it is essential to the successful working of our system that the persons entrusted with power in any one of the three great branches of Government shall not encroach upon the authority confided to the others. The ultimate responsibility for the conduct of the Executive Branch rests with the President.
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> "Within this Constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.
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> "Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be

completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

"I direct this action so as to maintain the proper separation of powers between the Executive and Legislative Branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government." 27/

This letter met with favorable public response. Let me quote from editorials which appeared in papers which have been very sensitive to any improper withholding of information. The next day, an editorial in The New York Times made this comment on the President's letter:

"The committee seems to feel that it has the right to pry farther into the conversations and discussions among members of the executive branch while they were considering a serious problem and, perhaps, reaching important decisions. The committee has no more right to know the details of what went on in these inner Administration councils than the Administration would have the right to know what went on in an executive session of a Committee of Congress."

An editorial in the Washington Post & Times-Herald for May 20, 1954, made the following observations:

"The question is simply whether the executive departments are to be administered by the properly constituted executive officials, or whether there is to be a sort of government-by-McCarthy. President Eisenhower was abundantly right in protecting the confidential nature of executive conversations in this instance."

III. Separation of Powers

Much has been written respecting the doctrine of separation of powers under the Constitution. In such a statement as this it is obviously impracticable to discuss its full application. I shall, however, make these comments.

The Supreme Court's classic statement of this doctrine arose in connection with a Congressional investigation. In the 1870's the firm of Jay Cooke & Sons went into bankruptcy, and the appropriate judicial proceedings were instituted. As Navy funds were deposited with the firm, the United States was a creditor. Upon that basis a House Committee instituted an investigation of a real estate pool in which the Cooke firm had participated.

The Committee issued a subpoena duces tecum to one Kilbourn. When he refused to produce certain documents, the House held him to be in contempt, and ordered him confined to the District of Columbia jail until he purged himself of his purported contempt. Thereafter Kilbourn instituted an action for false imprisonment: In reviewing the congressional proceedings the Supreme Court said:

> "It is believed to be one of the chief points of the American system of written constitutional law, that all powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires

that the lines which separate and divide these departments shall be broadly and clearly defined.

* * * *

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century /in 1880/ has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made * * *." Kilbourn v. Thompson, 103 U.S. 190-191. (1880).

The court held that the subject matter of this congressional investigation was judicial, and not legislative, that it was then pending before the proper court, and that the House lacked power to compel Kilbourn to testify on the subject.

The proposition in the Kilbourn case is that one of the three grand departments should not encroach upon the other. Thus what is true of the relationship between the Legislative Branch and the Judicial Branch is likewise applicable to attempted encroachment by the Legislative Branch with respect to the Executive Branch.

At an earlier day in our national history the Supreme Court summarized the responsibility of the President for the administration of the

Executive Branch in the celebrated case of Marbury v. Madison. There Chief Justice Marshall said:

> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist no power to control that discretion." 1 Cranch (5 U.S.) 137, 164 (1803).

This extract from Chief Justice Marshall's opinion in Marbury v. Madison certainly indicates a measure of the extent to which the President's discretion may be exercised by his subordinates, subject, of course, to conformity with his orders.

I recognize, of course, that Congress has broad powers of inquiry and investigation as an "attribute of the power to legislate." 28/ I have had some years of personal experience as counsel to legislative investigations. I recognized then and do now that the power to legislate is itself subject to constitutional limitations. So too, is the power to investigate. It is limited by the Fourth Amendment prohibition against unreasonable searches and seizures 29/ and the privilege against self-incrimination protected by the Fifth Amendment. 30/ Although the exact scope of the limitations is unclear the protections of the freedoms of religion, speech, and the press contained in the First Amendment also operate to limit congressional investigative power. 31/

The limitations on the investigative power are not confined to those expressly set forth in the Constitution. The classic expression of this principle is contained in Kilbourn v. Thompson, previously mentioned: 32/

> "It is * * * essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." * * *

This is not mere doctrine. It was regarded by the Founders as necessary to prevent the tyranny and dictatorships that result from the undue concentration of governmental powers in the same hands. Mr. Justice Brandeis has observed:

> "The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." 33/

Nor is there any question that protection against legislative autocracy was one of the principal aims of the Founders. From their knowledge of English history, the early settlers knew of the tyranny of the Long Parliament and others that followed it. What was particularly vivid in their minds were the harsh measures which colonial legislatures adopted for the early settlers. Those who dared criticize legislative proceedings or to reflect upon their integrity were punished directly and without the intervention of courts or the authority of statutes, and the punishments were frequently severe and degrading. 34/ The Supreme Court has said:

"When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned." 35/

It was probably based upon experiences such as these that Jefferson concluded: "One hundred and seventy-three despots would surely be as oppressive as one." 36/ So too, Alexander Hamilton out of his experience declared: "The tendency of the legislative authority to absorb every other has been fully displayed and illustrated." 37/ Therefore, it is not surprising that when the Federal Convention met in 1787 to adopt a new Constitution, its members were determined to enhance the powers of the executive and to restrict the powers of the legislative branch. 38/

The doctrine of the separation of powers was thus the very foundation stone of the Federal Government as established by the Constitution. It was regarded as the basic guarantee of the liberties of the people against tyranny. In view of this background, it is not remarkable that it has retained vitality and been given practical application throughout our history. Each branch has acted upon it and been protected by it. It has been held that the legislative branch in the exercise of its investigatory powers may not exercise basically judicial functions. Kilbourn v. Thompson, supra; United States v. Icardi, 140 F. Supp. 383 (D.C.D.C. 1956). Similarly the courts may not properly intrude on the exercise of legislative functions, Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729 (D.C.D.C. 1956), or on the Executive, Chicago &

Southern Air Lines, Inc. v. Waterman S. S. Co., 333 U.S. 103 (1948). And the President may not exercise legislative functions. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

A wise exercise of restraint has operated to prevent a test of all the possible situations in which one branch might invade the functions of another. However, there is little doubt that the investigative power of Congress could not constitutionally support an investigation into the discussions of the members of a Federal court relating to the decision in a specific case because this would be utterly destructive of a free judiciary. This certainly was the view of the House of Representatives in the converse situation, involving attempts to require the disclosure of certain information to courts. It resolved that:

> "No evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission." 39/

The same considerations may be said to operate with respect to an investigation of confidential advice within the executive branch. It has long been believed that the President may in his own discretion withhold documents from a court. In the trial of Aaron Burr, Chief Justice Marshall said:

> "In no case of this kind would a court be required to proceed against the president as against an ordinary individual. * * * In this case, * * * the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the

weight of the reasons for and against producing it, he is himself the judge. It is their operation on his mind, not on the mind of others which must be respected by the court." 40/

Under the doctrine of Marbury v. Madison, supra, this power may be exercised on his behalf and with his approbation by those whose acts "are his acts." This finds support in the judicial recognition, without reference to statute, of the fact that the privilege against revealing military secrets "is a privilege which is well established in the law of evidence." United States v. Reynolds, 345 U.S. 1, 7, and cases there cited. The Reynolds case also indicates that the privilege "which protects * * * state secrets" stands on a parallel footing with the military secrets privilege. id.

To conclude that a constitutional privilege exists in the President and in those acting on his behalf and pursuant to his direction to withhold documents and information as against a congressional demand for production or testimony does not wholly dispose of the problem. A further question arises. Is the Executive or the Congress to determine whether the privilege is appropriately asserted in a given case? There is no judicial precedent governing this question.

As a practical matter only the President can make the determination as to disclosure. A House Judiciary Committee took this view in deciding who is the best judge in a close case, of the propriety of divulging to any committee of the House "state secrets." It first noted that "in 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." Then it recognized what is so plainly implicit in the doctrine of separation of powers:

> "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."

Finally, it came to the question as to whose decision must be accepted in this matter. Its Report stated:

> "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. * * *." 41/

One of our great legal 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 said:

> "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." 42/

We are dealing in this field with one of the most difficult, delicate, and significant problems arising under our system. The doctrine of

separation of powers and the system of checks and balances was designedly established in the Constitution as the basic guarantor of the rights of the people. Tyranny by dictators or royalty, by legislatures and by courts were all known to the founders. What they attempted to establish was a government in which no one of the three elements could become pre-eminent, subordinate the others and ultimately be in a position to dictate to, rather than serve, the citizenry.

The dangers which follow from the failure of one branch of the Government to respect the powers of any of the others is as great today as when Washington, in his Farewell Address, felt impelled to caution that:

> "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." 43/

The principle of separation of powers indicates the relationship of the independent regulatory agencies to this question of the extent of the inquiry which can be made by Congress of another branch. I refer to such regulatory agencies, sometimes styled independent commissions, as the Federal Communications Commission, Interstate Commerce, Federal Trade, Federal Power, and Securities and Exchange Commissions. They have been frequently described as exercising quasi-judicial, quasi-executive and quasi-legislative functions.

No categorical statement as to the extent of the inquiry which can be made by Congress will be applicable equally to each of the independent agencies. Statutes created these agencies at different times in our history and contain varying mixtures of judicial, executive, and legislative functions. Some statutes create agencies which are predominantly legislative in character, others subject the agency to a strong proportion of executive control, in others the judicial function predominates. It is clear then that no answer to the question of the extent of permissible congressional inquiry of the independent agencies, or of permissible executive direction of independent agencies, can be given without considering the specific agency concerned, the statute creating it, the fact situation involved, and the particular function which the agency is exercising.

Not only by the original statutes creating the agencies, but by other legislation Congress has itself subjected the independent regulatory agencies to executive control. For example, the President has been

authorized to apply the Federal Employees Security program to all departments and agencies of the government.[44/] This includes the regulatory commissions. Hence the regulatory commissions are also subject to the requirements of secrecy governing employee security matters. The President's power to remove commission members for inefficiency, neglect of duty, or malfeasance (as specified in the Federal Trade, Interstate Commerce, and Atomic Energy Commissions and the Civil Aeronautics Board) imply that he may exercise a certain amount of managerial authority over the Commissions.

Thus in may respects the functions and operations of the so-called independent regulatory agencies are subject to executive control. Referring to my discussion of the fundamental principle of separation of powers above, the extent of the inquiry which can be made by Congress of one of the independent agencies should be determined on this principle. To the extent that the agency exercises executive functions it would have the right and duty to furnish or withhold information from congressional inquiry to the same extent as would other executive departments and officers of the Federal government.

On July 12, 1955, Attorney General Brownell had occasion to advise the Chairman of the Securities and Exchange Commission as to limits of congressional inquiry into executive functions of the SEC. Attorney General Brownell stated:

> "With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within

the Executive Branch of the Government on the principles as set forth in the President's letter of May 17, 1954 to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and the employees is privileged and need not be disclosed outside of the agency. Likewise any communication from others in the Executive Branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954." 45 /

Attorney General Brownell's letter thus advised that the executive privilege applied to the independent agencies as to "communications within the Executive Branch" and "with respect to administrative matters." The executive privilege of course does not apply where the independent agencies are exercising judicial functions.

However, by analogous reasoning the doctrine of separation of powers provides a guide to the limits of congressional inquiry, not only in relation to executive functions of the independent agencies, but also to judicial functions. Let me make this clear. In my view, whatever the practice has been in the treatment of these independent regulatory agencies, whenever an agency is exercising its judicial function by deciding an adversary proceeding before it, it should be just as free of any demand from Congress or the Executive Branch as a Court would be.

Nor does the executive privilege apply to the independent agencies where they are exercising legislative functions. Congressional inquiry is thus not so limited as in regard to executive or judicial functions. But I would caution that other considerations might cause Congress itself to

limit its inquiries on even legislative functions. Information of importance to competitors gathered in confidence from private businesses, for example, should not be publicized.

It should not be forgotten that the more frequent and the more extensive the Congressional inquiries made of the independent agencies, the less free and truly independent those regulatory agencies will become.

In summary:

(1) the executive privilege applies to the executive functions of the independent agencies;

(2) the executive privilege obviously does not apply to judicial functions; similarly,

(3) legislative inquiry into the legislative functions of the independent agencies is not limited by any executive privilege, but there are other restraining considerations, some of which I have noted above.

IV Proposed Legislation

Finally, I come to two bills which have been referred to the Committee. The first is S. 921, 85th Cong., which would amend § 161 of the Revised Statutes. That Section is a codification for the 10 executive departments of today of that provision of the 1789 Act respecting the Department of Foreign Affairs. You will recall that I discussed that Act in the second part of my statement.

Section 161 now provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." 46/

S. 921 would amend § 161 by adding a last sentence:

"This action does not authorize withholding information from the public or limiting the availability of records to the public."

As Deputy Attorney General, I expressed my views on this bill in letter dated June 13, 1957, to Senator Eastland, Chairman of the Senate Committee on the Judiciary. Let me summarize those views.

Insofar as the purpose of S. 921 is to assure the full and free flow of information to the public where not inconsistent with the national interest, the Department of Justice is in full accord. We believe that within limits the Executive and Legislative Branches should keep the public informed of their activities, and should make available information, papers, and records. Without doubt both branches are in accord with this fundamental principle.

We do believe that S. 921 would not clarify § 161 of the Revised Statutes. In the absence of legislative history or more specific language we cannot determine with any degree of certainty the effect of S. 921.

A recent example of the current application of this principle to the Legislative Branch is illustrated by an article in the Washington Evening Star on September 12, 1956. The article reads in part as follows:

"Congress barred the public from 1, 131 of its 3, 121 committee meetings in 1956, or more than one third of them.

"Spokesmen for several of those committees listed such things as national security, government efficiency and preserving the private rights of witnesses as reasons for closing meetings."

Such a statement is of course equally applicable to the proper functioning of the Executive Branch. Obviously it is equally applicable to the functioning of the Judicial Branch. Each of the three separate, coequal, and coordinate branches have recognized its force and significance in their relations with each other.

We in the Department of Justice cannot determine whether S. 921 would purport to override the principle that the disclosure of certain information would be inconsistent with the national interest. If Congress believes that any amendment to § 161 of the Revised Statutes is advisable, it is equally advisable that any such amendment make it much clearer than S. 921 now would that Congress does not ignore that principle. As S. 921 now stands, it is impossible to determine with any certainty that it would give just recognition to that principle.

The second bill is S. 2148, 85th Cong., a bill to amend § 3 of the Administrative Procedure Act of 1946.[47/]

When Congress passed the Administrative Procedure Act it clearly recognized beyond question or doubt that there are functions of the Government where disclosure would be inconsistent with the national interest, and that the Government cannot otherwise function effectively.[48/] These

considerations, which Congress recognized then, I have discussed above, and because of these considerations I am opposed to the passage of S. 2148.

Certainly in the time available it is not possible for me to discuss in detail the amendments to § 3 of the Administrative Procedure Act which S. 2148 would make and my reasons for opposing them. Those will be discussed in the necessary detail in the Department's report on the bill.

Footnotes

1/ The speech is reproduced in 40 Marq. L. Rev. 83-91 (1956).

2/ Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L. J. 487-488 (1957).

3/ 7 Journals of Congress 219.

4/ Writings of Thomas Jefferson 303-305.

5/ 1 Richardson, Messages and Papers of the Presidents, 196 (1896).

6/ 3 Hinds' Precedents of the House of Representatives 181 (1907).

7/ 8 Richardson, op. cit. supra note 5, at 377.

8/ 43 Cong. Rec. 527-528.

9/ Corwin, The President: Office and Powers 142 (1948 ed.). Professor Corwin is also the editor of the most recent edition of The Constitution, Annotated, S. Doc. No. 170, 82d Cong., 2d Sess. (1952).

10/ 3 CFR 1081 (1943-1948 Comp.). For the explanatory memorandum which was issued by the Office of the President on March 15, 1948, see H. R. Rep. No. 1595, 80th Cong., 2d Sess. 8-10 (1948).

11/ H. Res. 522, 80th Cong., 2d Sess., 94 Cong. Rec. 4777 (1948).

12/ New York Times, April 25, 1948, p. 50, col. 3.

13/ New York Times, April 23, 1948, p. 1, col. 1.

14/ H. J. Res. 342, 80th Cong., 2d Sess.

15/ Corwin, The President: Office and Powers 116 (1957 ed.).

16/ S. 1004, 80th Cong., 2d Sess.

17/ 94 Cong. Rec. 4303.

18/ Id.

19/ Id. 4305.

20/ Id. 4307.

21/ Id. 4311.

22/ S. Doc. No. 157, 80th Cong., 2d Sess. (1948).

23/ 94 Cong. Rec. 6199.

24/ Id.

25/ Id. 6263.

26/ Id. 6264.

27/ The letter and the memorandum are reproduced in 100 Cong. Rec. 6263 (daily ed. May 17, 1954).

28/ McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

29/ In Hearst v. Black, 87 F. 2d 68 (D. C. Cir. 1936) a legislative subpoena was held to be too broad contrary to the Fourth Amendment. Cf. Federal Trade Commission v. American Tobacco Co., 264 U.S. 299, 307. (1924). "We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law." But see In re Chapman, 166 U.S. 661, 668 (1897).

30/ McGrain v. Daugherty, supra note 28, at 173-174; Kilbourn v. Thompson, supra; Quinn v. United States, 349 U.S. 155 (1955).

31/ See Rumely v. United States, (App. D. C.) 197 F. 2d 166, 173; aff'd. United States v. Rumely, 347 U. S. 41 (1953). The Supreme Court declined to decide the issue on constitutional grounds. It held that the questions asked were outside the scope of the House Resolution authorizing an inquiry into lobbying; that only direct pressures were intended to be investigated, and not attempts to influence public opinion by books and other writings.

32/ 103 U.S. 191.

33/ Myers v. United States, 272 U.S. 52, 293 (dissent) (1926).

34/ Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. Pa. L. Rev. 691, 697-712 (1926).

35/ United States v. Lovett, 328 U.S. 303, 318 (1946).

36/ Jefferson, Notes on the State of Virginia, 120 (1954 ed.).

37/ The Federalist, No. 71.

38/ Warren, Presidential Declarations of Independence, 10 Boston U. L. Rev. 1, 2 (1930).

39/ H. Res. 427, 81st Cong., 2d Sess. See 96 Cong. Rec. 565-66.

40/ 2 Burr Trials 536 (1808).

41/ H.R. Rep. No. 141, 45th Cong., 3d Sess. 3-4 (1879).

42/ Taft, Our Chief Magistrate and His Powers, 129.

43/ 1 Richardson, op. cit. supra note 5, at 219.

44/ 64 Stat. 477, 5 U.S.C. § 22-3. See Executive Order No. 10450, 3 CFR 72 (Supp. 1953); Cole v. Young, 351 U.S. 536 (1956).

45/ Reproduced in Hearings on Power Policy, Dixon Yates Contract, Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 378-379 (1955).

46/ 5 U.S.C. § 22.

47/ 60 Stat. 238, 5 U.S.C. § 1002.

48/ See for example, S. Rep. No. 752, 79th Cong., 1st Sess. (1945),