STATEMENT OF
ATTORNEY GENERAL J. HOWARD McGRATH
BEFORE
SUBCOMMITTEE OF THE SENATE COMMITTEE ON FOREIGN RELATIONS
3:30 P.M., MARCH 27, 1950

Mr. Chairman: I appreciate the opportunity of appearing before your Committee today, together with the Director of the Federal Bureau of Investigation, in order to discuss with you a serious problem that has arisen in the course of the investigation that you are conducting pursuant to Senate Resolution 231. There has been a great deal of talk about the production before your Committee of loyalty and investigative files relating to the persons against whom Senator McCarthy has brought charges of disloyalty. I think that it is well that we should discuss this matter together at this time in the interest of clarifying some of the issues.

I need not remind you that it is only a matter of months since I myself was a member of that great body of which this Committee is a part, the United States Senate. Having had the privilege of serving in the Senate, as well as in the Executive Branch, I am fully aware and indeed extremely sensible of the degree of cooperation that must exist between the legislative and Executive branches of the Government if we are to make our tripartite system of government work.

Cooperation, however, is but one facet of the key to the solution of our problem. If our tripartite system is to work, each branch must also carefully avoid encroaching upon the prerogatives of the other.

This is such a basic principle that it was recognized as early as the administration of our first President. On February 22 last, the very day on which the Senate agreed to the Resolution under which this Committee is proceeding, the Farewell Address of President Washington was read in the Senate chamber. I call your attention to one paragraph of that Address, which appears on page 2158 of the Congressional Record of February 22, and which to me aptly states the principles by which we must be governed. President Washington stated:

> 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.

President Washington was speaking from personal experience with the very problem we now have before us--namely, a request by a congressional Committee for the production of documents which in the opinion of the Executive branch must be held confidential in the public interest. The problem, you see, is as old as the Government itself.

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 Com-

mittee 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 in so far 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 an unanimous conclusion as follows:

> 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.

The precedent there set by President Washington and his Cabinet was followed 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."

It was because of such experiences that President Washington felt called upon to refer, in his Farewell Address, to the importance of maintaining the independence of our separate branches of government. Later, President 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 purporting 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 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.
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> 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 Government; many more could be referred to.

Although I have mentioned only a few of the precedents, I might add that 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. The courts have recognized this constitutional prerogative of the Chief Executive and the great constitutional scholars uniformly agree that it is for the President to determine what papers and information in the Executive branch must be retained in confidence in the public interest. 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, 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.

It is against this background that we must consider President Truman's directive of March 13, 1948, concerning the confidential nature of loyalty files. Against this same background we must consider this Committee's request for the production of such files.

In his directive, the President 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.
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> For these reasons, and in accordance with the long-established policy that reports rendered by the Federal Bureau of Investigation and other investigative agencies of the executive branch are to be regarded as confidential, all reports, records, and files relative to the loyalty of employees or prospective employees (including reports of such investigative agencies), shall be maintained in confidence, and shall not be transmitted or disclosed except as required in the efficient conduct of business.

At the time of issuing this directive, the President specifically referred to some of the precedents that I have mentioned this afternoon and called particular attention to the sound reasons of public policy requiring the maintenance of the confidential status of loyalty files. The President referred to an opinion rendered by Attorney General Jackson at a time when, at the direction of President Roosevelt, he declined to furnish certain reports of the Federal Bureau of Investigation to the House Committee on Naval Affairs, as follows:

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 counterespionage 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.

With respect to files which this Committee has requested, their disclosure would, it seems to me, seriously impair the effectiveness of the Employee

Loyalty Program. It would subject the persons in question to a type of double jeopardy which is contrary to sound concepts of good government, fairness, and justice. It would also make it extremely difficult, if not impossible, for the Federal Bureau of Investigation to perform its investigative duties. The Federal Bureau of Investigation conducts all investigations under the Employee Loyalty Program. Loyalty files, therefore, are for all practical purposes F.B.I. files. Mr. Hoover is here to give you his view, which he has held for many years, of the damaging effect that would be caused by the disclosure of such files. I know of no one better qualified to speak on this subject. I am in thorough accord with his views in this regard.

It is my opinion--for the reasons stated--that loyalty and investigative files should be preserved in strict confidence.