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OFFICE OF
THE ATTORNEY GENERAL

4/28/75

TO: Mr. Buchen

FROM: The Attorney General

# Department of Justice

ADVANCE COPY FOR RELEASE AT 8:00 P.M., E.D.T.
MONDAY, APRIL 28, 1975

ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

8:00 P.M.
MONDAY, APRIL 28, 1975
42 WEST 44TH STREET
NEW YORK, NEW YORK

I would like to speak to you this evening about confidentiality and democratic government. The subject is an important one. It is complicated and has many facets. I do not suggest there are easy answers. I do suggest, however, that public understanding of the issues involved and the relationship among the issues is extremely important. The bar as a profession has an enormous responsibility to help clarify these issues. My belief is that understanding may be increased by putting together certain doctrines and values with which most of us would agree. The relationship among these doctrines and values may have been obscured in the recent past. If hard cases sometimes make bad law, emergency situations also have distorted our perspective. The public good requires that we try to correct that distortion.

In recent years, the very concept of confidentiality in government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of government. Any limitation on the disclosure of information about the conduct of government, it is said, constitutes an abridgement of the people's right

to know and cannot be justified. Indeed, it is asserted that governmental secrecy serves no purpose other than to shield improper or unlawful action from public scrutiny. This perception of the relationship between confidentiality and government has been shaped in large measure by the Watergate affair. The unfortunate legacy of that affair is a pervasive distrust of public officials and a popular willingness to infer impropriety. Skepticism and distrust have their value; they are not the only values to which our society must respond.

Our understanding of what is involved in the present controversy over government confidentiality is further inhibited by the very words sometimes used to describe the legal authority of the Executive branch to withhold information. I am referring, of course, to the term "executive privilege." The term fails to express the nature of the interests at issue; its emotive value presently exceeds and consumes what cognitive value it might have possessed. The need for confidentiality is old, common to all governments, essential to ours since its formation. The phrase "executive privilege" is of recent origin. It apparently made its first appearance in the case law in a Court of Claims

opinion by Mr. Justice Reed in 1958. It is only in the last few years that the phrase has preempted public discussion of governmental confidentiality, and the phrase has changed in meaning and connotation. Because it has been seen against the background of the separation of powers, and in this setting has often involved the directive of the President, the phrase has come to be viewed by the public as an exercise of personal presidential prerogative, protecting the President and his immediate advisers or subordinates in their role of advising or formulating advice for the President. Whether or not disclosure in response to congressional demands should be withheld only by Presidential directive, sweeping as was the case with President Eisenhower's order, or specific as President Kennedy promised, the phrase "executive privilege" has ceased to be a useful description of what is involved in the need for confidentiality. Our ability to analyze the legal and public interests involved has become a prisoner of our vocabulary. Much more is involved than the President's personal prerogative standing against the people's right to know. The problem is the need for confidentiality and its limitations in the public interest for the protection of the people of our country.

Let me suggest starting points for an analysis of the place of government confidentiality in our society. Government confidentiality does not stand alone. It is closely related to the individual's need for privacy and the recognition we frequently give to the needs of organizations for a degree of secrecy about their affairs. It also exists alongside the American citizenry's need to know and government's own right to investigate and discover what it needs to know. Those rights are not always consistent or fully compatible. They are circumscribed where they conflict. Yet sometimes these diverse interests are interrelated. One reason for confidentiality, for example, is that some information secured by government if widely disseminated would violate the rights of individuals to privacy. Other reasons for confidentiality in government go to the effectiveness --and sometimes the very existence -- of important governmental activity. Finally we should recognize that if there is a need for confidentiality, it is not necessarily based upon the doctrine of separation of powers found in our Constitution.

That doctrine may condition or shape the exercise of confidentiality, but governments having no doctrine of separa-

tion of powers have an essential need for confidentiality, and the doctrine does not diminish the need.

At the most general level of analysis, the question of confidentiality in government cannot be divorced from the broader question of confidentiality in the society as a whole. The recognition of a need for it reflects a basic truth about human beings, whether in the conduct of their private lives or in their service with the government. Throughout its history our society has recognized that privacy is an essential condition for the attainment of human dignity -- for the very development of the individuality we value -- and for the preservation of the social, economic, and political welfare of the individual. Indiscriminate exposure to the world injures irreparably the freedom and spontaneity of human thought and behavior and places both the person and property of the individual in jeopardy.

As a result, protections against unwarranted intrusion whether by the government or public have become an essential feature of our legal system. Testimonial privileges protect the confidentiality of the most intimate and sensitive human relationships -- between husband and wife, lawyer and client, doctor and patient, priest and penitent.

A number of the rights enumerated in the Constitution's first ten amendments are said to cast "penumbras" which overlap to produce the "right to privacy," a shadow that obscures from public view and intrusion certain aspects of human affairs. Several amendments -- most obviously the First and the Fourth -- mark off measures of confidentiality. The First Amendment -- guaranteeing freedom of expression -- shields the confidentiality of a person's thoughts and beliefs. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." In spirit this is an expression of the confidentiality of the person and his property and a recognition that a fundamental element of individuality would be sacrificed if all aspects of one's life were exposed to public view. In Katz v. United States the Court held that the Fourth Amendment guards not only the privacy of the person but also the confidentiality of his communications.

The need for confidentiality applies not only to individuals but also to groups, professions, and other social organizations. The Supreme Court in NAACP v. Alabama noted that public scrutiny of membership lists might well expose the members to "economic reprisal, loss of employment, threat

of physical coercion, and other manifestations of public hostility" and thereby condition their freedom of association upon their payment of an intolerable price. The point of the case is plain enough. Public disclosure would have destroyed the NAACP. Confidentiality was indispensable to its very existence. The claim of the news media for a privilege to protect the confidentiality of their sources of information is based on a belief that public disclosure of news sources, coupled with the embarrassment and reprisals that might ensue, could well deter informers from confiding in reporters. It would diminish the free flow of information. Another manifestation of the need for confidentiality of groups may be found in the law's protection of trade secrets. Again, businesses require some privacy as a prerequisite to economic survival.

Confidentiality is a prerequisite to the enjoyment of many freedoms we value most. The effective pursuit of social, economic, and political goals often demands privacy of thought, expression, and action. The legal rights created in recognition of that need undoubtedly infringe on the more generalized right of the society as a whole to know. But the absence of these legal rights would deprive our society of the quality we prize most highly.

The rationale for confidentiality does not disappear when applied to government. Indeed the Supreme Court recently noted that confidentiality at the highest level of government involves all the values normally deferred to in protecting the privacy of individuals and, in addition, "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making."

I doubt if we would wish the conferences of the United States Supreme Court to be conducted in public. We accept as fact that each Justice must be free to confer in confidence with his colleagues and with his law clerks if decisions are to be reached effectively and responsibly. And insofar as the product of the Supreme Court is primarily its words, the words it speaks publicly must be shaped and nurtured with care. We realize that some words are so important that their meaning should not be diluted by exposure of the often ambiguous process by which they were chosen.

For similar reasons, confidentiality is required in the decision-making processes with the Executive branch. As the Court recently stated, "Human experience teaches that

those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." */

Now I realize that linking law's protection of personal or organizational privacy with the government's need for confidentiality may seem disingenuous. It is of course true that a good deal of the law protecting individual and organizational privacy has been created to guard against the intrusion of government. But the origin of the threat to privacy should not obscure the value to be protected. It is the underlying wisdom about human nature found in the law of individual privacy that suggests the analogy. Much as we are used to regarding government as an automaton -- a faceless, mechanical creature -- government is composed of human beings acting in concert, and much of its effectiveness depends upon the candor, courage and compassion of those individual citizens who compose it. They are vulnerable to the same fears and doubts as individuals outside government. Undoubtedly we expect government officials to rise to the responsibilities they must meet. But this is just as true of the demands of private life.

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*/ U. S. v. Nixon (1974), Slip Opinion at 20.

Moreover, the law's protection of privacy does not only go to individuals but also to organizations, some of which rightly regard themselves as important adjuncts and correctives to the government. Just as the ability of these organizations to function effectively has come within the law's concern, so must the ability of government to function.

Yet of course there is another side -- a limit to secrecy. As a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made. This commitment is embodied in the First Amendment to our Constitution. In a democracy, the guarantee of freedom of expression achieves special significance. The people are the rulers; they are in charge of their own destiny; government depends on the consent of the governed. If the people are to rule, then the people must have the right to discuss freely the issues relevant to the conduct of their government. As Professor Meiklejohn noted, the First Amendment is thus an integral part of the plan for intelligent self-government. */ But it is equally clear that it is not enough that the people be able to discuss these issues freely. They must also have access to the information

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*/ Meiklejohn, Political Freedom (1960).

required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their government. Our theory of government seeks an informed electorate. As James Madison wrote

> "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." */

So it has been urged that the news media should enjoy under the First Amendment an extraordinary right of access to information held by the government. Indeed, it cannot be doubted that our press has assumed a special role as an indispensable communicator of information vital to an informed citizenry. Investigative reporting, however annoying, has often served the public well by discovering governmental abuse and corruption.

The concern over the need of the general public for access to information about government has not gone unanswered. The Freedom of Information Act has conferred a visitatorial right on each citizen to inquire into the myriad workings

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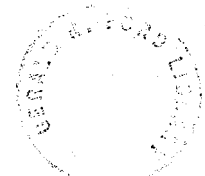
*/ (To W. T. Barry, Aug. 4, 1822) 9 Writings of James Madison 103 (G. Hunt ed. 1910).

of government. It is not an exaggeration to observe that the broad provisions of the Act have engendered a general uncertainty as to whether disclosure of almost any government document might not be compelled. The administrative burdens of compliance with the Act are enormous. The demands for information have constantly increased. Between October 1, 1973 and December 1 of that year, for example, the Federal Bureau of Investigation received 64 requests for information under the Act, or 1 per work day. Throughout the whole of 1974, the Bureau received 447 requests. In the current year, the Bureau is now receiving an average of 88 to 92 requests per work day. From January 1 to March 31 of this year, the Bureau received 705 requests, including 483 in the month of March and 161 on March 31 alone. As of March 31, compliance with outstanding requests would require disclosure of more than 765,000 pages from Bureau files. This does not include a request for information relating to the Communist Party which itself would entail over 3,000,000 pages. At present, the information released by the federal government pursuant to the Act, especially when coupled with information released as a matter of course, make it difficult to maintain that the volume of facts and opinions



disclosed to the public about the conduct of government is not truly of leviathan proportions. Yet claims persist that even the Act does not extend far enough and that official secrecy still holds too much sway.

As is so often the case in human affairs, we are met with a conflict of values. A right of complete confidentiality in government could not only produce a dangerous public ignorance but also destroy the basic representative function of government. But a duty of complete disclosure would render impossible the effective operation of government. Some confidentiality is a matter of practical necessity. Moreover, neither the concept of democracy nor the First Amendment confer on each citizen an unbridled power to demand access to all the information within the government's possession. The people's right to know cannot mean that every individual or interest group may compel disclosure of papers and effects of government officials whenever they bear on public business. Under our Constitution, the people are the sovereign but they do not govern by the random and self-selective interposition of private citizens. Rather, ours is a representative democracy, as in reality all democracies are, and our government is an expression of the collective will of the people. The concept of demo-

cracy and the principle of majority rule require a special role of the government in determining the public interest. The government must be accountable so it must be given the means, including some confidentiality, to discharge its responsibilities.

For similar reasons, the special role of the news media cannot be understood to include a trespassorial easement over all that lies within the governmental realm. The Supreme Court addressed the point when it said:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally. . . . Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies in executive session, and the meetings of private organizations. */

Just last term the Court reaffirmed this principle.

Demands by Congress for information from the Executive, while obviously raising problems of comity among the branches of government, do not change the need of all govern-

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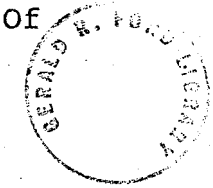
*/ Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972)

ments, however organized, for some confidentiality. Such demands, however, emphasize the point that the preservation of confidentiality where really necessary requires special modes of responsibility, as it indeed does in the executive branch. The risk that the confidentiality of information may be breached, even by inadvertence, is of course ever present. In this country, constitutional guarantees create special limitations on the ability of the Executive to prevent unauthorized disclosure of information. The Speech and Debate Clause, for example, confers on Members of Congress and their aides absolute immunity from civil or criminal liability, including questioning by a grand jury, for conduct related to their legislative functions. The Gravel case, in particular, raises the question whether laws legitimately restricting the dissemination of classified or national defense information can provide any assurance of confidentiality. New York Times Co. v. United States, or the so-called Pentagon Papers Case, further demonstrates the inability of the government to prevent publication of classified documents. The apparent lesson to be drawn from such cases is that once information is improperly released, its publication to the world becomes a certainty.

If the dissemination to Congress of some information is to be limited, acquiescence in this responsibility and limitation becomes a duty which must be willingly recognized. The choice which must be made concerns the extent of dissemination, the likely travels of disclosure, and the consequences which may follow. Successful democracies achieve an accommodation among competing values.

No provision of the Constitution, of course, expressly accords to any branch the right to require information from another. Article II does state that the President "shall from time to time give to the Congress information of the State of the Union. . . ," but the decision as to what information to provide is left to the discretion of the President.

So far I have referred only to the free and candid discussion of policy matters that is promoted by the governmental confidentiality. There are, however, several additional contexts in which confidentiality is also required and where the primary effect of disclosure would be to prevent legitimate and important government activity from occurring altogether. Aspects of law enforcement, including the detection of crime and the preparation of criminal prosecutions, cannot be conducted wholly in public. Of



particular importance is the confidentiality of investigative files and reports. The rationale for confidentiality in this regard was stated by Attorney General Robert Jackson in 1941 in declining to release investigative reports of the Federal Bureau of Investigation demanded by a congressional committee. The Attorney General wrote:

> "[D]isclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. . . [M]uch 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 embarras 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 could infringe on the privacy of those mentioned in the reports and might constitute "the grossest kind of injustice to innocent individuals." Mr. Jackson observed that "investigative reports include leads and suspicions, and sometimes even the statements of malicious and misinformed people," and that "a correction never catches up with our accusation."

Government must also have the ability to preserve the confidentiality of matters relating to the national

defense. Espionage statutes and national security classification procedures are examples of the acknowledged need to prevent unauthorized dissemination of sensitive information that could endanger the military preparedness of the nation. The Supreme Court addressed the issue in United States v. Reynolds, where disclosure of information possibly relating to military secrets was sought in the context of a civil suit. The Court stated:

> "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

The value of safeguarding the confidentiality of national security intelligence activities has recently been made even more apparent with the publication of Fred Winterbotham's book, The Ultra Secret. Britain's success in learning the Germans' cipher in 1939 later proved to be an important factor in the Allies' victory in World War II. Could anyone claim that Britain should not have worked secretly in

peacetime to prepare itself in case of war? Or that once prepared, it should have disclosed that it had broken the code? To have disclosed that information would have destroyed its usefulness.

Closely related is the need for confidentiality in the area of foreign affairs. History is filled with instances where effective diplomacy demanded secrecy. In the first of his Fourteen Points, President Wilson exuberantly proclaimed his support for "Open Covenants of Peace openly arrived at." As Lord Devlin has recently pointed out, "What Wilson meant to say was that international agreements should be published; he did not mean that they should be negotiated in public." Under our Constitution, the President has special authority in foreign affairs. In numerous decisions, the Supreme Court has recognized the unique nature of the President's diplomatic role and its relationship to confidentiality. Thus, in United States v. Curtiss-Wright, the Court stated that Congress must

> "Often accord to the President a degree of discretion and freedom from statutory restrictions that would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy

> in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which has never since been doubted."

The inappropriateness of the Judicial branch requiring disclosure of foreign policy information was emphasized in C & S Airlines v. Waterman Steamship Corp., where the Court said:

> "The President, both as Commander-in-Chief, and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would not be tolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In United States v. Nixon, the Court strongly intimated that disclosure of information held by the Executive would not be required even in the context of a criminal trial if "diplomatic or sensitive national security secrets were involved," and expressly noted that "[a]s to these areas of Art. II duties the courts have traditionally shown the utmost deference to presidential responsibilities."

In the context of law enforcement, national security, and foreign policy the effect of disclosure would often be to frustrate completely the government's right to know. Government ignorance in these areas clearly and directly endangers what has been said to be the basic function of any government, the protection of the security of the individual and his property.

Even as to national security and foreign policy, of course, the tensions between confidentiality and disclosure continue to place stress on the fragile structure of our government. The desire of Congress to know more about the activities of government in these areas, for example, has recently produced a legislative proposal that would impose extraordinary burdens on the ability of the Executive to conduct electronic surveillance even where foreign powers are involved. It would require the government not only to procure a court order as a precondition to electronic surveillance, but also to report to both the Administrative Office of the United States Courts and to the Committee on the Judiciary of both the Senate and the House of Representatives detailed information, including a transcript of the proceedings in which the order was requested, the names of all parties and places involved in the intercepted com-

munications, the disposition of all records and logs of the interceptions, and the identity of and action taken by all individuals who had access to the interceptions.

The wisdom of this scheme is dubious at best, since it would represent a severe incursion on the Executive's ability both to guard against the intelligence activities of foreign powers and to obtain foreign intelligence information essential to the security of this nation. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress previously disclaimed any attempt to place limitations on the President's constitutional authority in this area. In addition, the Supreme Court has specifically left open the question whether and to what extent the Fourth Amendment, and specifically the warrant requirement, applies to electronic surveillance authorized by the President to obtain information relating to the national security and the activities of foreign powers. In United States v. United States District Court, while holding that the warrant requirement of the Fourth Amendment applied in the domestic security field, the Court expressly stated that "the instant case requires no judgment with respect to the activities of foreign powers, within or without this country." It is not without significance that the words of the Court focus on the subject matter of the surveillance, rather than on the physical location where it is conducted.

It is by no means clear that the proposed legislative measures are compelled by the Fourth Amendment. Indeed, the only two Courts of Appeals to address the issue, the Third Circuit and the Fifth Circuit, have held that the warrant requirement does not apply to national security cases involving foreign powers, and that the President has the authority to conduct such electronic surveillance as part of his military or commander-in-chief and diplomatic responsibilities. I think it is also helpful to recall the exact words of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." It is the "people" whose security is to be protected, not that of foreign powers. The Fourth Amendment was intended to protect the privacy, not of other nations, but of the "We, the People" of this nation. Nor is there a requirement of public disclosure inherent in the Fourth Amendment. It was not designed to compel exposure of the government, but to prevent the unreasonable exposure of the individual. I think all of us understand the impulse which leads to such proposals. It comes in part from a desire to protect citizens from harass-

ment and from unfair prosecutions, and personal abuses of this nature. But this is to misstate the purpose and need of such surveillance; and therefore to misconceive the remedy for possible abuses.

As history has shown, implicit in the concept of government, including democratic government, is the need and hence right to maintain the confidentiality of information. Confidentiality cannot be without limit, of course, and must be balanced against the right of all citizens to be informed about the conduct of their government. An exercise of discretion is clearly required. In each instance the respective interests must be assessed so that ultimately the public interest may be served.

In most governments, the question of which governmental body shall have the authority to determine the proper scope of the confidentiality interest poses no problem. Under our Constitution, however, the answer is complicated by the tripartite nature of the federal government and the doctrine of separation of powers. But history, I believe, has charted the course. For the most part, we have entrusted to each branch of government the decision as to whether, and under what circumstances, information properly within its possession should be disclosed to the

other branches and to the public. Competing claims among the branches for information have been resolved mainly by the forces of political persuasion and accommodation. We have placed our trust that each branch will exercise its right of confidentiality in a responsible fashion, with the people as the ultimate judge of their conduct.

The only exception to this rule was established by the Supreme Court last Term in United States v. Nixon. The Court held in effect that need for demonstrably relevant and material evidence in the context of a criminal trial prevailed over the need of the Executive for confidentiality in decision-making. The Court also held, however, that the Executive's right of confidentiality was founded in the Constitution and in the doctrine of separation of powers. Thus, the Court stated:

> "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."
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> * * *
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> "Nowhere in the Constitution. . .is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."

The Court was careful to emphasize that the information sought was not claimed to involve military, diplomatic, or sensitive national security secrets, the disclosure of which the Court has repeatedly suggested could never be compelled and which as a matter of historical fact no court has ever compelled.

The practice as between the Executive and the Congress has been of a similar order. Each branch has traditionally accorded to the other that proper degree of deference and respect commanded by the doctrine of separation of powers and by the concomitant need for confidentiality in government. Attorney General Jackson, in declining to disclose investigative files to the congressional committee, observed that the precedents for such refusals extended to the very foundation of the nation and to the Administration of President Washington. He concluded:

> "This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine."

Congress, of course, has an oversight function under our Constitution. But that function has never been thought to include an absolute right of access to confidential information within the possession of the other branches. Its limits are necessarily defined by the legitimate need of the Judiciary and the Executive for confidentiality.

Comparative law may offer an insight in this regard. In resolving legal issues, we have often looked to Great Britain and the Parliament as helpful models. Many of our most cherished notions concerning justice and government have been shaped and influenced by the English tradition. The issue that presently confronts us is no exception. An examination of the British system reveals that little or no confidential information is ever disclosed by the Cabinet to parliamentary committees in the House of Commons. This is so despite the fact that maintaining the confidentiality of such information would be far easier than in this country. Parliamentary committees, for example, have far fewer members and staff than their American counterparts, thus appreciably minimizing the dangers of unauthorized disclosure. Moreover, the sweeping criminal provisions of the British Official Secrets Act, coupled with the absence of a First Amendment, deter unauthorized disclosure to a far greater extent than would be possible under our system.

More generally, having surveyed the democracies of Western Europe, it may be said without equivocation that it is not the practice of governments to disclose sensitive, national security, or foreign policy information to parliamentary committees. Furthermore, congressional committees in this country, through the cooperation and acquiescence of the Executive, receive far more such information than do legislative counterparts in any other country.

The more general question of disclosure by government to the public may also be illuminated by a comparison between the American system and the Swedish system. Under the Freedom of the Press Act, which is a part of its Constitution, Sweden is committed to the "principle of publicity," which states that both Swedish citizens and aliens alike shall have free access to all official documents. The extent of disclosure of official documents in Sweden is exceeded by few, if any, other governments in Western Europe. Sweden's principle of publicity is, however, subject to numerous exceptions specified in its Secrecy Act. These exceptions not only parallel but in many instances exceed the exceptions specified in our own Freedom of Information Act. It is also worth noting that under the

Swedish Act the unauthorized release of a document excepted from disclosure subjects a civil servant to criminal liability. By contrast, under the Freedom of Information Act, it is the arbitrary failure to release a document required to be disclosed that subjects a civil servant to disciplinary action.

Again, when compared with the democratic governments in Western Europe, it is fair to conclude that there is by far a greater degree of public disclosure of information by the United States Government than by any other government. As Professor Gerhard Casper has recently written, "From the vantage point of comparative politics, I think, there can be little doubt that governmental Geheimniskrämerei (petty secretiveness) looms less large in the United States than anywhere else."

Measured against any government, past or present, ours is an open society. But as in any society conflicts among values and ideals persist, demanding continual reassessment and reflection. The problem which I have discussed this evening is assuredly one of the most important of these conflicts. It touches our most deeply-felt democratic ideals and the very security of our nation. I am reminded of the

title which E. M. Forster gave to a collection of his essays, Two Cheers for Democracy. The third cheer, he suggested, must still be earned. I do not share that hesitancy. The structure established by our Constitution itself represents a compromise and a genius for government.

What I have said is not intended to minimize in any way the need for candor between the government and the people to whom it is responsible. Indeed this talk is an exercise in candor -- an attempt to confront issues directly because the issues are there. The issues will not go away. The American public is misused if it does not understand that important values are involved, that these values must be balanced, and that among these values are confidentiality, the right of the people to know, and the right of the government to obtain important information. No trick phrases will solve our problem. Reactions built upon crises in the immediate past are suspect. Rather we must reach back into the sources of our government, and to our own history of endeavor and accommodation, where wisdom has often been exercised to make the difficult choices.

As these choices are made I trust it is the bar's responsibility to enlighten them with understanding, to help

all see them in perspective because that is essential for the future of our country and for the protection and freedom of our citizens.

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Phil Buchen

| | |
|---|---|
| Take, necessary action | ☐ |
| Approval or signature | ☐ |
| Comment | ☐ |
| Prepare reply | ☐ |
| Discuss with me | ☐ |
| For your information | ☐ |
| See remarks below | ☐ |

FROM Jim Lynn

DATE ~~May 6, 1975~~

REMARKS

I asked my General Counsel, Cal Collier, for his reaction to the Attorney General's recent speech on government confidentiality. I thought you might be interested in his comments.



OMB FORM 4
REV AUG 70

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 5, 1975

MEMORANDUM FOR: JAMES T. LYNN

FROM: CALVIN J. COLLIER

SUBJECT: Comments on Attorney General's Speech on Government Confidentiality

You asked for my thoughts on the Attorney General's address on government confidentiality. Here goes:

1. I completely agree that the heart of the problem is striking the balance between the intuitively-felt need for privacy in conversation (and other communications) and the well-established principle that a democratic government cannot routinely conceal information from the electorate.

2. The Attorney General is perhaps correct in asserting that too little weight is currently given to the natural need for privacy. Our own experiences would seem to confirm that confidentiality is necessary to promote candor, rapport, peace of mind, and an atmosphere conducive to wise decisionmaking. Conversely, intuition suggests that publicity fosters grandstanding, posturing, anxiety, excessive pandering to popular fads, and unnecessary conflict.

3. To me, however, these recognitions begin the inquiry and do not end it.

4. First, these benefits of confidentiality are easily overstated. Apart from intuition, how can we be so sure that people could not adjust to increased openness? For example, most of us after being in Washington a while tend to assume that everything we commit to paper will some time see the light of day. Does it follow that we are never candid in our writing? Moreover, many important decisions in fact result from nonconfidential deliberations. Is there

a demonstrable difference in the "quality" of those decisions?1/ Finally, assumptions based on experience and intuition should be suspect, particularly where, as here, our experience is largely limited to a system permitting confidentiality. What do behavior experts say? And what has been the actual experience in those states that have so-called sunshine laws?

5. Most importantly, the fact that good reasons may exist for confidentiality does not dictate where the balance should be struck. Most privileges (including the intragovernmental communications privilege and the attorney's work product privilege) are qualified, not absolute. If a sufficient need exists, courts do not hesitate at invading the confidential relationship to get at evidence. Where should the balance be struck where the need is that of the informed electorate (or their proxies, interest group representatives and the press)? It seems to me that reasonable minds can differ.

6. The most that can be said, as I think the Attorney General implies, is that:

a. Different governments, responding to different public demands, will draw the lines in different places at different times;

b. The historical trend seems to be toward increased openness and less confidentiality;

c. The decision as to where the line is drawn at any time is the result of a dynamic political process in which all three branches of government have important roles to play.



1/ In a recent case not cited by the Attorney General, the Supreme Court said: "Manifestly, the ultimate purpose of this long-recognized privilege [for intra-governmental communications] is to prevent injury to the quality of agency decisions." N.L.R.B. v. Sears Roebuck & Co., 43 U.S.L.W. 4491, 4497 (April 28, 1973).

OFFICE OF
THE ATTORNEY GENERAL

7/21/75

To: Mr. Buchen

From: The Attorney General

# Department of Justice

FOR RELEASE AT 10:00 A.M., EDT
THURSDAY, FEBRUARY 27, 1975

STATEMENT

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

before the

SUBCOMMITTEE ON CIVIL RIGHTS & CONSTITUTIONAL RIGHTS

of the

HOUSE JUDICIARY COMMITTEE

on

FBI OPERATIONS

10:00 A.M.
THURSDAY, FEBRUARY 27, 1975
WASHINGTON, D. C.

Mr. Chairman and Members of the Committee:

I have been asked to appear here today to discuss the information-gathering practices and the files of the Federal Bureau of Investigation with respect to public officials, members of Congress, and citizens generally.

I realize that some time ago the Committee invited the Deputy Attorney General and the Director of the Bureau to testify on these subjects. With your agreement, their appearance was deferred until today so that I might join them in presenting the description of past practices, the present situation, and our thoughts for the future. What I have to say is to a considerable extent the result of a collaborative effort. The Director will present a statement to supplement my testimony and both the Deputy Attorney General and the Director will assist in responding to questions.

After but three weeks of being Attorney General, I do not have the depth of knowledge possessed by the Deputy Attorney General and the Director. The Deputy Attorney General has personally reviewed many of the files which will be mentioned in this testimony, as has the Bureau's Office of Inspection. There has obviously not been sufficient

time for me to do this, but I have personally examined some of the files considered most relevant in the effort to consider future guidelines or controls.

I should like to emphasize most strongly at the outset both my personal and official concern for the issues which are involved. These issues are close to the basic duties of the Attorney General to protect the society and the safety of our fellow citizens.

During the hearings on my confirmation I made a commitment to examine the practices of the Bureau in collecting information on individuals, including Congressmen. I assumed the obligation to develop guidelines, after appropriate consultation, on the acquisition, retention, and use of this information. While I have been Attorney General for only a brief period and the important issues with which I have been confronted have been many, I have given the highest priority of my time and effort to the subject matter of these hearings and to the development of standards or rules which may minimize the possibilities for abuse. My testimony today is in the nature of a report on the beginning steps in this endeavor.

The testimony is divided into three parts. First, I will set forth briefly the jurisdictional bases for the authority of the Bureau to engage in investigative activity. Second, I will endeavor to describe the practices of the Bureau in acquiring information about public officials,

Congressmen, and other citizens. In this connection, I will also describe in categories the "Official and Confidential" files that were retained by Director Hoover in his office suite. I am giving this emphasis to a discussion of these "Official and Confidential" files because I know there have been rumors and concern about them as being "dossiers," having a potential chilling effect on civil liberties and the political process.

Third, I want to share with you the results of our review of the practices of the Bureau and to give you my present judgment as to the types of abuses which past incidents suggest may require further safeguards.

## I. Investigative Jurisdiction of the FBI

The basic authority of the Federal Bureau of Investigation is drawn from section 533 of Title 28 of the United States Code. Under that statute, the Bureau is assigned the responsibility to "detect . . . crimes against the United States." It is pursuant to this provision of the statute that the FBI performs most of its work -- namely, investigating persons or incidents when there is reason to believe that a federal crime has been or is likely to be committed so that the violators can be prosecuted or the crime prevented. While this provision of the statute vests in the Bureau general

investigative authority over criminal violations, there are other statutes, such as the Congressional Assassination, Kidnapping and Assault Act (18 U.S.C. 351), which vest in the Bureau specific responsibilities to investigate violations.

Under 28 U.S.C. 533, the Bureau is also authorized to investigate matters where no prosecution is contemplated. Paragraph (3) of that section authorizes the Bureau "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." It is pursuant to this paragraph and the constitutional authority of the President that particular non-criminal investigative responsibilities have been assigned to the Bureau. For example, under several Executive Orders, the FBI is vested with the responsibility to conduct background security checks prior to appointment of individuals to sensitive positions. The Bureau has also been directed or authorized by Presidential statements or directives to gather information about activities that jeopardize the security of this Nation. Thus, as reported in United States v. United States District Court, 444 F.2d 651 at 659, on May 21, 1940, President Roosevelt sent a confidential memorandum to the Attorney General authorizing investigative agents "to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States including suspected spies." The President further directed

the Attorney General "to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens." Such Presidential statements or directives, of course, have to be considered as conditioned by the developing constitutional law on the powers of the President, and also have to be seen in the setting of legislative enactments and court decisions on the appropriate procedures for investigation.

Executive Order 10450 approved April 27, 1953, and since amended, requires investigation by the FBI of employees and applicants in the Executive Branch of the Federal Government on loyalty grounds as did Executive Order 9835, which it replaced. Under Executive Order 10450, the Bureau is also assigned the duty to disseminate to the heads of other departments and agencies and to the Civil Service Commission any information which has been received by the Bureau that bears on an employee's loyalty, character, or integrity. The order is specific on a variety of items deemed relevant. Thus, if a civil servant in the Department of Agriculture comports himself in a fashion that falls within the scope of the criteria of Executive Order 10450, and the FBI becomes aware of it, the Bureau is required to advise the proper official at the Department of Agriculture and the Civil Service Commission. I should point out the Executive Order applies only to employees of the Executive Branch.

If information received involves a question of loyalty on the part of an employee of an agency of the Executive Branch of the Government, the FBI would them conduct the investigation. If information received by the FBI pertains only to the employee's suitability, the Bureau conducts no investigation. However, the unsolicited data received by the Bureau is forwarded to the employing agency and the Civil Service Commission. In addition, the Bureau also conducts investigations under Executive Order 10450 at the request of the employing agency when such agency has developed information bearing on the loyalty of the employee.

During the fiscal year of 1974, 367,656 security forms were received by the FBI for processing under Executive Order 10450 and 935 investigations were conducted by the FBI under Executive Order 10450. At the present time, we do not have statistics on the total number of reports on government employees passed by the FBI to other agencies of the Executive Branch under Executive Order 10450.

In brief summary, then, the Bureau's investigative authority gives it responsibility to investigate violations of Federal law, to conduct background investigations for government employment, and to gather information bearing on our Nation's security.

## II. Files Compiled by the FBI on Public Officials, Congressmen, and Private Individuals

The Bureau currently maintains a total of approximately six and one-half million files and 55 million index cards that cross-reference these files. (These numbers do not include what is commonly referred to as identification records which consist of arrest, conviction and fingerprint records. They are maintained in a separate system.) Ordinarily each file is contained in one file jacket which can vary in volume from one page to hundreds of pages. Each file typically involves a single subject matter. For example, if a Senator is the victim of seven separate assassination threats, seven separate files are opened.

The FBI maintains the same kinds of files on members of Congress as it does on other American citizens. We have prepared for the Subcommittee's information an appendix entitled "FBI Information-Gathering Practices with Respect to members of Congress." The following discussion of the types of FBI files on members of Congress would apply equally to any public official; or indeed to any citizen.

The files maintained by the Bureau on members of Congress fall into five categories.

The first category covers instances in which individual Congressmen or Senators are the victims of criminal activity.

The most common examples of this type of material are files on extortion demands and assassination threats. These extortion demands and assassination threats files represent fully 79 per cent of the files relating to Senators (700 files) and 30 per cent of those relating to Congressmen (219 files). In addition, less than one per cent of the files on Senators (six files) and House Members (four files) contain "Victim -- Security" designations. Only when a member of Congress is threatened by an extremist group is the file designated "Victim -- Security."

Second, the Bureau maintains files on Congressmen or Senators who are the target of a Federal criminal investigation. These criminal investigative files comprise about three per cent of the files on Senators (30 files) and about eight per cent of the files relating to House Members (55 files). In addition, about one per cent of the Senate files (seven files) and slightly over two per cent of the files relating to House Members (17 files) carry "Subject -- Security" designations, and include investigations relating to possible violations of the security laws, the laws prohibiting disclosure of classified information, and Foreign Agents Registration Act, and so forth.

The third category encompasses files relating to background investigations -- commonly known as "full field investigations" -- on those Congressmen or Senators who have been appointed to or considered for Executive Branch positions or other positions

for which a background check is required. These files represent almost two per cent of those relating to Senators (18 files) and slightly more than seven per cent of those relating to members of the House (53 files).

Fourth, the Bureau maintains files -- carrying the designation "Laboratory Cases" -- covering requests for FBI laboratory work in cases received from other law enforcement agencies in which individual Senators or Congressmen are the victims. For example, a Chief of Police requested an examination of certain materials found on the exterior of a Senator's home which had been vandalized. These files represent two per cent of the files relating to Senators (14 files) and House Members (16 files).

Finally, the Bureau maintains files involving correspondence with or about the Congressman. These files represent approximately 12 per cent of the files relating to Senators (108 files) and approximately 50 per cent of those relating to House Members (358 files). Typically, the files include correspondence with individual Congressmen or Senators relating to matters which are of interest to them. For example, a Congressman will write to the Bureau requesting crime statistics or the Director's views on capital punishment, juvenile delinquency, or legalized gambling. The correspondence files also contain information volunteered by American citizens in the nature of "allegations" against individual members of Congress. In some cases, these "allegations" may involve the member's personal life such as morals or drinking habits.

If one totals all the files on current members of Congress in the five categories which I have mentioned, the number of files is 1,605 -- 883 relating to members of the Senate, and 722 pertaining to members of the House of Representatives. It may be important to clarify that the files are cross-referenced by index cards. Thus, if a Congressmen's name appears in one file, the FBI's Files and Communications Division may prepare an index card so the information in this file can be retrieved expeditiously.

I should add that the legislative liaison section of the FBI maintains a record of its contacts with members of Congress and other information of the sort typically held by legislative liaison offices of other government agencies. This information is recorded on index cards. The cards are not themselves regular FBI files, nor does the regular FBI file index refer to them. They ordinarily contain biographical material of the same sort that is listed in a "Who's Who" entry or indeed in the Congressional Directory. In addition, the cards generally record the liaison section's correspondence with or concerning members of Congress, notations of informal FBI contacts with members of Congress, and public record material such as statements members have made concerning their positions on issues in which the Bureau has an interest. I should also point out that some

cards contain information retrieved from the Bureau's regular files. Information of that sort is retrieved and recorded when, for example, a member of Congress has inquired about an investigation or is a victim of a crime. A partial review of the cards kept by the legislative liaison section indicated that they generally do not contain derogatory information concerning the personal life or morals of members of Congress. The partial review did, however, turn up one instance in which a derogatory allegation received by the Bureau in official correspondence concerning an individual who is no longer in the Congress was listed on a card. In this instance, the information was identified as being unsolicited and unsubstantiated.

I should now like to go back to the question, which I know has been a major concern, of how the Bureau ought to handle the unsolicited allegations concerning the members of Congress received by the Bureau. I have heard recommendations that the Bureau should be prohibited from retaining any unsolicited allegations if the allegations do not relate to conduct or activities within the FBI's criminal investigative jurisdiction. As Director Kelley has indicated in his public statement on this matter, if an unsolicited allegation received by the Bureau does not come within its investigative jurisdiction over criminal violations, a letter stating this is sent to the individual who made the allegation. But under current procedure, both the letter containing the allegation and the FBI's response are then retained and filed by the Bureau.

I realize there are policy considerations which argue in favor of retention of the unsolicited material allegations which on their face do not come within the Bureau's jurisdiction at the time they are received but which may come within the jurisdiction at a later time because of additional facts or circumstances. A vitriolic allegation concerning a Congressman can become of importance later on if the Bureau subsequently receives an anonymous extortion or assassination threat against the Congressman. There are other examples not difficult to imagine in which the allegation, as part of a developing later picture, becomes relevant and significant. If an investigative agency destroys material it has received and later it is claimed that the material should have alerted the agency to all kinds of serious problems, that criticism may be impossible to evaluate. The criticism indeed may be justified; the destruction of the information may have been improperly motivated. Nevertheless, I suggest a procedure could be devised and authenticated to screen materials to be retained, or to periodically review materials from this standpoint.

But whatever the ultimate decision on this is, I believe an overriding issue is not retention or return or destruction, but rather what the FBI does with respect to allegations either inside or outside of its jurisdiction. These allegations are unsubstantiated charges. Are they kept secure by the Bureau from improper use or dissemination? I realize this question will

not arise if the information is destroyed, but this seems to me to be too easy a circumvention of the central and broader inevitable question as to which the quality of the Bureau and appropriate guidelines and protective rules should give a reassuring answer.

It is at this point that I believe I must refer to a past practice of the Bureau with respect to certain files, not with reference to their subject matter, but to their location. The review of FBI files on individual Congressmen disclosed certain files -- marked "Official and Confidential" or simply "OC" -- that were retained by Director Hoover in his office suite. These files were removed from Mr. Hoover's office suite following his death and taken to an adjoining office occupied by the then Associate Director of the FBI.

The "OC" files dated back to the 1920's. In late 1941, Mr. Hoover reorganized the confidential files maintained in his office suite; he described them as including "various and sundry items believed inadvisable to be included in the general files of the Bureau." He directed that many of the materials then in his office suite be transferred either to the office of the then Assistant FBI Director in charge of the Administrative Division (who had responsibility for files and other crime records generally), or to what was then known as the National Defense Division. The material transferred to the National Defense Division included confidential memoranda on undercover employees, including those

working on the war effort; confidential informants; national security surveillances; and similar items.

Mr. Hoover directed that the materials to be retained in his office suite following these transfers "be restricted to confidential items of a more or less personal nature of the Director's and items which (Director Hoover) might have occasion to call for from time to time, such as memoranda to the Department on the Dies Committee, etc." The official and confidential files maintained in Mr. Hoover's office suite represented 164 file jackets or folders. They cover a period from the 1920's to shortly before Mr. Hoover's death in 1972. Of the 164 files, one had no date, and 131 contained entries limited to one decade -- that is, all of the material in the folder was entered in a single decade. Most of the files were compiled between 1940 and 1960. A breakdown of the reslationship of these files to various time periods is as follows: in the 1920's -- 1; in the 1930's -- 5; in the 1940's -- 55; in the 1950's -- 25; in the 1960's -- 28; in the 1970's -- 17.

Some of the files covered two decades. There were four files covering the two decades of the 1930's and 1940's; seven in the 1940's to the 1950's; eight in the 1950's to the 1960's; and three in the 1960's to the 1970's.

The remaining 10 folders covered the time periods of three or more decades: five covered three decades, four spanned four decades, and one file covered five decades. Of the 164 OC files, 106 pertain to individuals, three to organizations, and

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55 to miscellaneous matters. The three pertaining to organizations all relate to the Communist Party.

We have also broken down the OC files by subject matter into the following areas: policy matters; administrative matters; materials pertaining to Mr. Hoover or the FBI; reference material; internal personnel matters; protection of sources or sensitive information; public figures or prominent persons; and matters which appeared to be of particular personal interest to Mr. Hoover. Details concerning these categories are as follows:

(1) Policy Matters

There were 21 folders that pertain to policy matters, covering such broad areas as an agreement with the Secret Service concerning Presidential Protection; Presidential directives regarding the role of the FBI in the security field; conversations between Mr. Hoover and a President-elect regarding the role of the FBI in his forthcoming Administration; letters to and from the White House regarding expansion of FBI legal attache posts abroad; and a statement outlining FBI policies regarding civil rights and domestic violence prepared in 1947 for Mr. Hoover's use in addressing the President's Committee on Civil Rights.

(2) Administrative Matters

There were 40 folders considered to fall within the category of administrative matters. Some examples are as follows: memoranda regarding an Attorney General's

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decision with respect to supervision of the FBI by an Assistant Attorney General, the Bureau's recommendations for improved security measures at the Capitol; letters to Mr. Hoover from an individual declining employment in the FBI; memoranda between the Bureau and the Department concerning reimbursement for funds expended for Department of Justice applicant investigations; and a memorandum concerning the briefing of the President by Mr. Hoover and the Attorney General with respect to certain intelligence activities by hostile nations within the United States.

(3) Matters Pertaining to Mr. Hoover or the FBI

Encompassed within this category are thirteen folders that include such things as memoranda regarding efforts on the part of various people to have Mr. Hoover replaced as Director; information concerning an alleged smear campaign against Mr. Hoover; derogatory remarks about him; and so forth.

(4) Reference Material

There were four folders in this category containing information concerning materials developed indicating foreign influence in certain domestic extremist movements; a compilation of data concerning the 1964 riots; organized crime matters; and a report of incidents involving explosives and incendiary devices.

(5) Internal Personnel Matters

There were four folders considered to fall within the category of internal personnel matters. They deal with such things as the poor attitude of an FBI employee; handwritten letters from former FBI agents concerning internal matters within the Bureau; and so forth.

(6) Protection of Sources or Sensitive Information

Fifteen folders comprise this category. Specific examples of this type of information include: the possible defection and redefection of an individual; material on FBI counterintelligence activities; technical devices and techniques; and telephone surveillances involving sensitive coverage in the national security area.

(7) Public Figures or Prominent Persons

There were 48 folders considered to fall within this category. By and large, the material in these folders contained derogatory information concerning individuals. It does not necessarily follow that the derogatory information pertained to the individual named on the caption of the folder; in some instances a folder would contain only a record of a contact between Mr. Hoover and a public figure during which derogatory information concerning another individual was discussed. Some of the derogatory material was developed as a result of official investigations by the Bureau; some was furnished by another government agency; and some was furnished by informants. Included in the

public figures or prominent persons category were Presidents, Executive Branch officers and 17 individuals who were members of Congress. In the latter category, two of the individuals are still in the Congress. Fifteen of the folders relating to Congressmen were in Director Hoover's OC files; and the other two were in confidential files which as mentioned above were maintained by the then Assistant Director in charge of the Administrative Division.

Some of the OC files relating to Congressmen contain summaries of materials in the regular FBI investigative files specially prepared for meetings which Mr. Hoover had with those Congressmen. Some of the Congressional OC files contain indications of how the material was used. There is a document in one file indicating that derogatory material was improperly disseminated. In this instance an FBI agent forwarded derogatory information to Mr. Hoover concerning a Congressman who had attacked the Director. The file contains a document which indicates that Mr. Hoover disseminated the derogatory information to others in the Executive Branch. We cannot, however, always know what action, if any, was taken with respect to these files. In the case of instances of use of the resources of the FBI by Executive officials outside the Bureau -- a subject which I will discuss in a moment -- the files indicate that, on several occasions, the Bureau was directed to maintain no records with respect to the actions they had been requested to take.

(8) Items of Personal Interest to Mr. Hoover

There were 19 folders considered to fall within this category. These files include such things as an internal memorandum reporting information from a source that a reporter intended to "expose the incompetency" of an official of an intelligence agency in 1941, and other miscellaneous correspondence to and from individuals.

I do not know why these files were retained in the suite of offices of the Director of the Federal Bureau of Investigation. The range of items in the OC files includes many routine, mundane and totally innocuous materials. I believe it can be concluded that the OC files maintained by Director Hoover do not, except in very limited instances, warrant the term "dossiers" in the pejorative sense.

Looking toward the future, I would be disturbed at the thought of an FBI Director maintaining files on specific individuals in his own personal offices with the unavoidable consequence that the files would be generally suspected of being "dossiers," with various connotations as to purpose or use. Even though the number of OC files on individuals or organizations is relatively small -- particularly since they were gathered over such a long period of time -- the potential effect of the mere knowledge that such files were kept in the Director's office is, I think, obvious. Director Kelley and I both agree that such files should not be so maintained.

No such files have been maintained by DIrector Kelley during his tenure as Director of the Federal Bureau of Investigation.

## III. Instances of Misuse of the Resources of the Federal Bureau of Investigation

Moving beyond the OC files, our review disclosed a small number of instances in the past where the resources of the FBI were misused by the Executive Branch. The fact that they have occurred should require us to ensure that measures are taken to preclude or at least minimize the possibility of repetition.

These few abuses were not unique to any particular Administration or to any political party. In order to consider what measures may be appropriate, we have endeavored to characterize the types of abuses to which the Bureau has been susceptible in the past.

### (1) Use of the Resources of the FBI to Gather Political Intelligence

Our review disclosed a few documented instances in which the Bureau at times during the course of an election campaign, was requested to provide -- and did indeed provide -- information which could be used as political intelligence information. In one instance, this involved a check of FBI files on the staff of a campaign opponent.

### (2) Improper Use of the FBI in Connection with the Political Process

In a few instances recorded in Bureau files, an incumbent

President caused the FBI to gather intelligence relating to a political convention under circumstances that, although cast in legitimate law enforcement terms, could -- and some would say should -- have been suspected of being politically motivated.

(3) Use of the FBI to Report on Certain Activities of Critics of an Administration's Policies

The FBI's files document a few instances in which an incumbent President caused the Bureau to report on certain activities of Members of Congress who were opposed to and critical of his policies.

(4) Use of Information in the FBI Files to Respond to or Discredit Critics

Again, the Bureau files document a very small number of instances in which derogatory information legitimately obtained by the Bureau was disseminated to other members of the Executive Branch to enable them to discredit their critics.

(5) Use of the FBI in Connection with Other Legitimate Law Enforcement Activities

There was one documented instance where the FBI was used to conduct an inquiry for what might be described as political purposes, relating to an investigation properly conducted by other Executive Branch officials.

Our review of the files on these matters indicated three common threads that occur throughout. First, the initiation of the improper request was usually from a White House staff member -- purporting to act in the President's name -- to a counterpart subordinate official in the FBI. There are relatively few documented instances of abuse involving the direct participation of a principal -- either a President or the FBI Director -- although

the principals in certain cases were probably knowledgeable of the action. Second, many of the improper requests for information or activity were cast in terms of "national security" or other legitimate law enforcement purposes. Finally, the instances in which the Bureau was improperly used could have been avoided had former officials of the FBI not been reluctant to utilize available "safeguards." These safeguards are mainly two: first, the availability of the Attorney General as a "lightning rod" to deflect improper requests -- and in some of the instances covered this would have been an important protection for the Bureau; and second, the FBI Director's right, in these kinds of circumstances, of direct recourse to the President -- the nominal "source" of the improper request -- to verify (a) his knowledge that the request had been made, and (b) his judgment that the request was a legitimate one which he would wish to authorize.

The development of measures to preclude or minimize the possibilities for abuse is not an easy task, and I consider that our work in preparing appropriate guidelines is at its beginning, not at its end. We will need a great deal of consultation and undoubtedly help on measures which might be taken. I am sure, of course, we all realize that it is the inherent integrity and quality of the Bureau itself which have been and must be the most important guarantee. But some abuses have occurred and we must attempt to find the best remedial steps which will protect the Bureau in its proper mission.

While we are at the beginning of our search for and consideration of those steps, there is one obvious measure which I have thought it important to put into effect at once.

I have instructed the Director of the Bureau to report to me immediately any requests or practices which in his judgment are improper or which, considering the context of the request, he believes present the appearance of impropriety. The Director has, in turn, instructed Bureau personnel to report any untoward requests or behavior to him.

There is one other measure that the Department of Justice has supported for some time -- legislation that would impose criminal sanctions on Federal employees who improperly disseminate information about individuals from FBI files. Similar legislation, H.R. 61, has been introduced by the Chairman of this Subcommittee. I believe that legislation in this area is important. This is, of course, the direction of the new privacy laws but they do not cover this situation.

Beyond these two measures, there are obviously other steps that are required and should be considered. We should consider the possibility of an Executive Order which will limit the authority in the White House to make requests directly to the Bureau to a few highly placed White House officials. This is because it is characteristic of a significant number of past abuses that they have involved requests by personnel at the White House to the Bureau. I believe that a proper Executive Order can be drafted which will ensure greater accountability. This would

by no means be a panacea, but it would be an added protection which may be helpful and should be explored.

We shall also give consideration to the scope and effect of the Executive Order which requires the Bureau to report to heads of Executive departments and the Civil Service Commission unverified allegations on a variety of items which may be relevant to the character of a government employee. The meaning of this order has undoubtedly changed over the course of the years because of intervening case law. But in addition I think we must take into account the need to protect against the tendency of practices in one area becoming contagious in another area. In this sense, the requirement to report in the Executive area has a relevance to the acceptance, perhaps too easily, of the practice to retain information sent in on members of the Legislative Branch.

The preparation of adequate guidelines remains the major task before us. These guidelines will have to speak to the appropriate investigatory areas and the scope of the Bureau's investigating practices in relation to the jurisdiction and authority which has been conferred upon the Bureau. I tried to set forth that jurisdiction and authority earlier in this testimony. They extend to the detection and investigation of crimes against the United States where there is reason to believe these crimes have been committed or are likely to be committed, to conduct investigations for government employment, to gather information important to national security. This is a broad charter but not an unlimited

one. I believe we are all in agreement that criteria are required to further define the appropriate scope of the Bureau's work and this relates of course also to the question of retention and disclosure of information. The Bureau operates under the supervision of the Department of Justice of which it is a part. The guidelines therefore must, in addition, speak to the effectiveness of this supervision.

Mr. Chairman, I assume we all realize that no agency of government, since it is a human agency, if looked at with the critical eye of hindsight and history over many years, can be totally free of flaws. An examination of these mistakes or tendencies must be seen in perspective. We have examined them to provide that vigilance which is always required, and to safeguard the future. In his nineteen months as Director of the Federal Bureau of Investigation, Clarence Kelley has succeeded in keeping the Bureau out of partisan politics. I trust the steps we have already taken and those which we must devise together will be helpful to the proper and important role of the Bureau.

Justice

(4th Amendment)

November 18, 1975

Dear Leo:

Attached is a copy of the Attorney General's presentation on the Fourth Amendment, which I thought you might find interesting.

Sincerely,

Philip W. Buchen
Counsel to the President

Mr. Leo Cherne
Executive Director
Research Institute of America, Inc.
589 Fifth Avenue
New York, New York 10017

# Department of Justice

TESTIMONY

OF

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE SENATE SELECT COMMITTEE
TO STUDY GOVERNMENTAL OPERATIONS
WITH RESPECT TO INTELLIGENCE ACTIVITIES

10:00 A.M.
THURSDAY, NOVEMBER 6, 1975
RUSSELL SENATE OFFICE BUILDING
WASHINGTON, D. C.