

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
Washington 25, D.C.

March 6, 1962

MEMORANDUM FOR THE SECRETARY OF THE ARMY

Attention: Major General H. A. Gerhardt
Chief of Legislative Liaison

THE SECRETARY OF THE NAVY

Attention: Rear Admiral Robert E. M. Ward
Chief of Legislative Affairs

THE SECRETARY OF THE AIR FORCE

Attention: Major General Thomas C. Musgrave, Jr.
Director, Legislative Liaison

THE ASSISTANT SECRETARY OF DEFENSE (COMP)

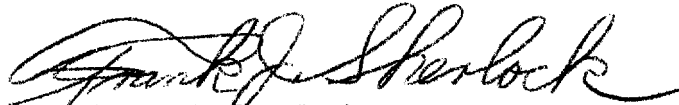
Attention: Assistant General Counsel (Fiscal Matters)

THE ASSISTANT SECRETARY OF DEFENSE (Manpower)

SUBJECT: H. R. 10174, 87th Congress, a bill "To amend the Internal Security Act of 1950."

There is attached a proposed report on the above subject bill on which the views of the addressees are requested not later than the close of business, March 14, 1962.

Hearings are scheduled for March 22, 1962.



Frank J. Sherlock
Director
Legislative Reference Service

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
Washington 25, D. C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Defense on H. R. 10174, 87th Congress, a bill "To amend the Internal Security Act of 1950."

The bill prescribes the personnel security procedures to be followed in employing, detailing, or assigning personnel to the National Security Agency. Among other provisions, it provides that every employee, including those assigned or detailed to the Agency, shall receive a full field investigation, that boards of appraisal shall pass upon their eligibility for employment and access to classified information, and that the Secretary of Defense may summarily terminate the appointment of any such officer or employee.

The Department of Defense is in full agreement with the over-all objective of this bill, namely, to insure that only those whose loyalty and suitability meet the highest standards are permitted access to sensitive information of the National Security Agency. In the Department's view, the provisions of the bill may be characterized as follows: (a) those which properly exempt the Agency from the disclosure of classified information in the execution of certain personnel functions; (b) those which call for the same security practices as are presently being administered by the Agency; and (c) those which are so restrictive as to deny to the Secretary of Defense, and more immediately the Director of the Agency, the necessary flexibility in carrying out the Agency's mission. For these reasons, which are more fully set forth below, the Department of Defense recommends that the bill be revised in certain respects.

Section 301(a) would provide that the employment, assignment, or detail of all persons to the Agency must be "clearly consistent with the interests of national security." This would impose by statute the same employment standard that is prescribed by Executive Order 10450. While this standard has been in effect in the National Security Agency since 1953, the Department interposes no objection to enactment of a statutory standard.

Section 301(b) would require that no person assume duties in the Agency unless "in connection with such employment, detail, or assignment" he has been the subject of a full field investigation and has been cleared for access to classified information. Exceptions would be authorized on a temporary basis in time of war, national disaster, "or in exceptional cases in which the Secretary makes a determination in writing that his action is necessary or advisable in the national interest."

This provision would depart from the present practice of the Agency in that it would require a full field investigation to be completed on individuals prior to their actual employment instead of, as at present, prior to granting clearance for access to sensitive cryptologic information.

Because of the very sensitive nature of the Agency's operations, those seeking employment must pass very rigorous screening procedures. The Agency does not hire any applicant until a favorable evaluation has been made of the National Agency Check, and of such additional investigations, examinations, and inquiries as are necessary to determine the applicant's loyalty and suitability. Only upon the successful completion of these requirements is an applicant offered a conditional appointment, subject to the favorable evaluation of a current full field investigation.

Upon receiving a conditional appointment, the newly hired employee is assigned to a training school in a restricted area for useful and necessary basic orientation and training. If, upon the completion of formal training the full field investigation is not yet completed, he is assigned to productive work which may require limited access to classified information. However, under no circumstances is he authorized access to sensitive cryptologic information. To insure that such information is not disclosed to a person in this category, he is assigned to an especially established work area which is physically separated from areas in which sensitive cryptologic work of the Agency is performed. Only upon a favorable evaluation of the full field investigation, the granting of a Top Secret clearance, and the completion of security indoctrination, is the employee given access to sensitive cryptologic information. It is within this context that the Department of Defense has serious reservations regarding the necessity for the requirement of a full field investigation before being employed by the Agency.

Furthermore, to complete background investigations expeditiously, under provisions of Section 301(b), it would be necessary to greatly expand the investigative work force. Even then, the refusal of applicants, particularly those possessing skills or aptitudes in high demand, to await employment until all aspects of the investigation have been completed would seriously endanger the Agency's efforts to recruit personnel necessary to carry out its missions which are vital to the national security. The Department recommends that it be permitted to continue to employ successful applicants under the controlled conditions outlined above. Section 301(b) is consequently opposed.

Section 301(c) would provide for the creation of boards of appraisal to pass upon the loyalty, suitability, and fitness of employees and of persons assigned or detailed who require access to classified information. If the board recommends that employment, assignment, detail, or clearance be denied, only the Secretary or his designee for such purpose, may rule to the contrary, provided a determination is made in writing that such employment, assignment, or detail is in the national interest.

While the Department of Defense has no basic objections to the creation of boards of appraisal, it is recommended that section 301(c) be changed in certain respects. The requirement that a board's recommendation can only be overruled by a "written determination" constitutes an unnecessary administrative burden on the Secretary or his designee. Accordingly, it is recommended that the section be revised so as to delete a requirement that the determination be in writing. Secondly, the requirement that the board members be cleared by the Secretary, constitutes, in our mind, an inflexible requirement. Further, as the Director of the National Security Agency is charged with the immediate responsibility for the administration of his Agency, it is submitted that these boards should be established in the National Security Agency by the Director, NSA, and that the Director, NSA, will appoint and issue clearances to the members thereof. Thirdly, it is recommended that the boards of appraisal confine their recommendations to loyalty and suitability, and that the requirement concerning fitness be deleted from the bill. The term "fitness" relates to qualification requirements for Federal employment and is not considered to fall within the security procedures objectives of the bill as stated in Section 301(a). Fourthly, because of the conditional appointment process outlined previously, the board must, and should, limit itself to recommending on final clearance for access to Top Secret classified information. Fifthly, from the standpoint of a good administration and sound security practices, it is necessary that clearances issued by one office of the Defense Department be respected throughout the Defense Establishment. Those military and civilian members who are assigned or detailed from other echelons of the Department of Defense, and who have already been investigated and cleared by their respective military departments, should not be required to undergo a second evaluation. The bill should therefore concern itself with employees of the Agency and other personnel being considered for initial or continued access to classified information. Sixthly, it is considered that the use of boards would be too unwieldy a device for acting upon a large volume of cases which are clear cut and can be resolved readily. It is submitted, therefore, that the Director, NSA, should refer to the boards only those cases in which he determines there is a doubt as to whether final clearance for or continued access to classified information would be clearly consistent with the national security.

Section 301(d) would authorize the Department of Defense to utilize the services of any investigative agency provided the head of that agency consents. In those instances in which the Department of Defense has found it necessary or desirable to seek the assistance of other investigative agencies of the Government, it has experienced marked cooperation. While enactment of this section would merely give statutory recognition to what has been a long accepted administrative practice, the Department interposes no objection to its enactment.

Section 301(e) would give the Secretary of Defense, or his designee, summary authority to terminate the employment of any officer or employee of the Agency. Any employee so discharged would be entitled to accept employment with any other department if he is otherwise eligible for such

employment. The effect of this section would be to remove the statutory and administrative procedural restrictions imposed upon the National Security Agency with respect to termination of employment. Under present law, removals on security grounds are carried out under Public Law 733, 81st Congress (5 U.S.C. 22-1), removals on suitability grounds, in the case of veterans, under section 14 of the Veterans Preference Act (5 U.S.C. 863).

The authority to discharge an employee on a determination that it is "in the interest of the United States" is equivalent to that granted the Director of the Central Intelligence Agency by section 101(c) of the National Security Act of 1947, as amended (50 U.S.C. 403(c)). In this respect, section 301(e) has a statutory precedent.

While there may be some instances when the procedural requirements of these "discharge" statutes should give way to the demands of national security, there are other occasions in which the termination of an employee can be effected under circumstances which do not give rise to the disclosure of classified matters. From a morale standpoint, it is especially important that each employee be informed of the reasons prompting his proposed dismissal, and be given the opportunity to present his side of the case. Subject to the necessary limitations of national security, both the Government and the employee stand to benefit by a proceeding that makes a full inquiry into the employee's eligibility for continued employment.

In the light of these considerations, the Department of Defense does not object to the enactment of section 301(e), but recommends that it be amended in two respects. First, that this authority be reserved solely to the Secretary of Defense; secondly, that this authority be invoked only upon a determination that the normal removal procedures where appeal rights are involved cannot be invoked consistently with the national security. This authority would be similar to that granted the Secretary of Defense by Section 9 of Executive Order 10865 relating to the Industrial Security Program.

Section 301(f) defines "classified information" in the same manner as it is defined in the criminal statute imposing penalties for unauthorized disclosure of certain categories of classified information (18 U.S.C. 798). The Department concurs in the enactment of this section.

Section 301(g) and (h) would exempt personnel appointments from the provisions of Civil Service laws and exempt the Agency from the Performance Rating Act. The Department favors enactment of these sections as these exemptions would provide statutory assurance that classified information about the Agency's activities need not be disclosed in administering these aspects of its personnel program.

Cost and Budget Data

Enactment of H. R. 10174, as introduced, would involve an annual cost to the Department of Defense of approximately \$800,000. As proposed to be amended by the Department of Defense, the cost is estimated at \$35,000 per year.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

Cyrus R. Vance

Honorable Francis E. Walter
Chairman, Committee on Un-American
Activities
House of Representatives