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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

28 May 1968

Honorable Charles J. Zwick
Director, Bureau of the Budget
Washington, D. C. 20503

Dear Mr. Zwick:

Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 1035, a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasion of their privacy."

The purpose of S. 1035 is to make it unlawful to require or request a civilian employee, or person seeking employment in the executive branch of the United States Government, to disclose his race, religion, or national origin, or the race, religion, or national origin of any of his forebears; attend meetings or to participate in activities unrelated to the performance of his official duties; report outside activities or employment unless there is reason to believe that these activities conflict with his official duties; submit to questioning about his religion, personal relationships or sexual attitudes through interviews, psychological tests or polygraphs, support political candidates, or attend political meetings; buy bonds or other obligations issued by the United States; disclose any items of his or his family's property or income other than specific items tending to indicate a conflict of interest with respect to the performance of any of his official duties; or submit, when he is under investigation for misconduct, to interrogation which could lead to disciplinary action without the presence of requested counsel. To provide enforcement powers, the bill vests jurisdiction in the United States District Courts to hear cases under the Act and to provide injunctive relief. It also provides for a Board on Employees' Rights to investigate and hear complaints charging violation or threatened violation of the Act. Limited exceptions to certain of the bill's provisions are extended to the Central Intelligence Agency (CIA), the National Security Agency (NSA), and the Federal Bureau of Investigation (FBI).

The Department of Defense is opposed to the enactment of S. 1035 in its present form. Set forth immediately below is a summary of the principle objections.

1. The bill fails to distinguish between eligibility for government employment as such, and the special responsibilities of a national security nature entrusted to certain Departmental personnel. The business of inhibiting espionage by careful selection of persons to be given access to sensitive information is extremely difficult at best. Without adequate information concerning the background, affiliations, personal relationships, mores, and financial and general integrity of persons considered for such access, it may well be impossible. The exemption of inquiries made for the purpose of determining eligibility for sensitive positions (rather than simply for general employment) would seem the minimum necessary to preserve the integrity of the existing security programs.

2. The bill fails to provide the Secretary of Defense with authority to exempt certain sensitive activities of the Department from its provisions, despite the fact that those activities involve access to classified defense information of equal or greater import to national security than positions in the agencies cited in section 6. The exemption authority granted to the CIA, NSA and FBI is based on a recognition of the sensitivity of their missions and, for the same reasons, should be extended to the Department of Defense when the Secretary determines the national security so requires.

3. The provisions permitting civil actions to be filed in the United States District Court without claiming damages or exhausting administrative remedies are disruptive to the Department's grievance procedures and to employee-management relationships. To permit disregard of the jurisdictional prerequisites to judicial review would most certainly encourage the filing of spurious suits and open the door to broad and possibly organized harassment of executive actions.

4. The provision authorizing the Board on Employees' Rights to reprimand, suspend or remove civilian violators is in derogation of the responsibilities of the employing agency

and of the Civil Service Commission. Furthermore, the Board's authority to initiate court martial proceedings against offending military supervisors is discriminatory, since penalties involving fines or imprisonment may not be imposed on civilian supervisors who violate the terms of the Act.

5. The effectiveness of the employee organization system of representation established by E. O. 10988 would be seriously disrupted. Under section 4, an employee organization could join in a court suit at the employee's request, even though the organization does not represent the employees of that Defense activity. Furthermore, under section 5 an employee organization could intervene in proceedings before the Board on Employees' Rights if "in any degree [it is] concerned with employment of the category in which any alleged violation of this act occurred." In this instance, it could intervene without regard to the wishes of the complaining employee.

A more complete exposition of these points is set forth in the attached "Section by Section Analysis." The attachment includes recommended language changes in the bill to meet the objections summarized above.

Sincerely,

L. Niederlehner
Acting General Counsel

Enclosure

SECTION BY SECTION ANALYSIS

Section 1(a) would prohibit, with certain exceptions, inquiries about an employee's race, religion or national origin or that of his forebears. It is recommended that the second proviso beginning on page 2, line 8 be amended to read, in part: "Provided further, That nothing contained in this subsection shall be construed to prohibit inquiring concerning the national origin of any employee or of any person seeking employment, or the national origin of any person connected with either by blood or marriage, when such inquiry is deemed necessary or advisable***." (emphasis added) The need for broadening the category of persons exempted is especially important where an applicant or an employee is to be entrusted with highly sensitive information, or is to be assigned to overseas areas where coercion might be brought against him or his close relatives.

Section 1(b), in protecting an employee against compulsory attendance at meetings, forbids taking notice of an employee's participation in subversive activities or with other groups whose interests might be hostile to United States interests. Such a restriction is strongly opposed by the Department, and is contrary to well accepted security practices. Accordingly, it is recommended that a proviso be added to section 1(b) reading as follows: "Provided further, That nothing in this subsection shall be construed to prohibit taking notice of the participation of an employee in the activities of organizations, groups, and movements deemed relevant to the national security." This section is also objectionable because it appears to bar taking notice that an employee failed to attend security indoctrination lectures. In some instances, these counseling sessions would not relate specifically to "the performance of his official duties." For example, the sessions may relate exclusively to an explanation of foreign intelligence operations, and how employees holding extremely sensitive positions may become targets of foreign espionage. Obviously, efforts to secure attendance at such sessions should not be prejudiced. Accordingly, section 1(b) should be further revised to meet this consideration.

Section 1(c) would prohibit requiring an employee to participate in activities unrelated to his official duties or to the development of work skills. It is assumed that the term "official duties" is to be broadly construed and that it would not bar issuing instructions and guidance to persons assigned to highly sensitive duties. For example,

such employees may be required to report security violations, attend security indoctrination lectures, and report definite indications of mental instability and other unusual behavior on the part of other similarly assigned employees. With the understanding that these precautionary measures to safeguard highly sensitive information are part of the "official duties" of every such employee, the Department of Defense interposes no objection to this section.

Section 1(d) would prohibit requiring or requesting an employee to make any report concerning his activities or undertakings unless they relate to the performance of his official duties, the development of his work skills, or there is reason to believe that he is engaged in outside activities or employment in conflict with his official duties. The Department recognizes that this provision was designed to eliminate certain improper reporting practices, and in this respect we support the principle behind this provision. However, there are some instances in which there is a good and sufficient cause for requiring such reports. For example, it may be necessary to determine whether an employee is engaged in political activities proscribed by the Hatch Act. Obviously, the best way to ascertain the facts is to ask the employee for an explanation. It is also important that an employee assigned to sensitive duties report any approach by known intelligence agents, his planned travel to communist-controlled countries, or his attendance at such meetings where representatives of such countries will be in attendance. To make provision for these special circumstances, it is recommended that a proviso be added at the end of page 3, line 25, reading substantially as follows: "Provided, however, That nothing contained in this subsection shall be construed to prohibit requesting a report when necessary for law enforcement purposes or when the employee is assigned to activities or undertakings related to the national security."

Section 1(c) would generally prohibit interrogation, examination or psychological tests designed to elicit information about an individual's personal relationship with any relatives, his religious beliefs or practices, or his attitude or conduct with respect to sexual matters. The Department is in agreement that such inquiries are not required to determine eligibility for non-sensitive positions. But when it comes to determining the suitability of employees for positions involving a

high degree of personal responsibility and often a high degree of psychological pressure or nervous strain, the results of such examinations and psychological tests may produce an important insight. Examples of such positions are those requiring access to nuclear weapons and nuclear weapon systems, chemical and biological warfare information, and operational war plans data. Because of the grave responsibilities, there is a need to evaluate fully the suitability and dependability of each prospective employee to determine the existence of any deep-seated emotional problems involving his family, sex attitudes and conduct. While section 6 permits some limited psychological testing, it applies only to a very limited number of Department of Defense employees (those employed in the National Security Agency) and then only under very restrictive circumstances. Furthermore, even this exception is limited to polygraph examinations and psychological tests, and does not permit an employee to be interviewed about derogatory information that has come to the attention of the Department. Oftentimes, these interviews would be less embarrassing than the more formalized polygraph or psychological tests. Employees occupying "critical-sensitive positions" must, of necessity, meet higher standards, and consequently must be examined on matters which would not be considered in determining eligibility for less sensitive positions or non-sensitive positions. By "critical-sensitive" positions, we mean any position the principle duties of which include: (a) access to TOP SECRET information; (b) development or approval of war plans, plans or particulars of future or major or special operations of war, or critical and extremely important items of war; (c) development or approval of plans, policies or programs which affect the overall operations of a department or agency, i.e., policy-making or policy determining positions; (d) investigative duties, the issuance of personnel security clearances, or duty on personnel security boards; or (e) fiduciary, public contact, or other duties demanding the highest degree of public trust. Accordingly, a proviso should be added that would permit the Department to conduct such interrogations, examinations or psychological testing where the position is designated "critical-sensitive." While the Department believes this authority is essential to effective security operations, it would exercise it only where the circumstances warrant it, and then only under properly administered controls.

Section 1(f) would prohibit requiring or requesting an applicant or an employee to take a polygraph test regarding his personal relationships

with his relatives, his religious beliefs, or his attitude or conduct with respect to sexual matters. The National Security Agency would be exempted, but only under the restrictive conditions imposed by section 6. Under Department of Defense Directive 5210.48, July 13, 1965, polygraph examinations may be conducted only with the prior written consent of the individual, and if he refuses, no adverse action may be taken by the Department. It is believed that this policy should be continued, and that polygraph tests should be permitted in specific security cases which cannot otherwise be resolved, provided the individual voluntarily consents. Accordingly, it is recommended that a clause be added beginning on line 10, page 5, reading as follows: "unless the employee voluntarily consents to such a test in order to resolve specific questions not otherwise resolvable relating to his suitability for employment or suitability for assignment to activities or undertakings related to the national security."

Section 1(g) would prohibit coercion of any employee to contribute to the nomination or election of a person or groups of persons to public office. While the Department supports the objectives of this section, it is noted that the Commission on Political Activities of Government Personnel has submitted sweeping recommendations for revision of the Hatch Act. The Committee may wish to defer consideration of this provision in favor of the broader study.

Section 1(h) would bar coercion in bond drives and fund-raising campaigns, and in that sense reflects the firmly established policy of the Executive Branch and of the Department of Defense. When allegations of coercion have come to the Department's attention -- and they have been relatively few -- generally they could not be substantiated. In the few instances in which the allegations were verified, it was due for the most part, to errors of judgment, excessive zeal or misunderstood communications, rather than any criminal intent to compel or coerce others. Nevertheless, section 1(h), when taken in conjunction with sections 3, 4 and 5(1) would make such acts unlawful, and in the case of a military offender, a basis for court martial action. The Department of Defense does not consider criminal sanctions in the case of military personnel, or the judicial sanctions contemplated in the bill for civilian personnel, as either enlightened, effective, or appropriate measures for dealing with such conduct. Administrative personnel

action is eminently more suitable. We are convinced that creating a specific new crime or establishing specific new judicial sanctions in the context of demonstrably worthy programs -- the encouragement of bond purchases and the support of charities -- is neither necessary nor desirable. Furthermore, should a military officer deliberately disregard administrative instructions, ample authority already exists to charge him for failure "to obey any lawful general order or regulation" under Article 92 of the Uniform Code of Military Justice (10 U.S.C. 892). Consequently, the Department of Defense believes that it already has sufficient authority to deal with this kind of coercion complaint.

Section 1(i), by placing restrictions on requiring or requesting an employee to disclose financial information, seriously handicaps the Department's ability to evaluate an individual's personal financial stability and susceptibility to bribes or other financial pressures. This is especially important in cases in which the Department receives information that an employee holding an extremely sensitive position is reported to be in serious financial straits. A number of individuals have become involved in espionage against the United States or have attempted to do so, solely because they were deeply in debt and hoped to make a fast recovery by selling information to foreign powers. Oftentimes sufficient financial information cannot be obtained simply by checking credit agencies, creditors or other financial institutions. In many instances, the employee must be interviewed and a frank discussion held in order to find the basis for his financial irresponsibility or unexplained affluence. Should the right to make informal inquiries be denied, the Department may be required to initiate disciplinary or removal actions on the basis of information which does not include the employee's denial or explanation. Thus the prohibition not only blunts the Department's investigative effort, but also may operate to the detriment of the employee. Accordingly, it is recommended that the following proviso be added on page 7, line 6: "Provided further, That this subsection shall not apply to any employee whose financial responsibility or unexplained affluence has come into question in regard to determining his suitability for assignment to activities or undertakings related to the national security." With the adoption of this proviso, section 6, which contains a limited exception for the National Security Agency Director, should be modified by deleting the words, "or to provide a personal financial statement" appearing on lines 12 and 13 of page 18.

Section 1(j) prohibits requiring an employee, excluded from the protections afforded by section 1(i), to disclose his finances or those of his family except specific items tending to indicate a conflict of interest. It is not clear whether the employee may elect to disclose financial data in a conflict of interest situation, or whether the Department may conclude that a possible conflict exists and that the employee should therefore reveal his financial condition. Under 18 U.S.C. 208 an employee is required to make a full disclosure of his financial interests if he participates personally in his Governmental capacity in any matter in which he, his family or business or associate has a financial interest. Under that statute his failure to make a positive disclosure subjects him to possible criminal prosecution. It is believed that this section should be reconsidered, since its provisions are so obscure as to make impossible a precise determination as to its effect on section 1(i) and on the exceptions permitted the National Security Agency by section 6.

Section 1(k) would prohibit interrogation of an employee "under investigation for misconduct" without the presence of counsel, or other person, if he so requests. The Department recommends that the words "or other person of his choice" be deleted from lines 8 and 9 of page 8. Since this section is designed to protect an employee's legal rights, it is questionable whether the presence of non-legal counsel would assure that protection. Further, this outside party might also be directly or indirectly involved in the investigation, in which event his presence would not be in order.

It is assumed that section 1(k), by providing for the right of counsel to be present, does not carry with it the obligation of the government to furnish counsel. In some situations, the Department has made available a government lawyer to insure that the employee has a proper understanding of his rights and obligations. But as a general rule, the Department does not have the capability to furnish a legal adviser in all possible situations covered by section 1(k).

It is also assumed that preliminary questioning to establish whether or not there has been misconduct in the performance of official duties would not be considered within the coverage of section 1(k). In this respect, the Department distinguishes this kind of questioning from the formal questioning which would follow after preliminary inquiries

have established the misconduct. To construe this section otherwise would mean that a supervisor's ability to resolve day-to-day employment incidents and to provide constructive guidance concerning an employee's job performance would be replaced by time consuming and expensive legal consultations.

Section 1(1) prohibits reprisals against an employee who refuses to submit or comply with any requirement made unlawful by S. 1035, or who avails himself of the remedies provided by the bill. Reprisals would include discharge, discipline, demotion, denying promotion, relocation, reassignment, or otherwise discriminating in the terms of his employment. While the Department agrees that reprisals have no place in personnel management programs, section 1(1) does raise some practical operating problems particularly as it relates to the reassignment of those holding extremely sensitive positions. For example, the Department may receive reliable information that an employee occupying such a position has been spending large sums of money far beyond his normal income and that he has been seen in company with foreign agents. Should he be questioned about his unexplained affluence, and should he refuse to answer, the Department might elect to reassign him, pending completion of the investigation. Thereupon, the employee could charge that this action constituted a reprisal within the meaning of section 1(1), when, in fact, the reassignment was but a reasonable and necessary precautionary measure. Under these circumstances, it is believed that this section should be modified by deleting the words "relocate, reassign" from line 24, page 7. The Department should not be foreclosed from taking action of this nature to protect the national security under pain of being threatened with a law suit.

Section 2 makes it unlawful for Civil Service employees to violate or attempt to violate any of the provisions of section 1. The Department defers to the views of the Commission on this section.

Section 3 prohibits a military supervisor from requiring or requesting a civilian employee to perform any act or submit to any requirements made unlawful by section 1. The Department agrees that the bill should apply to military officers supervising civilians in the same manner that it applies to civilian supervisors. But section 3, when taken in conjunction with section 5(1), discriminates against military officers by singling them out from all other members of a class and

making them the only supervisors who are subject to criminal penalties for misconduct. Because of this, these provisions appear constitutionally questionable and should not be enacted. Actually, an employee is not without remedy if he has cause to believe that his military superior is commiting a wrong constituting a crime under the Uniform Code of Military Justice. Under paragraph 29 of the Manual for Courts Martial, 1951, any person having knowledge of the offense may present a violation of the act to duly constituted military authorities. Additionally, from a technical drafting standpoint, section 3 should be modified to read, in part: "*** under his authority to act with regard to any civilian employee of the executive branch of the United States Government under his authority or subject to his supervision in a manner made unlawful by section 1 of this Act." Section 1 prohibitions are not all cast in terms of "request and require."

Section 4 provides that an employee may sue to enjoin a violation or threatened violation of sections 1, 2 or 3, or obtain redress therefrom without alleging damages or exhausting any administrative remedy. Also, with the employee's consent, any employee organization may file the suit or intervene. The Department is opposed to section 4 for a number of reasons. It would actively encourage the avoidance of agency procedures and permit the filing of frivolous suits. It would overburden the courts inasmuch as evidentiary hearings would be required in many cases. It would undermine grievance and adverse action procedures under the mistaken assumption that present employee grievances are not fairly considered. (Contrary to this assumption, the grievance figures in one of the military departments shows that in FY 1967, 36.8% of the grievances were resolved in the employee's favor at the first level of consideration and 66.7% were resolved favorably at the second level.) It would create an independent remedy for one group of grievances, whereas all other grievances would continue to be processed through normal agency grievance procedures. It would vest in employee organizations the right to bring suit or intervene, with the employee's consent, even though the organization has no identifiable interest with the activity with which the employee is assigned, a concept contrary to well accepted principles of employee-management relationships. To meet these objections, it is recommended that the phrase reading, "without regard to whether the aggrieved party shall have exhausted any administrative remedies that may be provided by law," appearing on lines 22 - 24 of page 11, be changed to read, "when the aggrieved party shall have exhausted any administrative remedies that may be provided by law." In addition, it is recommended that the last two sentences of section 4 appearing on lines 5 - 16 of page 12, be deleted.

Section 5 would create a Board on Employees' Rights to investigate complaints of violations or threatened violations and to conduct hearings. The Board would be empowered to reprimand, suspend, or remove civilian officials violating the act. Military violator cases would be referred to the military departments for prosecution under the Uniform Code of Military Justice. Federal employee organizations could intervene in the proceedings if they are "in any degree" concerned with employment of the category in which the alleged violation occurred. The Department is opposed to the creation of an independent Board, and to the provision calling for the court-martial of military supervisors. Under this section, agency grievance procedures could be circumvented by permitting an employee to file a complaint directly with the Board. It would impinge upon the authority of the appointing agency by vesting disciplinary action in an outside agency instead of the appointing agency or the Civil Service Commission. As to the Board's action against military violators, it would create a number of problems. The investigation, hearing and report of the Board would have little direct effect on any court-martial proceedings since these actions would not appear to qualify as a pretrial investigation under Article 32 of the Uniform Code of Military Justice. But, the Board's report recommending court-martial proceedings would raise the spectre of "command influence" since the Board's report would be submitted to the President, the Congress, and the general courts-martial convening authority. It would also violate employee privacy by permitting intervention by employee organizations without regard to the wishes of the employee, and would negate the employee-management system established by Executive Order 10988.

If the Congress decides section 5 should be retained over the objections of the Department, it is recommended that the first sentence of section 5(h) beginning on page 14 be deleted and a new sentence substituted reading substantially as follows: "The Board shall not entertain a complaint from or on behalf of an aggrieved party, unless the remedy sought by him shall have been denied in whole or in part by a final agency decision." Further, in order to provide for the observance of the procedural protections afforded civilian violators by title 5, United States Code, it is recommended that section 5(k)(3)(A) be deleted and the following substituted: "in the case of a civilian officer or employee of the United States, other than any officer appointed by the President, by and with the advice and consent of the Senate, who violates this act, forward its decision to the agency for determination of the severity and application of the penalty to be effected consonant with statutory protections afforded by title 5 of the United States Code."

Section 6 would permit the CIA, NSA, and FBI to conduct polygraph and psychological tests concerning an employee's personal family relationships, religion, sexual conduct and financial affairs when a specific determination is made that the protection of national security so requires. (Inquiries would still be barred under section 1 if the employee were simply interrogated about such matters without use of polygraph or psychological tests.) If the added measures of protection to national security are needed by the agencies cited, they are obviously required by the intelligence elements within DoD which deal with sources of equal sensitivity, and by other elements of the Department of Defense charged with the planning and execution of strategic and tactical military operations. In fact, many of the requirements upon which the operations of CIA and NSA are based are developed by elements of the Department of Defense. Also, if the broader interests of national security are to be served, it is necessary that information about and resulting from the sensitive activities of the CIA, NSA and FBI must be disseminated to selected personnel throughout the Defense Department. This is now the case. Therefore, to a considerable degree, any added measure of personnel security by the three excepted agencies is wasted unless it is matched within the Defense Department. Accordingly, inasmuch as the NSA is under the supervision of the Secretary of Defense, it is recommended that section 6 be amended to grant the exception provided for NSA in section 6 to the Secretary of Defense or his designee for this purpose. Such an amendment would enable the Secretary of Defense to assure consistency of Defense policy in this overall area and to apply a like policy to all elements of the Department of Defense engaged in similar activities.

Section 7 provides that each department may establish its own grievance procedures, but that these procedures shall not preclude a suit under section 4 or a complaint to the Board on Employees' Rights under section 5. The Department firmly believes that an employee should first seek relief through his own department's grievance procedures, and that outside review should be permitted only after completion of Departmental action. Accordingly, the phrase, "but the existence of such procedure shall not preclude any applicant or employee from pursuing the remedies established by this Act or any other remedies provided by law," appearing on lines 22 - 25 of page 18 of the bill, should be deleted. To provide three alternative means of resolution of this particular type of grievance -- one through the traditional grievance system, one through the newly created, but yet administrative, Board on Employees' Rights, and one through immediate access to the United States District Courts, increases the prospects of divergent interpretations which will operate to the advantage of neither the employee nor his supervisor.