Paper given to Representative

Derwinski on 25 September 1967.

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OGC 67-1817

22 September 1967

The Honorable J. Walter Yeagley
Assistant Attorney General
Internal Security Division
Department of Justice
Washington, D. C. 20530

Dear Walt:

I am enclosing a copy of S. 1035, the bill I mentioned to you the other day, and the Senate Committee on the Judiciary's Report on this bill. Also enclosed is a draft letter which we are considering for delivery to the Chairman of our Subcommittee in the House. While there may be changes in this letter, I think it will serve the purpose of giving you our analysis of the problems involved. The bill passed the Senate by a vote of 79 to 4, although there was a strenuous debate for three and one-half hours on 13 September 1967 which is set forth in the Congressional Record beginning at page S 12912. S. 1035, six identical bills, and three similar bills have been referred to the House Post Office and Civil Service Committee. We have no indication, however, that that Committee plans to hold hearings at any time in the near future.

In the event one of these bills begins to move in the House, I think it would be very important to know whether your office agrees with our analysis and particularly with the legal problems that look to us to be potentially so dangerous. I would very much appreciate hearing from you when someone from your office has had an opportunity to review this material.

Sincerely,

s/

Lawrence R. Houston
General Counsel

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Enclosures

25 Aug 67

S. 1035

Its Impact on Government Security Programs

S. 1035 has as its objectives the protection of the constitutional rights of Federal employees and their right to privacy. With these objectives there can be no quarrel in the Executive Branch. It is the concept of solving the problems and the methods of securing these rights embodied in the bill that cause the difficulties. Not too many years ago there was a great hue and cry about persons of unsuitable character employed in the Executive Branch. Particularly the Congress was concerned and expressed itself in charges of loose personnel security practices. The Congress was fully aware of the vulnerability to blackmail and pressure on those individuals who were sex deviates, those who were deep in debt, or those who had close relatives living behind the Iron Curtain.

Since then the departments and agencies with sensitive positions have developed methods and procedures for detecting these areas of vulnerability in their employees or applicants. But S. 1035 prohibits inquiry of employees or applicants concerning family relationships, religious beliefs or sexual attitudes and conduct through psychological

tests or polygraph examinations. Even where S. 1035 provides partial exceptions for two of the most sensitive agencies, NSA and CIA, personal findings are required by the Directors or their designees before such inquiries can proceed. This would require literally thousands of personal findings each year. These agencies have determined that the polygraph is an extremely valuable aid to supplement other means of security investigation by providing investigative leads. They do not rely on the polygraph to detect truth or untruth. Further, psychological testing, even in the hands of medical officers, is restricted unless utilized in a course of medical treatment. The use of either of these tools in the areas of security vulnerability mentioned above is completely denied all other agencies.

S. 1035 further provides that no individual shall be interrogated in any matter which could lead to disciplinary action without the presence of counsel or other person of his choice. While no one would wish to deny counsel, it is a question of when counsel is to be permitted. Under the bill a supervisor inquiring of an employee about tardiness for the last three days could be halted in a normal supervisor-employee relationship by that employee insisting on the right to counsel before he responds. Or consider the situation in an intelligence agency or other agency possessing

sensitive classified documents where an employee is queried about the circumstances of a security violation such as leaving a safe open the night before or his apparent loss of a Top Secret document. Again the employee who insists on counsel at this point could cause an intolerable management situation for the supervisor and the department. Even more serious might be an inquiry related to the conduct of an employee engaged in a highly classified project, negotiation or undertaking, with the employee refusing to respond until he is permitted counsel.

S. 1035 establishes an independent Board of Employees' Rights which has the authority to investigate any complaint and conduct a hearing. Further, it may issue a cease and desist order and may suspend the Government officer found guilty of violating provisions of the bill. It may even direct separation of such officer notwithstanding any views of the head of that agency. The Board is given broad powers and there is no provision for the protection of sensitive national security or intelligence information that may be involved in these proceedings. Not only is the Board approach available, but much more far-reaching is the provision having the greatest impact on Government operations which authorizes an employee to file directly in a Federal district court against a Government officer whenever he believes he has been

aggrieved. Even more alarming, this right is open to applicants. The right to file by an applicant could be more injurious and harassing than the right of an employee. Applicants who for any reason failed to secure the job they thought they were qualified to fill could flood our courts. We all have faith in the integrity of our judicial system; but with respect to the security agencies, the defense of suits in open court, even though the plaintiff's action is adjudged to be groundless, requires revelation of names, procedures, and operational activities injurious to the national security.

Additionally, the prohibition against informing an employee that his department will "take notice" of his attendance at outside meetings is so broadly worded that apparently it would be unlawful for the department to take note of his attendance of a meeting of the local Communist Party the night before. The bill further makes it unlawful to require an employee to inform or report to his department on any of his outside activities unless there is reason to believe that such activities are in conflict with his official duties. Employees engaged in sensitive activities are required in many agencies to report routinely on contacts with foreign nationals not only to alert the employing department but also to protect the employee in his own personal security by informing him of those situations where such foreign nationals are members of foreign intelligence services.

There are other specific provisions making it unlawful to coerce people to buy bonds, to engage in political activities in the United States, and others with which no one could quarrel in and of themselves. It is only when these desirable objectives are joined in law with the right of employees and applicants to file lawsuits to seek redress that problems are foreseen with regard to sensitive activities of Government.

The recognition that Congress has given to the special problems of personnel security and the protection of sensitive information in Government would be seriously eroded if S. 1035 is enacted into law. It will be more difficult to prevent the employment of Communist oriented individuals or persons of unsuitable character. In like manner the problem of removing such persons is made more complicated.