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Dear Ed:

Attached is a little piece on the bill you and I discussed. As you will see, it is not in the form of a technical analysis but it is accurate.

There are no restrictions from my viewpoint with regard to Senate members you might wish to discuss this with (non-attributable, of course).

With the Congress out I will be out for a few days but I would like to feel free to be in touch with you to review the results before the week of the 18th.

/S/

John S. Warner

1 September 1967

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S. 1035

Well Intentioned - But Misguided

The objectives of S. 1035 are commendable. No one wishes to deny to Federal employees their constitutional rights and their right to privacy. The problem is how to accomplish this and at the same time preserve the best interests of the nation. In the late 1940's and early 1950's charges of loose personnel security practices in the Executive Branch became household words, and Congress itself was particularly concerned. The country at large, but more specifically Congress, became profoundly aware of the vulnerability to blackmail and pressure on those employees who were sex deviates, those who were deep in debt, or those who had close relatives living behind the Iron Curtain.

In response to the recognized need, and spurred on by pressures from the Congress and the general public, departments and agencies have developed methods and procedures to assist in detecting these areas of vulnerability in their employees or applicants. Psychological testing and polygraph examinations are extremely valuable aids to supplement other means of security investigation by providing investigative leads. S. 1035 prohibits inquiry of employees or applicants concerning family relationships, religious beliefs, or sexual attitudes and conduct through psychological tests or polygraph examinations.

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It does provide partial exemptions for two of the most sensitive agencies, NSA and CIA, on the basis of personal findings in each individual case before such inquiry can proceed. Apart from the unrealistic burden imposed by the exemption on each of these Directors, it is inherent in the nature of the exemption that these tests could not be used routinely in the proscribed areas even though good security practice requires that each and every applicant and employee be examined for traits which could create security hazards. The use of either of these tools in the proscribed areas of security vulnerability is completely denied to all other agencies.

The language of the prohibition against informing an employee that notice will be taken of his attendance at outside meetings is so broad that it could be interpreted to make it unlawful for a department to take notice of attendance of an employee at 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. Common sense suggests that agencies engaged in sensitive activities require employees 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 when such foreign nationals are members of foreign intelligence services.

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Whether it be in business or Government, good management requires freedom of inquiry between supervisors and subordinates. If a supervisor is to supervise he must be free to do so without fear of establishing the basis for a legal action against him by his performance of the most routine duties. S. 1035 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 if he so requests. Under the bill a supervisor inquiring of an employee about an excessive number of coffee breaks could be estopped in the normal supervisor-employee relationship by the employee insisting on the right to counsel at that stage. Security agencies and other agencies possessing classified documents would be faced with serious problems. If the employee insisted, he could not be 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, without the presence of counsel. This could cause an intolerable management situation for the supervisor and the department. Inquiry into the conduct of an employee engaged in a highly classified project, negotiation, or undertaking would be even more serious if the employee insisted upon counsel and might be totally impossible if the employee selected counsel who could not be granted a security clearance.

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There is no quarrel with specific provisions making it unlawful to coerce employees to contribute to charity organizations or to buy bonds, to engage in political activities in the United States and others. It is only when these issues are made available as a defense to an employee who has been discharged for good cause that problems are foreseen with regard to sensitive activities of Government.

S. 1035 establishes two avenues of relief to an applicant or employee who alleges a violation of the act. It establishes an independent Board on Employees' Rights which has the authority to investigate any complaint and conduct a hearing. Not only may this Board issue a cease and desist order and suspend the Government officer found guilty of violating the provisions of the bill, but it may even direct separation of such officer irrespective of any views of the head of that agency. We are aware of no other authority in the law relating to Government employees which grants authority to an independent board to terminate an employee of a department or agency. Traditionally, the authority to terminate rests solely with the department head. Protection of sensitive national security or classified information that may be involved in Board proceedings is left entirely to the discretion of the Board. A much more far-reaching provision, and one which has the greatest impact on Government operations, authorizes an employee to file directly in a Federal district court against a Government officer whenever the employee feels he has been aggrieved under the provisions of this bill. Even more alarming, this

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remedy is open to applicants who could flood our courts if they for any reason fail to secure the job they thought they were qualified to fill. This right to file suit by an applicant could be far more injurious and harassing than the right of an employee. Without questioning the integrity of our judicial system, the defense of suits by security agencies 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.

The reasons which apparently justify the complete exemption from this bill for the FBI are equally applicable to the positions occupied by people having access to classified information in other departments and agencies and to the other agencies in the security field in their entirety.

Constitutional rights of employees and their right to privacy equate with God and motherhood, and it is not surprising that S. 1035 has 55 sponsors. The problem is to keep the pendulum from swinging too far. Rules which may be safely applied to chauffeurs, computer programmers and letter carriers have a different impact when applied to nuclear physicists and military planners.

Congress has recognized the special problems of personnel security and the protection of classified information in Government

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and has granted broad authorities to aid in meeting these problems. These authorities 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 and in like manner the problem of removing such persons is made more complicated.

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