18 June 1968

MEMORANDUM FOR THE RECORD

SUBJECT: S. 1035

1. I attended a hearing of the House Subcommittee on Manpower and Civil Service on S. 1035 at which Carl W. Clewlow, Deputy Assistant Secretary of Defense, and Frank Bartimo, Assistant General Counsel for Manpower, Office of Secretary of Defense, testified. Subcommittee members present were: Representatives David N. Henderson (D., N.C.), H.R. Gross (R., Iowa), James T. Broyhill (R., N.C.), and Lee H. Hamilton (D., Ind.). I obtained a copy of Mr. Clewlow's prepared testimony which he followed closely throughout his presentation.

2. Following the prepared testimony Chairman Henderson asked to what extent psychological testing is used in the Department of Defense. Mr. Bartimo stated that it was used only in cases involving sensitive security matters and then only as an aid. The same question was asked with regard to the polygraph and essentially the same answer was given.

3. Henderson also asked what is the present policy on financial disclosure. Bartimo replied that this is required only where there is a potential for conflict of interest.

4. Representative Gross also raised questions regarding financial disclosure and indicated that he is still somewhat angry over the refusal of the Department of Defense to provide information on the TFX contract. Gross' attitude toward both S. 1035 and H.R. 17760 could not be judged from the nature of his questions.

5. Representative Hamilton asked if the national security would be seriously jeopardized if S. 1035 should become law, to which Bartimo

Henderson
Brophill
Hamilton

STATEMENT OF CARL W. CLEWLOW & Frank Bortimo
DEPUTY ASSISTANT SECRETARY OF DEFENSE
(MANPOWER AND RESERVE AFFAIRS)
BEFORE THE SUBCOMMITTEE ON MANPOWER AND CIVIL
SERVICE OF THE COMMITTEE ON POST OFFICE
AND CIVIL SERVICE OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
ON

S. 1035, an Act "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 invasions of their privacy."

H. R. 17760, a Bill "To recognize the rights and obligations of the civilian employees of the executive branch of the Government of the United States, and for other purposes."

June 18, 1968

Mr. Chairman:

I am Carl W. Clewlow, Deputy Assistant Secretary of Defense (Manpower and Reserve Affairs). I welcome the opportunity to appear before this Committee to present for your consideration the views of the Department of Defense on S. 1035 and H. R. 17760.

The Department's interest in these bills is based on their impact on personnel administration and on the national security activities of the Department. As the Civil Service Commission Chairman stated the adverse effect S. 1035 would have on personnel administration, I shall address the major portion of my remarks to matters of special

concern to the Department of Defense. To summarize our position -- The Department opposes the enactment of S. 1035.

This morning I would like to direct my remarks to four basic areas:

(1) The Department's reasons why S. 1035 should not be enacted in its present form.

(2) The Department's opposition to S. 1035 because of its discriminatory provisions against military personnel performing supervisory responsibilities.

(3) The additional sensitive activities of the Department which should be included in the exemptions extended to the FBI, the CIA and the NSA.

(4) The Department's initial reaction to H. R. 17760 is favorable, but we would appreciate the opportunity to study it closely. In fact, in anticipation of such a request, the interested DoD components have been requested to submit comments to the Department as soon as possible. We could have specific comments to you within a few days thereafter.

Defense Department's Position on S. 1035.

In the 90th Congress, the Department filed a report with the Senate Subcommittee on Constitutional Rights in which it concurred in the

opposition report of the Civil Service Commission. In addition, it noted that the bill did not take into account national security considerations and that it applied unfairly to military supervisors. To assist the Committee, I offer for insertion in the record at this time a copy of the Department's report of June 5, 1967 to the Senate Subcommittee.

While the bill, as passed by the Senate, meets certain of the Department's objections, it continues to contain a number of provisions which would hamper the proper execution of executive responsibilities. In order to be as brief as possible, I will summarize the principal objections of the Department:

(1) The bills fails to distinguish between eligibility for government employment in general, and the special responsibilities of a national security nature entrusted to the Department. 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. It is essential that, as the sensitivity of a

position increases, the Department must be permitted to broaden the scope of its inquiries.

(2) The bill fails to provide the Secretary of Defense with authority to exempt from its provisions certain sensitive activities of the Department, 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.

(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. 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.

To assist the Committee, I would like to identify a few examples of the types of operational problems the Department would face should S. 1035 be enacted in its present form.

The Department receives information that an employee has attended secret Communist Party meetings and that "outside parties or organizations" are instructing him on how to sabotage government facilities. Under section 1(b)

an investigator's questions in these areas would be unlawful. They constitute "notice" of his attendance at a non-government meeting on a subject other than the performance of his assigned official duties.

The Personnel Office receives information that an employee is heavily in debt and that his failure to pay his just and honorable debts reflects on the Federal service. Under section 1(d) it cannot require the individual to make a report, since his indebtedness does not relate to his assigned official duties. It would also be barred under section 1(i) since most employees, with certain limited exceptions, may not be asked about their financial liabilities.

The Security Office receives information that an employee has come into unexpected wealth and that there is reason to believe that the employee may have received money from a foreign embassy. The employee is assigned to critically sensitive duties involving information of considerable value to foreign intelligence. Under section 1(i) the employee may not be required, or even requested, to disclose the amount of or sources of his income, property or other assets.

In addition, I offer the Department's report on S. 1035 of June 18, 1968 -- the report includes a ten page sectional analysis, and proposed amendatory language.

S. 1035 Discriminatory Against Military Supervisors.

The Department concurs in the concept that, if S. 1035 is enacted, it should apply to military officers who supervise civilians in the same measure that it applies to civilian supervisors. But under the terms of the bill, civilian supervisors would not be subject to criminal charges, whereas the Board on Employees' Rights could direct military authorities to institute court martial action against a military supervisor. In our view, this distinction in treatment is patently discriminatory, if not constitutionally questionable.

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.

Sensitive Activities of the Defense Department Which Should be Exempted.

As noted in my earlier remarks, we believe that the same type of exemptions should be extended to the other agencies of the Department

concerned with intelligence and national security matters as are extended to the FBI, CIA and NSA. For example, the Department has a number of positions requiring access to nuclear weapons and nuclear weapons systems, chemical and biological warfare data, and operational war plans. In addition, it has a number of intelligence elements which deal with intelligence sources which are as sensitive as those in the CIA, FBI and NSA. Obviously, CIA, NSA and FBI information must be disseminated to selected personnel throughout the Department of Defense. Consequently, any added measure of personnel security by these agencies is wasted unless it is matched within the Defense Department. We are concerned that the Secretary of Defense be in a position 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.

It is my understanding that the Committee will receive testimony from National Security Agency representatives in Executive Session later today. At that time, classified activities will be discussed and a Section by Section Analysis will be made. Consequently, I will not elaborate further on the critical nature of certain Departmental operations or on the need to ensure the highest standards of trustworthiness and integrity for those who man such posts.

Defense Department's Position on H. R. 17760.

Turning to H. R. 17760, the Department considers it preferable to S. 1035. It presents a set of balanced standards of rights and obligations -- it vests responsibility for administration of the Act where it belongs, in the employing agency and the Civil Service Commission -- and it provides statutory protection to Federal employees without prejudicing the proper performance of Government operations. As to its specific provisions, the enumerated "employee rights" are cast in general terms, and in this respect may need clarification in order to provide meaningful standards for both employer and employee. For example, the bill declares that an employee has "the right to be protected against any unwarranted invasion of personal privacy." It also enjoins supervisors to respect employee rights "consistent with law and with the responsibilities of employment in the public service."

A provision that is not included among the enumerated "employee rights" is one pertaining to the political activities of Federal employees. This fundamental right would seem to deserve inclusion in the bill. We are pleased to learn from reading the testimony that efforts will be made to take up the legislation recommended by the Commission on Political Activities of Government Personnel.

Conclusion.

As the biggest single employer within the Executive Branch, the Department is mindful of its responsibilities to insure a proper balance between individual rights and management objectives. The basic objective of S. 1035 is laudable -- that respect for human dignity must be an essential ingredient of the Federal Government's employment policies -- that its employees do not surrender their rights to respect from their employer. But S. 1035 has not fully considered the Government's interest and has created a system of remedies which are cumbersome, contrary to well accepted tenets of Government administration, and in some instances prejudicial to the Department's mission.

In closing, may I express appreciation to the Chairman for his efforts to bring forth a bill that will give proper balance and recognition to the rights and responsibilities of both management and its employees.

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330

OFFICE OF THE SECRETARY

June 5, 1967

Dear Mr. Chairman:

Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 1035, 90th Congress, 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 invasions of their privacy." The Secretary of Defense has delegated to the Department of the Air Force the responsibility for expressing the views of the Department of Defense.

The purpose of S. 1035 is to make it unlawful to require 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.

Section 2 of the bill makes it unlawful for any officer of the Civil Service Commission to violate or attempt to violate any of the provisions of the Act.

Section 3 of the bill makes it unlawful for any commissioned officer of the armed forces to perform any of the acts set forth in section 1 of the Act.

Section 4 of the bill provides a criminal penalty of a $300 fine or 30 days imprisonment for violations of the Act.

Section 5 gives United States District Courts jurisdiction to hear cases under the Act and to provide injunctive relief.

Section 6 establishes a Board on Employees Rights to receive and investigate complaints on behalf of persons aggrieved by a violation or threat of violation of the Act.

Section 7 excludes the FBI from operation of the Act.

S. 1035 is a revised version of S. 3779, 89th Congress. In its report of December 14, 1966, to the Chairman of the Senate Committee on the Judiciary, the Department of Defense not only concurred in the opposition report of the Civil Service Commission on that bill, but also particularized certain other objections to the proposed legislation from the standpoint of national security.

The Department of the Air Force, on behalf of the Department of Defense, is opposed to the enactment of S. 1035 in its present form, and endorses the Civil Service Commission report of the proposed bill - particularly the proposal to eliminate sections 4, 5, and 6 of the bill.

In addition, the Department of Defense is especially troubled by those portions of subsection 1(a), 1(d), 1(f), 1(g), or 1(j), which are incompatible with the Department's obligations to screen and investigate personnel employed in or applying for sensitive and critical sensitive positions. The enactment of these subsections and their applicability to this Department would make it extremely difficult to obtain the background information which must be considered before an individual can be authorized to handle classified defense information. More specifically:

(1) Section 1(a) would prohibit an officer from requiring applicant or an employee to disclose the national

origin of himself or of close relatives. Such data obviously is relevant in determining the extent to which an applicant or employee could be subject to coercion by a foreign country seeking his cooperation.

(2) Sections 1(b) and 1(c) would prohibit the Department from requiring employees to attend important security lectures necessary to alert them to the dangers and techniques of espionage or to the lapses leading to inadvertent, unauthorized disclosure of classified information.

(3) Section 1(d) would prevent the Department from requiring employees to report on contacts with foreign nationals or other private activities of possible security significance.

(4) The restrictions in section 1(f) on the use of psychological tests and assessments would greatly hamper the Department in 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.

(5) Section 1(g) would prohibit the use of questions in a polygraph interview which may have counterintelligence significance in a particular instance.

(6) The restriction of section 1(j) on requiring or requesting the disclosure of financial information would also create a serious problem because of the relevance of such information in evaluating an individual's personal financial stability and susceptibility to bribes or other financial pressure to force the revelation of classified information.

Taken together these restrictions of section 1 would make almost impossible a balanced evaluation of whether granting a security clearance to an individual is clearly consistent with the national interest. Therefore, for national security reasons this Department asks that the exemption extended to the Federal Bureau of Investigation in section 7 be expanded

to include all sensitive positions as defined in Cole v. Young, 351 U.S. 354 (1956). If this is considered too broad to be acceptable, an exemption from the restrictions of section 1 should at least be extended to the National Security Agency and to such other critical sensitive positions as may be designated by the Secretary of Defense. At your request, we will be happy to elaborate on the relevance of such information to determining suitability for employment or security clearance.

In addition to security considerations, section 1(i) prohibits coercion in the sale of bonds or other obligations or security issued by the United States or any of its agencies. The Department of Defense shares the desire to eliminate any practice which smacks of coercion, compulsion, or the threat of reprisal to induce the participation of employees in the promotion of bond sales. Nevertheless, we strongly oppose the imposition of criminal penalties in the manner contemplated in this bill. Good personnel administration would be better served through traditional techniques of control rather than through the threat of criminal sanctions.

The Department of Defense concurs in the concept that, if the bill is enacted, it should apply to military officers who supervise civilians in the same measure that it applies to civilian supervisors. However, unless sections 4, 5, and 6 are deleted, as recommended by the Civil Service Commission and concurred in by this Department, a conflict would develop between section 6(1) and section 4 with respect to punishment of offending military supervisors. Section 6(1) compels action against military supervisors under the Uniform Code of Military Justice. Because of the principle of double jeopardy, the court martial action would effectively preclude civil trial pursuant to section 4. This resulting discrimination, whether considered favorable or unfavorable to the military officer does not appear to be in keeping with the idea that military and civilian supervisors should be treated alike. Additionally, that portion of section 6(1) providing for reference to "any person authorized to sign charges" is not meaningful since the Uniform Code of Military Justice, Article 30 (10 U.S.C. 830), grants this authority to all members of the armed forces. Accordingly, it is recommended that this provision be deleted.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

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,

Honorable James O. Eastland
Chairman, Committee on the
Judiciary
United States Senate

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

18 JUN 1968

Honorable Thaddeus J. Dulski
Chairman, Committee on Post Office
And Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

It is requested that the following views of the Department of Defense be included in the Committee's consideration of 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 principal 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.

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,

(Signed) L Niederlehner

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 provisions 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(e) 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. When it comes to determining the suitability of employees for sensitive 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.