

ROUTING AND RECORD SHEET

SUBJECT: (Optional) Proposed Executive Order to Govern Access to Classified Information

STAT	FROM: Acting Director of Security	EXTENSION	NO. OS 88-2047 DATE 6 MAY 1988
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TO: (Officer designation, room number, and building)	DATE	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
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STAT	1. General Counsel 	10 May 88	FAB	<div style="border: 2px solid black; padding: 5px; width: fit-content; margin: auto;"> General Counsel 88-01797 </div>	
	2.				
	3. DDA 7D18 HQ	12 MAY 1988	RMH		
	4.				
	5. ER 7E12 HQ	12 MAY 1988	RL		
	6.				
	7. EXDIR 7E12 HQ	12 MAY 1988	JT		
	8.				
	9. DDCI 7E12 HQ	17 May	RB		
	10.				
STAT	11. D/Security 	5/23/88	5/25/88		OV
	12.	26 May 1988	26 May		BS
	13. EO PPS	13 Jun	PS		FYI
	13a Registry				
	14.				
	15.				



General Counsel
88-01797



6 MAY 1988

MEMORANDUM FOR: Deputy Director of Central Intelligence

VIA: Executive Director
Deputy Director for Administration
General Counsel

FROM:
Acting Director of Security

SUBJECT: Proposed Executive Order to Govern Access to
Classified Information

REFERENCE: Memo for DDCI fm D/OS dtd 24 March 1988, Subj:
Proposed Executive Order to Govern Access to
Classified Information

1. Action Requested: Attached for your signature is a letter to Lieutenant General Colin L. Powell, Assistant to the President for National Security Affairs, forwarding appropriate language exempting the Agency from the "oversight" and administrative appeal procedures of the proposed Executive Order on personnel security. Also included is language which would substitute "sufficient doubt" as the Government-wide security standard in place of "reasonable doubt." If the objections we have to the proposed Executive Order cannot be resolved to our satisfaction through the NSC process, we recommend that our concerns be brought to the attention of the President.

2. Background: In deference to our concerns, the Department of Defense has officially concurred with the Agency's proposed amendments to Sections 7 and 9 of the proposed Executive Order which would protect the authorities of the Director of Central Intelligence. In deference to DOD's concerns, the Agency has agreed to support personnel security oversight of DOD by the Information Security Oversight Office. Additionally, DOD concurs with our objection to the use of "reasonable doubt" as the standard for the denial and revocation of security clearances and approvals, although it has suggested language of its own as the preferred alternative to be considered in the NSC process. While we are not entirely comfortable with DOD's proposed alternate language, nevertheless, we are willing to discuss, under NSC auspices,

OS 88-2047



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whether a standard other than the "sufficient doubt" standard we have proposed would be the best substitute for the "reasonable doubt" standard. Attachment A reflects DOD concurrence with our amendments to Sections 7 and 9 and indicates DOD objection to the term "reasonable doubt." The Office of Personnel Management has been briefed on our concerns but has remained noncommittal.

In order to appropriately address in a national security forum all concerns raised by the proposed Executive Order, it is important that all significant issues relating to the proposed Order be resolved by the NSC process before the draft Order is circulated by the Office of Management and Budget for Government-wide review and comment. Both DOD and OPM share this view.

3. Recommendation: That you sign the attached letter to General Powell, which requests that a staff-level meeting of the affected agencies be convened under NSC auspices to resolve all outstanding issues, and which requests that a final decision be made by the President, if necessary.

STAT



Attachments

cc: Director, Intelligence Community Staff

CONCUR:

STAT



General Counsel

10 May 88
Date

STAT



Deputy Director for Administration

13 May 88
Date

STAT



Executive Director

16 May 88
Date

The Deputy Director of Central Intelligence

Washington, D.C. 20505

20 May 1988

Lieutenant General Colin L. Powell
Assistant to the President
for National Security Affairs
Washington, -D.C. 20506

Dear General Powell:

Pursuant to my letter of 4 April 1988, I am forwarding to you language which would amend the draft Executive Order on personnel security to accommodate the serious concerns I expressed in that letter.

The Department of Defense has officially concurred with our proposed amendments to Parts 7 and 9 of the draft Order, which would protect the authorities of the Director of Central Intelligence. Although DOD also concurs with our objection to the use of "reasonable doubt" as the standard for the denial and revocation of security clearances and approvals in Part 6 of the draft Order, DOD has suggested that language other than that which we have proposed might better insulate security decision making from judicial review. Therefore, DOD has indicated that it would like for the "reasonable doubt" issue to be addressed further in the NSC process.

I believe that these matters, and all other serious points of disagreement concerning the draft Order, should be resolved through the NSC process before the draft Order is circulated by the Office of Management and Budget for Government-wide comment. Both DOD and the Office of Personnel Management share my views in this regard. Accordingly, I request that a staff-level meeting of the affected agencies be convened under NSC auspices to resolve all outstanding issues related to the draft Order. Should these issues not be resolved, I request that they be presented to the President for a final decision.

Sincerely,



Robert M. Gates

Attachment

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A
ATTACHMENT



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

April 21, 1988

MEMORANDUM FOR ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE
(COUNTERINTELLIGENCE & SECURITY)
ATTN: Mr. Bill Fedor

SUBJECT: CIA Proposed Changes to Personnel Security **Executive**
Order

This responds to your request for our input on the CIA's proposed revision to the above draft Executive Order, currently pending action at the National Security Council.

This office has no objection to the proposed revisions to Parts 7 and 9 of the Executive Order.

Although this office agrees, for the reasons stated by CIA, that the term "reasonable doubt" should not be utilized in Part 6, we do not concur with their proposed substitution of the term "sufficient doubt" therefor. Such term is vague and ambiguous and would invite a reviewing court to interpret it at will (a likely "interpretation" of the term "sufficient" is "reasonable"). Of greater concern, however, is that the phraseology employed under either formulation, in my opinion, creates the impression that the burden is on the agency to justify a clearance denial.

This office proposes the following revision to Part 6 in the alternative. It accomplishes the same purpose sought by the CIA, and is based upon language recently used by the Supreme Court in Navy v. Egan (attached) to describe the "clearly consistent" standard.

Section 2.1 Standards

(b) Except ... national security information. A determination of eligibility for access to such information is a wholly discretionary security determination, and [eligibility] may be granted based on judgments by appropriately trained security personnel only where the facts and circumstances indicate such access is clearly consistent with the national security interests of the United States. In all such determinations, the protection of the national security of the United States shall be the paramount determinant, and security personnel should err, if they must, on the side of denials.

...

Section 6.2 Adjudication of Initial Investigations

(c) At such time ... national security information. ~~Where there is reasonable doubt concerning these matters or sufficient information cannot be developed to evaluate an individual under these standards~~ When security personnel cannot conclude, based on the available information in its entirety, that granting the individual access to national security information meets the standards described in this Order, such access eligibility will be denied.

Note: The above change also should be made to Section 6.4.

Questions concerning this memorandum may be addressed to the undersigned or to Dale A. Stalf at x53392/56710.



Michael A. Sterlacci
Assistant General Counsel
(Legal Counsel)

Attachments

86-1552—OPINION

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DEPARTMENT OF NAVY v. EGAN

ance was denied, and whether transfer to a nonsensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further. Cf. *Zimmerman v. Department of the Army*, 755 F. 2d 156 (CA Fed. 1985); *Buriani v. Department of the Air Force*, 777 F. 2d 674, 677 (CA Fed. 1985); *Bacon v. Dept. of Housing & Urban Development*, 757 F. 2d 265, 269-270 (CA Fed. 1985); *Madsen v. Veterans Admin.*, 754 F. 2d 343 (CA Fed. 1985).*

As noted above, security clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The Board, however, reviews adverse actions under a preponderance of the evidence standard. § 7701(c)(1)(B). These two standards seem inconsistent. It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. ~~The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials.~~ Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the

*Prior to the Act's passage in 1978, most federal employees dismissed for cause could pursue an appeal to the Civil Service Commission. The parties here appear to agree that the old Commission never exercised jurisdiction over a security-clearance determination. We fail to see any indication that Congress intended to grant the Board greater jurisdiction in this respect than that possessed by the Civil Service Commission. The Board was created to assume the adjudicatory functions of the old Commission and, with certain exceptions, those functions passed unchanged from the Commission to the Board. When the Senate and House committees listed the changes effected by the Act, they gave no indication that an agency's security-clearance determination was now to be subject to review. See S. Rep. No. 95-969, pp. 46 and 52 (1978); H. R. Rep. No. 95-1403, pp. 21-22 (1978). Such changes as were made did not bear upon the issue. If there be any contrary implication in the legislative history, as respondent would suggest, it is much too frail for us to conclude that Congress intended a major change of that kind.

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OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301-2000

POLICY

22 APR 1988

STAT

MEMORANDUM FOR OFFICE OF THE GENERAL COUNSEL,
CENTRAL INTELLIGENCE AGENCY

Subject: CIA Proposed Changes to the Personnel Security
Executive Order

I have reviewed, together with the DoD Office of General Counsel, the paper which you provided to Bill Fedor in which you propose three changes to the draft Executive Order. We have no objection to the proposed revisions to Parts 7 and 9 of the Executive Order.

With respect to Part 6 we concur that the term "reasonable doubt" should be removed. However, I agree with the rationale set forth in the attached 21 April 1988 memorandum, signed by Mr. Sterlacci, with respect to the inadvisability of substituting "sufficient doubt" for reasonable doubt. Moreover, I agree with the proposed revisions to Section 2.1, Standards, and Section 6.2, Adjudication of Initial Investigations, recommended by Mr. Sterlacci in his 21 April 1988 memorandum.

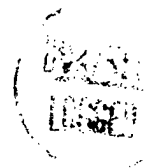
Please advise if you wish to discuss further.

A handwritten signature in cursive script that reads "John F. Donnelly".

John F. Donnelly
Assistant Deputy Under Secretary of Defense
(Counterintelligence and Security)

Attachment
As Stated

24 MAR 1988



MEMORANDUM FOR: Deputy Director of Central Intelligence

VIA: Executive Director
Deputy Director for Administration
General Counsel

STAT FROM:
Director of Security

SUBJECT: Proposed Executive Order to Govern Access to
Classified Information

REFERENCE: Memo for ADCI fm D/OS dtd 27 Feb 87, Subj:
Draft Executive Order to Govern Access to
Classified Information

1. Action Requested: Certain provisions of the Executive Order proposed by the Department of Justice to govern access to classified information remain inconsistent with important CIA and Intelligence Community prerogatives and, if approved, would seriously erode DCI statutory authority. You are requested to address this concern with Lieutenant General Colin L. Powell, Assistant to the President for National Security Affairs, and to notify him that we are drafting specific language to amend the Order. Attached for your signature is a letter to General Powell summarizing our objections to the proposed Order and requesting that the NSC convene a staff-level meeting of the affected agencies upon receipt of our proposed language. Meanwhile, an effort will be made to obtain the concurrence of two of the major participants in the drafting process--the Department of Defense and the Office of Personnel Management--in specific language that would amend the Executive Order and safeguard our equities. A second letter to General Powell containing the appropriate exempting language will then be sent forward for your signature.

2. Background: The Deputy Attorney General has forwarded to the President, through the NSC, the current draft of a proposed Executive Order on personnel security. In a covering memorandum to the President, the Deputy Attorney General cites

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five issues which require resolution and recommends to the President that these issues be resolved quickly to permit adoption of the Order. Issues 1 and 4 concern proposed oversight and appeals procedures. Each is severely misrepresented and falls short of reflecting Agency concerns. Issues 2, 3, and 5 address investigative standards, reinvestigations, and the need for a current review of Executive Order 10450. These issues are succinctly stated, and the related recommendations are reasonable.

3. Tab A is a copy of my memorandum to you dated 26 February 1987 identifying the issues of concern at that time. Tab B is a copy of your letter to the Attorney General dated 18 March 1987 wherein you emphasize the impact this Order would have on DCI statutory authorities. Tab C is the Attorney General's reply of 25 March 1987. Tab D consists of a copy of the Deputy Attorney General's 20 November 1987 letter to the President and the current draft Executive Order.

4. Regretfully, the follow-up meetings you suggested between representatives of the Department of Justice (DoJ), the Office of General Counsel, and members of my own staff, produced little in the way of substantive agreement. In particular, the concerns we had with respect to oversight by the Information Security Oversight Office (ISOO) and the procedures involved in processing security clearances continue essentially unresolved. I remain convinced that the intrusive aspects of these provisions warrant our continued vigorous opposition.

5. To reiterate, Issues 1 and 4 cause grave concern. Specifically, Issue 1 addresses oversight of government-wide personnel security programs and would delegate extensive oversight authority for personnel security matters to ISOO. As stated in your 19 March 1987 letter to the Attorney General, "The sweeping oversight provisions..., which effectively permit ISOO to direct aspects of our security programs and second-guess security policy and other determinations made by the DCI, conflict with the statutory responsibility of the DCI to protect intelligence sources and methods." Oversight autonomy for either the Central Intelligence Agency or other appropriate intelligence agencies has not been expressly provided for in the current draft. Also, a series of Agency proposals to moderate ISOO oversight in a manner consistent with Agency interests proved futile. In short, we are back where we started relative to oversight.

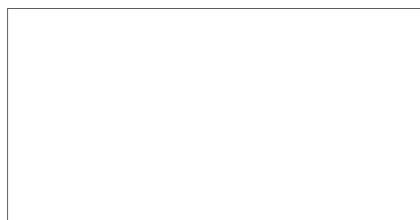
6. Issue 4 would establish security clearance appeal procedures for all on-board Agency personnel and extend the right of appeal to contractor employees with access at the collateral classified level. Not only would this provision override existing DCI authority, it would clearly establish procedures that do not now exist and are not required by law. With respect to the contractor world specifically, I would add, parenthetically, that appeal procedures do exist, to be sure, but are confined to the SCI environment only under the circumstances as mandated by DCID 1/14.

7. I am informed that representatives of the Office of General Counsel have alerted NSC legal officials to our concerns and that the Order is now on hold pending formal word from the Agency. In view of earlier unproductive efforts through DoJ to incorporate alternative language into the Order, a different approach is needed. Specific language exempting the Agency and other intelligence agencies, as appropriate, from oversight and appeal procedures is, in my view, a prudent next step in our efforts to gain relief from this unwarranted intrusion on the discretionary authority of the DCI.

8. I believe it is essential that the Assistant to the President for National Security Affairs clearly understands the equities at stake and the need to resolve the substantial disagreements which remain. Therefore, you are requested to sign the attached letter to General Powell advising him that specific language to amend the draft Order will be forthcoming and requesting that the NSC Staff convene a meeting of the affected agencies upon receipt of our proposed language. A second letter to General Powell, transmitting the appropriate exempting language, will soon be forwarded for your signature. If you wish to be briefed further on this matter, please contact me at your convenience.

STAT

Attachments



cc: Director, Intelligence Community Staff

SUBJECT: Proposed Executive Order to Govern Access to Classified Information

CONCUR:

STAT
General Counsel

25 March 88
Date

STAT
Deputy Director for Administration

30 March 88
Date

STAT
Executive Director

31 March 1988
Date

With so many people biting at our ankles, it's a wonder we're able to get anything done. I support proposed approach. This is ludicrous.

STAT
STAT
With so many people biting at our ankles, it's a wonder we're able to get anything done. I support proposed approach. This is ludicrous.

JT

The Deputy Director of Central Intelligence

Washington D.C. 20505

ER-1317-88

4 APR 1988

Lieutenant General Colin L. Powell
Assistant to the President for
National Security Affairs
Washington, D.C. 20506

Colin
Dear General Powell:

I have reviewed the Department of Justice draft Executive Order on personnel security, which would establish government-wide policy concerning access to classified information. Further, I have reviewed the transmittal materials which would accompany the draft Executive Order. Based upon my review, I have concluded that certain provisions of the draft Order would erode the statutory responsibilities of the Director of Central Intelligence (DCI) and are, therefore, unacceptable. Moreover, I believe that the proposed transmittal materials do not adequately discuss certain issues that have generated substantial disagreement.

Previously, on 18 March 1987, I informed the Attorney General of my concerns and suggested that our representatives meet to attempt resolution of our outstanding differences with respect to the draft Order. A meeting did take place between our representatives at that time, but the final draft Order forwarded to you does not accommodate my concerns.

The draft Order which delegates extensive "oversight" authority for personnel security matters to the Information Security Oversight Office (ISOO) to direct aspects of our security program, and to second-guess security policy and other determinations made by the DCI, would undercut the statutory responsibility of the DCI to protect intelligence sources and methods. The Order must expressly provide for oversight autonomy for the Central Intelligence Agency and, as appropriate, other intelligence agencies.

The Order also imposes, as mandatory, a set of administrative appeal procedures for the revocation of security clearances and approvals which must be followed unless the DCI personally certifies otherwise in each case. There is nothing in current law that requires this, and I consider such a requirement an unwarranted intrusion on the statutory discretion of the DCI, which carries with it a serious potential for protracted litigation with respect to the appropriateness of the DCI's certification in each case. Moreover, the Order ties the denial and revocation of clearances and approvals to the legal standard of "reasonable doubt," another invitation for the entire program to be drawn into unnecessary and debilitating litigation.

Lieutenant General Colin L. Powell

Considerable effort has gone into this endeavor, and the draft Order addresses important issues in an area in which revision and clarification are long overdue. It is imperative, therefore, that every effort be undertaken to reach a solution. In this vein, we will provide you, under separate cover, language to amend the draft Order. As I believe the National Security Council Staff may be in the best position to facilitate an agreement, I urge you to convene a staff-level meeting of the affected agencies upon receipt of this language. I am hopeful that a resolution can be reached under NSC auspices which accommodates our concerns.

Sincerely,



Robert M. Gates

STAT

Colin - This poses a real problem which, failing a solution, I believe the DCI would want to discuss with the President.

STAT

OS/PPS  (17 Mar 88)

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