

Serial: N 0083

MEMORANDUM FOR THE SECRETARY OF DEFENSE**(ATTN: General G. B. Erskine, USMC-Ret,
Assistant to the Secretary of Defense,
Special Operations)****SUBJECT: Legislation for the National Security Agency (U)**

1. Reference is made to your memorandum of December 15, 1960, for the Executive Secretary of the National Security Council. Therein are stated reasons for not pursuing legislation at this time to carry out the recommendations of the President's Board of Consultants on Foreign Intelligence Activities.

2. It is my opinion that the full implementation of the Board's recommendations is urgently needed to enhance our capability to provide for the security of NSA activities. I feel, further, that the Board's objectives can only be fully carried out by legislative action, and that there is no more timely opportunity to submit such a proposal than the present session of Congress in view of the scrutiny now being given to our security program by the House Armed Services Committee.

3. In view of the above and pursuant to the recent briefing on this subject, I wish to restate our position and respectfully request your reconsideration of our requirements. There is inclosed for this purpose a draft of proposed legislation for NSA, together with complete justification data.

L. H. FROST
Vice Admiral, USN
Director

Incl:
a/s

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PERS

M/R: Mr. Mitchell, OSO, advised that copy of memorandum from Secretary of Defense (OSO) received in PERS was the official Agency copy and could be used in the request for a restudy by OSO, of our requirements for legislation for NSA. Booklet of proposed legislation with appropriate transmittal drafts, sectional analysis of the Bill, and exposition of our present situation and problems attached.

Maurice H. Klein
Maurice H. Klein, PERS, 3755, 28 Dec 60, mgk

LEGISLATIVE REQUIREMENTS OF THE
NATIONAL SECURITY AGENCY

This booklet presents a draft of the proposed legislation for NSA together with drafts of an accompanying transmittal letter and of a sectional analysis of the bill for submission with the legislative proposal. In addition, we are submitting a full exposition of our present situation and of the problems which make this legislation vitally important to the Agency.

TAB A - Draft of Proposed Bill

TAB A-1 Draft Letter of Transmittal

TAB A-2 Draft Sectional Analysis of the Proposed Bill

TAB B - NSA's Requirements for Legislation

A BILL

To provide certain authorities for the National Security Agency, prescribe a security employment standard, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) there shall be in the Department of Defense a National Security Agency which shall be administered by a Director. The Director shall be designated by the Secretary of Defense, after consulting the Joint Chiefs of Staff, from commissioned officers of the armed forces. The Director shall serve for a term of four (4) years and may be redesignated in the same manner for additional terms. He shall serve in the grade of lieutenant general or general or vice admiral or admiral, as the case may be.

(b) Under the direction, authority, and control of the Secretary of Defense, the National Security Agency shall perform such functions relating to the communications intelligence and communications security activities of the United States as the National Security Council may prescribe.

SEC. 2. No person shall be employed in the National Security Agency unless it has been established by the Director that such employment is clearly consistent with the national security; no person shall be continued in employment in the Agency when the Director determines that his retention is not clearly consistent with the national security. The Director shall establish such security requirements, restrictions and safeguards relative to employment and removal from employment in the Agency as he deems necessary to comply with this section.

SEC. 3. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director may, in his discretion, terminate the employment of any officer or employee of the National Security Agency whenever he shall deem such termination necessary or advisable in the interests of the United States, but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission.

SEC. 4. The first sentence of Section 2 of the Act of May 29, 1959 (73 Stat. 63, Public Law 86-36) is amended by inserting after the words "and to appoint thereto" the following: ", without regard to the civil service laws,".

SEC. 5. Section 2 (b) of the Performance Rating Act of 1950, as amended (5 U.S.C. 2001), is amended by changing the period at the end thereof to a semicolon and adding the following new paragraph:

"(14) The National Security Agency."

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The Secretary of Defense
Washington

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Dear Mr. Speaker:

There is forwarded herewith a draft of proposed legislation to provide certain authorities for the National Security Agency, prescribe a security employment standard, and for other purposes.

This proposed legislation is a part of the Department of Defense legislative program for 1961, and the Bureau of the Budget advises that there is no objection to its presentation to the Congress. It is strongly recommended that it be enacted.

The National Security Agency was established eight years ago, pursuant to a Presidential directive, to provide centralized coordination and direction for certain very highly classified functions vital to the national security. The Agency was organized as an element of the Department of Defense which was designated Executive Agent of the Government for these matters. Therefore, its operations are subject to the authority, direction, and control of the Secretary of Defense. All positions in the Agency have been designated sensitive in the sense that the occupants thereof could bring about, by virtue of the nature of their positions, a material adverse effect on the national security.

Purpose of the Legislation

The first objective of this proposal is to obtain express recognition and approval by the Congress of the establishment and activities of the National Security Agency. This would be accomplished by providing specifically by statute for the existence and activities of the Agency and the appointment of a Director thereof.

The second objective is to enable the Agency to safeguard more effectively its extremely sensitive activities. This would be accomplished by provisions of law which would:

(a) Prescribe by mandate of the Congress a security standard for employment in the Agency.

(b) Grant authority to terminate such employment when such action is deemed necessary or advisable in the interest of the United States.

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(c) Exempt the Agency from certain civil service laws where justification exists on the grounds of security.

These provisions are intended to directly and fully implement recommendations made to the President on October 3, 1950, by the President's Board of Consultants on Foreign Intelligence Activities in its classified report.

The Department of Defense is convinced that the proposed legislation is required to enable the Agency to control more effectively those persons who have access, and who are to continue to have access, to uniquely sensitive information. In its judgment, the national interest necessitates that extreme security precautions be taken to prevent the possible compromise of this information. If the requested authority to terminate employment be granted by the Congress, the Department of Defense and the Agency are determined that it be exercised with due regard for the rights of employees. It is considered that existing law vests the Secretary of Defense with ample authority to protect fully the rights of employees of the Agency.

Cost and Budget Data

The enactment of the proposed bill would not result in increased costs to the Government.

Sincerely yours,

2 Inclosures:

1. Draft Bill
2. Sectional analysis

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SECTIONAL ANALYSIS

of a bill

To provide certain authorities for the National Security Agency, prescribe a security employment standard, and for other purposes.

Section 1. This Section would provide express statutory authority for the existence and activities of the Agency and the appointment of the Director thereto. During the past eight years, the Congress has regularly appropriated funds for the Agency. Moreover, the Congress has on several occasions enacted legislation pertaining to the Agency. Public Law 86-30 is the most recent statute. Therefore, this provision would provide de jure recognition for a de facto situation.

Section 2. This Section would prescribe by statute a security standard for employment and retention in the Agency. The standard proposed is now applied to Agency employment by Executive Order 10450, as amended. However, this provision would impose this standard by mandate of the Congress. The intent is to provide a more authoritative legal basis to enable the Agency to apply the security standard more effectively.

Section 3. This Section would grant the Director of the Agency discretionary authority to terminate the service of an employee once it has been determined that his continued employment would not be in the interest of the United States. Its intent is to enable the Agency to maintain more effectively the integrity and security of its operations. It would overcome serious inadequacies in existing termination authority. For example, under existing law, alternative authority to terminate must be relied upon depending on whether the basis of dismissal is national security or unsuitability/unfitness reasons. However, in view of the close relation of Agency positions to the national security, it is often difficult for the Agency to determine whether the basis of dismissal is the national security or unfitness or unsuitability for employment. Yet, the Agency may be bound by its election of a separation procedure. Moreover, regardless of the type of authority relied upon, the Agency may be forced to comply with strict procedural requirements and safeguards designed to protect the employee. Furthermore, the Agency must decide whether the disclosure of sufficient information to sustain a termination may generate risks incompatible with the nature of the Agency's mission and inconsistent with the security instructions prescribed by higher authority. Therefore, it is proposed to grant the Director of the Agency discretionary termination authority. If the Congress concurs, internal procedures would be established to assure that such authority be exercised with due regard for the rights of Agency employees.

Section 4. This Section would authorize the appointment of civilian officers and employees of the Agency without regard to the Civil Service

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Laws. It would replace the present appointment authority under which appointments are exempted administratively from the competitive service by the U. S. Civil Service Commission.

Section 2. This Section would exempt the Agency, on security grounds, from the Performance Rating Act of 1950, which authorized the U. S. Civil Service Commission to inspect the administration of the Agency's performance-rating plan.

NSA'S REQUIREMENTS FOR LEGISLATION
(SUPPLEMENTAL JUSTIFICATION)

1. The Director of NSA is charged with the responsibility for assuring the integrity and security of the operations of the Agency. In this regard he is responsible for the application within NSA of the Personnel Security Clearance Standards promulgated by DCID No. 6/3 which govern the granting of access to COMINT information to individual employees of the Agency. He is also responsible, under delegation of authority from the Secretary of Defense, for carrying out the provisions of Public Law 733, Executive Order 10450, and DOD Directives No. 5210.7 and No. 5210.8 relating to personnel security.

2. Within NSA all positions are "sensitive positions" since the duties of all employees expose them to information, the improper use of which could affect adversely the national security. Thus, employment and access to COMINT information are synonymous. Without access there can be no continued productive employment in NSA.

3. The Director, while fully responsible for maintaining the security of NSA and for enforcing the prescribed security standards, does not possess the requisite authority which should accompany these assigned responsibilities. Our proposed legislation has as its primary purpose the remedy of this defect. In an activity in which the Director bears such heavy security responsibilities it is inappropriate that his authority to carry out effectively these responsibilities should be based on a "patch-work" of legislation, orders, and directives that, at best, only indirectly give recognition to the severe security problems faced by an agency such as NSA.

4. Currently, the only procedures expressly available to the Director to effect the termination of an employee whose services are deemed to be no longer in the interest of national security stem from Public Law 733 and the orders and directives implementing this Act. Under the authority of PL 733 only the Secretary of Defense can terminate an employee of NSA. The Director, NSA, can only suspend an employee. After suspending an employee, the Director must then process through the Office of the Secretary of Defense a proposal to terminate the employee. A departmental hearing board reviews the proposal and forwards its recommendations to the Secretary of Defense for final determination. These procedures are defective in the following major respects:

a. They separate the direct responsibility of the Director for COMINT security and the authority to effectively secure such security through termination action. The Director is in the position of having been assigned a serious and important responsibility without commensurate authority to carry out those responsibilities.

b. The security hearing board is in the position of reviewing a security termination action while under a considerable handicap. The hearing board has little opportunity, because of security restrictions, to fully understand and appreciate the gravity of the security problem involved in NSA activities.

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c. Under these procedures the employee must be given a written statement of the charges against him which "shall be as specifically stated as security considerations permit". In many situations the disclosure of information sufficient to make a statement of charges meaningful is incompatible with the nature of the Agency's mission and inconsistent with the security instructions prescribed by higher authority. Further, the quasi-judicial aspects of PL 733 procedures encourages the exposure of unindoctrinated persons, such as the employee's counsel and hearing board members, to various aspects of the Agency's operations. Such exposure is highly undesirable from a security point of view. Also undesirable is the publicity concerning the Agency that may be generated by contested cases under PL 733.

d. These procedures may result in inequitable treatment of NSA employees. Because of the extremely sensitive nature of the NSA mission and operations, it is inherent that the standards and criteria for adjudging continued employment be of the strictest order. The interpretation and application of these standards to NSA employees must of necessity be more rigid than is the application of PL 733 to employees in many other "sensitive" positions within other agencies of the Government. It then follows that individuals may be adjudged no longer qualified for employment in NSA who would be found acceptable to other governmental agencies. To brand such an individual as a "security risk" under PL 733 would appear to be unjust, inequitable, and unwarranted.

5. Because of the aforementioned defects in PL 733, as applied to NSA, the Agency has sought other means to rid itself of employees found wanting from a security standpoint. There has been fostered within the Agency a strong belief on the part of most employees that it is in their personal interest to resign rather than engage in a prolonged controversy over their ability to meet the security requirements for continued employment. Consequently, when there arises a serious question of an employee's security fitness for further employment, the employee usually resigns voluntarily prior to any formal action by the Agency to proceed against him under PL 733. In cases where a resignation was not volunteered, the Agency has frequently elected to terminate his Schedule A appointment if the employee concerned is a non-veteran. It is understood that this procedure has recently been questioned. It is clear that employees will not voluntarily elect to resign if the resignation action will not prejudice against further employment. If the Agency is unable to continue its past practices, its only recourse, without legislation, will result in a substantial increase in the number of cases to be processed under PL 733.

6. A substantial increase in the number of cases brought under PL 733 will pose serious security problems to the Agency. As noted previously, meaningful charges are frequently difficult to draw within the limits of security considerations; the inequities arising from utilizing PL 733 procedures to enforce security standards that are almost unique to NSA will undoubtedly elicit Congressional criticism; the exposure of additional persons

to a knowledge of NSA operations is highly undesirable; and the workloads and delays involved in processing NSA security actions under PL 733 may seriously disrupt the security program of the Agency.

7. Because of the defects inherent in the application of PL 733 procedures, the Agency has elected to use other means to terminate the services of employees found wanting from a security standpoint. Citation of specific cases to illustrate Agency application of PL 733 procedures is, therefore, difficult to do. In any event, the number of instances in which the Agency would have difficulty in terminating an employee is not a relevant point. In an extremely sensitive activity such as NSA, no employee can be retained on duty who, in the opinion of competent authority, is not eligible to have access to Agency information. Our experience indicates that the Agency, through one means or another, has in the past managed to terminate the services of employees whenever such action was deemed necessary. However, these procedures, although successful in the past, are largely based on the use of a variety of authorities and avenues open to the Agency. It is not appropriate that the Agency's security be based upon "catch-as-catch can" application of a variety of laws and authorities not directly designed to meet the Agency's problems. It is desired that the Agency's security program be based upon a solid legislative foundation.

8. For the reasons noted above, it is considered urgent that the proposed legislation be submitted to the Congress. Its early consideration and enactment is essential for the protection and safeguarding of the security of the Agency and of its mission. In view of the scrutiny now being given to NSA's security program by both the executive and legislative branches of the Federal Government, it would appear that there could be no more timely opportunity for seeking Congressional approval of the proposal and that the present Congress should be favorably inclined toward passage of the legislation.