

d r a f t

The President

The White House.

My dear Mr. President:

I have caused to be prepared, and I am herewith presenting, through the Director of the Bureau of the Budget, two proposed Executive orders entitled, respectively, "Security Requirements Relating to Civilian Employment in Sensitive Positions in the Government" (hereinafter referred to as the sensitive order), and "Investigative Requirements Relating to Civilian Employment in Non-Sensitive Positions in the Government" (hereinafter referred to as the non-sensitive order.)

The two proposed orders replace Executive Order No. 10450 of April 27, 1953, entitled "Security Requirements for Government Employment." Issuance of these orders is an interim measure, pending the completion of the report of the Commission on Government Security and the implementation thereof, designed to cope with certain problems and clarify certain other aspects of the Government employees' security programs arising as a result of the recent decision of the Supreme Court in the case of Cole v. Young (351 U. S. 536). That decision, in effect, held that not all positions in the Government affect the "national security," and that the act of August 26, 1950 (64 Stat. 476) authorizes the suspension or termination of employment of only those Government employees whose positions are so affected.

In view of that decision of the Supreme Court, I feel that it is advisable to issue a new Executive order that applies only to

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employees in sensitive positions, and conforms to the precise terms of the decision and the said act of August 26, 1950.

The three important differences between Executive Order No. 10450 and the proposed sensitive order are as follows:

1. Executive Order No. 10450 was not specifically limited in its application to sensitive positions and contained no description of such positions, whereas the proposed order is limited in its application to sensitive positions and specifically describes such positions. That change makes the proposed order coextensive with the act of August 26, 1950, and that change appears extremely desirable inasmuch as the removal authority relied upon in Executive Order No. 10450 is based upon that act.

2. Executive Order 10450 required, as a condition of employment, that a person's employment be "clearly consistent with the interest of national security," whereas the proposed order provides that the employment of a person shall be suspended or terminated if such suspension or termination is in the interest of the national security. The latter terminology more precisely conforms to the language of the act of August 26, 1950.

3. Executive Order No. 10450 requires that a full field investigation be conducted with respect to each applicant for, or occupant of, a sensitive position. The new order requires that a full field investigation be conducted with respect to ^{alien employees and} each applicant for, and each occupant of, a sensitive position in which there will be access to defense information or material classified as "top secret" pursuant to Executive Order No. 10501.

9. The minimum investigative requirement with respect to other sensitive positions would be a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation. Written inquiries could be dispensed with in the case of certain persons who have been employed by the Government for continuous periods of five years or more. The investigative requirements prescribed by the new order would be minimum requirements and could be supplemented by the head of the agency concerned. This change in the investigative requirements is recommended as a result of a study that indicates that, since incumbent sensitive employees have been screened and the current program relates primarily to applicants for sensitive positions, lesser investigations may be permitted which would greatly reduce the cost of the program without risk to the national security.

^eThose changes necessitated a substantial redrafting of the provisions of Executive Order No. 10450, and, in the interest of clarity and precision of language, made timely a number of minor changes.

Section 10 of the proposed sensitive order needs special consideration. It deals with the list of organizations designated pursuant to section 12 of Executive Order No. 10450. Section 10 of the new order authorizes the Attorney General, in his discretion, to continue to furnish that list to the heads of other departments and agencies. ^{is}That section also continues the effectiveness of the list, heretofore distributed, until such time as the Attorney General may revoke that list, in whole or in part.

The function of the list as presently maintained has been carefully reviewed and it is my opinion that continued designation of organizations in connection with an employee security program has been rendered ineffective. In recent years diligent enforcement of Federal laws against subversion has compelled the Communist Party and its members to follow a policy of infiltrating legitimate organizations and organizing groups of a temporary or local nature. These tactics are designed, in part at least, to frustrate registration requirements of the Internal Security Act of 1950. However, such tactics also tend to minimize the value of the designation program which includes a public hearing under this Department's regulations, and further, have made it extremely difficult for this Department to maintain the list in a current status. Under these circumstances, the existing list of designated organizations does not properly serve as an aid to the departments and agencies of Government. Consequently, it is my intention to discontinue the present list as of June 30, 1957, and to make no new designations in the interim period. However, discontinuance of the practice of designating organizations will not materially alter the operation of the security program, because the departments and agencies will still be required to consider any information pertinent to a determination as to a person's employability and reported information relating to membership in a questionable organization should receive appropriate consideration.

In view of the interest of a large segment of the Congress with respect to the employee security program, I propose to advise Congress of this intention and to bring the matter to the attention of the Commission on Government Security. Should the Congress or the Commission conclude that legislation to

continue a designation program is desirable, it will have ample opportunity to take appropriate action.

The proposed non-sensitive order involves only those employees not covered by the sensitive order. The sole purpose of this order is to continue the minimum investigative standards contained in Executive Order No. 10450. The order does not provide for the removal of non-sensitive employees and such removals would be accomplished under existing laws and procedures.

It is strongly recommended that the orders be issued concurrently, and it should be noted that the non-sensitive order cannot be issued until after the sensitive order has been issued because section 1(a) of the non-sensitive order specifically refers to the sensitive order. Accordingly, it has been necessary to leave blanks in section 1(a) of the non-sensitive order which should be filled with the Executive order number and the date of the sensitive order when it is issued.

I approve the proposed order as to form and legality, and recommend that it be issued.

Respectfully,

Attorney General.

Mr. Tolson	✓
Mr. Nichols	✓
Mr. Boardman	✓
Mr. Belmont	✓
Mr. Mohr	✓
Mr. Parsons	✓
Mr. Rosen	✓
Mr. Tamm	✓
Mr. Trotter	✓
Mr. Nease	✓
Tele. Room	✓
Mr. Holloman	✓
Miss Gandy	✓

FROM

OFFICE OF LEGAL COUNSEL

REVISION OF EXECUTIVE ORDER

OFFICIAL INDICATED BELOW BY CHECK 10450

Memorandum

February 15, 1957

- The Attorney General
- Executive Assistant
- The Solicitor General
- Deputy Attorney General
- Assistant Attorney General, Antitrust
- Assistant Attorney General, Civil
- Assistant Attorney General, Lands
- Assistant Attorney General, Tax
- Assistant Attorney General, Criminal
- Assistant Attorney General, Internal Security
- Director, Federal Bureau of Investigation
- Director, Office of Alien Property
- Commissioner, Immigration and Naturalization Service
- Director, Bureau of Prisons
- Administrative Assistant Attorney General
- Public Relations

Attached are copies of a covering memorandum to the Attorney General, proposed orders for sensitive and nonsensitive cases, and proposed transmittal letter to the President which will be submitted today to the Attorney General at his request. This procedure is being followed so that if there are any further comments respecting this material they may be made to the Attorney General no later than February 20.

It would be appreciated if such comments are also distributed among the following prior to February 20: Civil Division, Internal Security Division, Federal Bureau of Investigation, and Office of Legal Counsel.

us *lw*
Nathan Siegel

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FBI
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FEB 12 15:27 PM '57

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~~EXP. PROC.~~

30 FEB 15 1957

52 FEB 20 1957

Memo Stanley to Rosen 2-15-57
Memo to [unclear] 2-15-57
CHS: [unclear] [unclear] EX-108

2-15-57

MEMORANDUM FOR THE ATTORNEY GENERAL

- Re: 1. Proposed Executive order entitled "Security Requirements Relating to Civilian Employment in Sensitive Positions in the Government."
 2. "Investigative Requirements Relating to Civilian Employment in Non-Sensitive Positions in the Government."

Attached are two proposed Executive orders relating, respectively, to sensitive and non-sensitive positions in the Government, together with a proposed letter transmitting those orders to the President, through the Director of the Bureau of the Budget. The proposed "sensitive" order would supersede Executive Order No. 10450, and the proposed "non-sensitive" order would replace the investigative aspects of Executive Order No. 10450 with respect to non-sensitive positions.

The proposed orders have been reviewed by the Civil and Internal Security Division and the Federal Bureau of Investigation, and, with the exception of five matters raised by the Federal Bureau of Investigation (two common to both orders, one relating to the non-sensitive order, and two to the sensitive order), there appear to be no unresolved differences concerning these orders.

In brief, the matters raised by the FBI are as follows:

Matters common to both orders: (1) Both of the attached orders provide that investigative reports shall remain the property of the investigating agency. The FBI recommends that additional provisions be included in the orders specifically providing for the protection of confidential sources, informants, and investigative techniques, and requiring investigative reports to be held in confidence. The Office of Legal Counsel is opposed to the inclusion of such provisions. (2) The FBI reports that one of the greatest sources of criticism of Executive Order No. 10450 was the fact that there was no effective central guidance. You will recall that you directed that an earlier draft of the order be modified to limit this department's obligation with respect to the government-wide program to furnishing

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advice as distinguished from advice and guidance. You will also recall that it was proposed that an interagency committee be established to provide central guidance and that a provision was drafted to establish such a committee, but that such provision was dropped from the order after the Internal Security Division discussed it with you.

Non-sensitive order: Section 2(e) of the attached non-sensitive order provides that investigations which develop information involving a reasonable doubt as to the loyalty of the individual involved shall be referred to the FBI for a full field investigation. The FBI recommends that the types of loyalty cases which are to be referred to the Bureau be described in detail as is done in Executive Order No. 10450 and the attached proposed sensitive order. The Internal Security Division is opposed thereto.

Sensitive order: (1) The proposed letter to the President states that you intend to terminate the Attorney General's list on June 30, 1957. The Bureau opposes termination of the list. (2) Section 7(j) of the proposed order requires that investigations include information with respect to refusals to testify, on the constitutional ground of self-incrimination, with respect to matters involving loyalty. The Bureau recommends that this be broadened to include refusals to testify, on the ground of self-incrimination, concerning matters involving misconduct other than those pertaining to loyalty. The Internal Security Division opposes the inclusion of the additional requirement.

For your convenience, this office has prepared and attached a compilation of comments and cross comments with respect to the five points. Also attached are all pertinent memoranda concerning the attached orders which have been presented to this office or prepared in this office since the preparation of the attached orders commenced.

The proposed letter to the President describes the major differences between the attached orders and Executive Order No. 10450, and indicates that you plan to terminate the Attorney General's list on June 30, 1957.

Nathan Siegel
Acting Assistant Attorney General
Office of Legal Counsel

C O P Y

The President,

The White House.

My dear Mr. President:

I have caused to be prepared and I am herewith presenting, through the Director of the Bureau of the Budget, two proposed Executive orders entitled, respectively, "Security Requirements Relating to Civilian Employment in Sensitive Positions in the Government" (hereinafter referred to as the sensitive order), and "Investigative Requirements Relating to Civilian Employment in Non-Sensitive Positions in the Government" (hereinafter referred to as the non-sensitive order).

The two proposed orders replace Executive Order No. 10450 of April 27, 1953, entitled "Security Requirements for Government Employment," which was designed to implement the act of August 26, 1950, 64 Stat. 476. Issuance of these orders would be an interim measure, pending the completion of the report of the Commission on Government Security and the implementation thereof, designed to cope with certain problems and to clarify certain other aspects of the Government employees' security programs arising as a result of the recent decision of the Supreme Court in the case of Cole v. Young (351 U.S. 536). That decision holds, in effect, that not all positions in the Government are affected with the "national security," and that the said act of August 26, 1950, authorizes the suspension or termination of employment only of those Government employees whose positions are so affected.

In view of that decision, I feel that it is advisable to issue a new Executive order that applies only to employees in sensitive positions, and that conforms more precisely to the terms of the decision and of the said act of August 26, 1950.

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The three important differences between Executive Order No. 10450 and the proposed sensitive order are as follows:

1. Executive Order No. 10450 is not specifically limited in its application to sensitive positions and contains no description of such positions, whereas the proposed order is so limited and does contain such description. That change, which makes the proposed order coextensive with the act of August 26, 1950, appears extremely desirable inasmuch as the removal authority relied upon in Executive Order No. 10450 is based upon that act.

2. Executive Order No. 10450 requires, as a condition of employment, that a person's employment be "clearly consistent // with the interests of the national security," whereas the proposed order provides that the employment of a person shall be suspended or terminated if such suspension or termination is in the interest of the national security. The latter terminology more precisely conforms to the language of the act of August 26, 1950.

3. Executive Order No. 10450 requires that a full field investigation be conducted with respect to each applicant for, or occupant of, a sensitive position. The new order requires that a full field investigation be conducted with respect to alien employees and to each applicant for, and each occupant of, a sensitive position in which the employee will have access to defense information or material classified as "Top Secret" pursuant to Executive Order No. 10501 of November 5, 1953. Under the proposed order the minimum investigative requirement with respect to other sensitive positions would be a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation. Also written inquiries could be dispensed with in the case of certain persons who have been employed by the Government for continuous periods of five years or more. Further, the investigative requirements prescribed by the new order would be minimum requirements and could be supplemented by the head of the agency concerned. These changes in the investigative requirements are recommended as a result of a study which indicates that, since incumbent employees of sensitive positions have been screened and the current program relates primarily to applicants for sensitive positions, less investigations may be permitted which would greatly reduce the cost of the program without risk to the national security.

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The above-described changes necessitated a substantial redrafting of the provisions of Executive Order No. 10450, and, in the interest of clarity and precision of language, made timely a number of minor changes.

The proposed non-sensitive order applies only to those employees not covered by the proposed sensitive order. The sole purpose of this order is to continue the minimum investigative standards contained in Executive Order No. 10450. The order does not provide for the removal of non-sensitive employees, and such removals would be accomplished under existing laws and procedures.

It is strongly recommended that the orders be issued concurrently, and it should be noted that the non-sensitive order cannot be issued before the sensitive order is issued because section 1(a) of the non-sensitive order specifically refers to the sensitive order. Accordingly, it has been necessary to leave blanks in section 1(a) of the non-sensitive order for the insertion of the number and the date of the sensitive order when it is issued. The number of the order will be supplied or inserted by the Federal Register Division upon request.

I approve the proposed orders as to form and legality, and recommend that they be issued.

Respectfully,

Attorney General

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C O P Y

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I have caused to be prepared and I am herewith presenting, through the Director of the Bureau of the Budget, two proposed Executive orders entitled, respectively, "Security Requirements Relating to Civilian Employment in Sensitive Positions in the Government" (hereinafter referred to as the sensitive order), and "Investigative Requirements Relating to Civilian Employment in Non-Sensitive Positions in the Government" (hereinafter referred to as the non-sensitive order).

The two proposed orders replace Executive Order No. 10430 of April 27, 1953, entitled "Security Requirements for Government Employment," which was designed to implement the act of August 26, 1950, 64 Stat. 476. Issuance of these orders would be an interim measure, pending the completion

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Baltimore

of the report of the Commission on Government Security and the implementation thereof, designed to cope with certain problems and to clarify certain other aspects of the Government employees' security programs arising as a result of the recent decision of the Supreme Court in the case of Gins v. Young (351 U.S. 536). That decision holds, in effect, that not all positions in the Government are affected with the "national security," and that the said act of August 26, 1950, authorizes the suspension or termination of employment only of those Government employees whose positions are so affected.

In view of that decision, I feel that it is advisable to issue a new Executive order that applies only to employees in sensitive positions, and that conforms more precisely to the terms of the decision and of the said act of August 26, 1950.

The three important differences between Executive Order No. 10450 and the proposed sensitive order are as follows:

1. Executive Order No. 10450 is not specifically limited in its application to sensitive positions and contains no description of such positions, whereas the proposed order is so limited and does contain such description. That change, which makes the proposed order coextensive with the act of August 26, 1950, appears extremely desirable inasmuch as the removal authority relied upon in Executive Order No. 10450 is based upon that act.

2. Executive Order No. 10450 requires, as a condition of employment, that a person's employment be "clearly consistent with the interests of the national security," whereas the proposed order provides that the employment of a person shall be suspended or terminated if such suspension or termination is in the interest of the national security. The latter terminology more precisely conforms to the language of the act of August 25, 1950.

3. Executive Order No. 10450 requires that a full field investigation be conducted with respect to each applicant for, or occupant of, a sensitive position. The new order requires that a full field investigation be conducted with respect to alien employees and to each applicant for, and each occupant of, a sensitive position in which the employee will have access to defense information or material classified as "Top Secret" pursuant to Executive Order No. 10501 of November 5, 1953. Under the proposed order the minimum investigative requirement with respect to other sensitive positions would be a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation. Also, written inquiries

could be dispensed with in the case of certain persons who have been employed by the Government for continuous periods of five years or more. Further, the investigative requirements prescribed by the new order would be minimum requirements and could be supplemented by the head of the agency concerned. These changes in the investigative requirements are recommended as a result of a study which indicates that, since incumbent employees of sensitive positions have been screened and the current program relates primarily to applicants for sensitive positions, less investigations may be permitted which would greatly reduce the cost of the program without risk to the national security.

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I approve the proposed orders as to form and legality, and recommend that they be issued.

Respectfully,

Attorney General



Office of the Attorney General
Washington, D.C.

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The White House.

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positions in the Government are affected with the "national security", and that the said act of August 26, 1950, authorizes the suspension or termination of employment only of those Government employees whose positions are so affected.

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1. Executive Order No. 10450 is not specifically limited in its application to sensitive positions and contains no description of such positions, whereas the proposed order is so limited and does contain such description. That change, which makes the proposed order coextensive with the act of August 26, 1950, appears extremely desirable inasmuch as the removal authority relied upon in Executive Order No. 10450 is based upon that act.

2. Executive Order No. 10450 requires, as a condition of employment, that a person's employment be "clearly consistent with the interests of the national security", whereas the proposed order provides that the employment of a person shall be suspended or terminated if such suspension or termination is in the interest of the national security. The latter terminology more precisely conforms to the language of the act of August 26, 1950.

3. Executive Order No. 10450 requires that a full field

investigation be conducted with respect to each applicant for, or occupant of, a sensitive position. The new order requires that a full field investigation be conducted with respect to alien employees and to each applicant for, and each occupant of, a sensitive position in which the employee will have access to defense information or material classified as "Top Secret" pursuant to Executive Order No. 10501 of November 5, 1953. Under the proposed order the minimum investigative requirement with respect to other sensitive positions would be a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation. Also, written inquiries could be dispensed with in the case of certain persons who have been employed by the Government for continuous periods of five years or more. Further, the investigative requirements prescribed by the new order would be minimum requirements and could be supplemented by the head of the agency concerned. These changes in the investigative requirements are recommended as a result of a study which indicates that, since incumbent employees of sensitive positions have been screened and the current program relates primarily to applicants for sensitive positions, less investigation may be permitted which would greatly reduce the cost of the program without risk to the national security.

The above-described changes necessitated a substantial redrafting of the provisions of Executive Order No. 10450, and, in

the interest of clarity and precision of language, made timely a number of minor changes.

Section 10 of the proposed sensitive order needs special consideration. It deals with the list of organizations designated pursuant to section 12 of Executive Order No. 10450. Section 10 of the new order authorizes the Attorney General, in his discretion, to continue to furnish such list to the heads of other departments and agencies. The section also continues the effectiveness of the list heretofore distributed until such time as the Attorney General may discontinue the list.

The function of the list as presently maintained has been carefully reviewed, and it is my opinion that continued designation of organizations in connection with an employee security program has been rendered ineffective. In recent years diligent enforcement of Federal laws against subversion has compelled the Communist Party and its members to follow a policy of infiltrating legitimate organizations and organizing groups of a temporary or local nature. These tactics are designed, in part at least, to frustrate registration requirements of the Internal Security Act of 1950. However, such tactics also tend to minimize the value of the designation program, which includes a public hearing under this department's regulations, and further, have made it extremely difficult for this department to maintain the list in a current status. Under these circumstances, the existing list of designated organizations does not properly serve as an aid to the departments and agencies of the Government. Consequently,

It is my intention to discontinue the present list as of June 30, 1957, and to make no new designations during the interim.

However, discontinuance of the practice of designating organizations will not materially alter the operation of the security program, because the departments and agencies will still be required to consider any information pertinent to a determination as to a person's employability, and reported information relating to membership in a questionable organization should continue to receive appropriate consideration.

In view of the interest of a large segment of the Congress with respect to the employee security program, it is my purpose to advise Congress of my intention to discontinue the list as of June 30, 1957, and I shall also bring the matter to the attention of the Commission on Government Security. Should the Congress or the Commission conclude that legislation to continue a designation program is desirable, it will have ample opportunity to take appropriate action.

The proposed non-sensitive order applies only to those employees not covered by the proposed sensitive order. The sole purpose of this order is to continue the minimum investigative standards contained in Executive Order No. 10450. The order does not provide for the removal of non-sensitive employees, and such removals would be accomplished under existing laws and procedures.

It is strongly recommended that the orders be issued concurrently, and it should be noted that the non-sensitive order cannot be issued before the sensitive order is issued because section 1(a) of the non-sensitive order specifically refers to the sensitive order. Accordingly, it has been necessary to leave blanks in section 1(a) of the non-sensitive order for the insertion of the number and the date of the sensitive order when it is issued. The number of the order will be supplied or inserted by the Federal Register Division upon request.

I approve the proposed orders as to form and legality, and recommend that they be issued.

Respectfully,

Attorney General.

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EXECUTIVE ORDER

SECURITY REQUIREMENTS RELATING TO
CIVILIAN EMPLOYMENT IN SENSITIVE
POSITIONS IN THE GOVERNMENT

By virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631), the Civil Service Act of 1883, 22 Stat. 403 (5 U.S.C. 632, et seq.), and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.), and as President of the United States, it is hereby ordered as follows:

Section 1. It is deemed necessary in the best interest of the national security that, in addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act be, and they are hereby, extended to all other departments and agencies of the Government in which there are civilian positions affecting the national security, which positions shall be designated as sensitive positions pursuant to section 2 of this order.

Section 2. The head of each department and agency shall designate or cause to be designated as a sensitive position any civilian position within his department or agency the occupant of which could bring about by virtue of the nature of the position an adverse effect on the national security. Such a position is one in which the occupant (1) has access to defense information or materials classified as "Confidential," "Secret," or "Top Secret" pursuant to the provisions of Executive Order No. 10501 of November 5, 1953; (2) exercises or participates in policy-making functions which could adversely affect the national security; or (3) by his misconduct could adversely affect the national security.

Section 3. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee in a position designated as sensitive in accordance with the provisions of this order is not contrary to the purposes of the act of August 26, 1950, or this order.

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Section 4. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government in a sensitive position may not be in the interest of the national security, the head of the department or agency concerned shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interest of the national security, and, following such investigation and review as he may deem necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination to be necessary or advisable in the interest of the national security, in accordance with the said act of August 26, 1950. Determinations by department and agency heads pursuant to this section shall be conclusive and final.

Section 5. No person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, shall be reinstated or restored to duty or reemployed in the same department or agency in a sensitive position unless the head of the department or agency finds that such reinstatement, restoration, or reemployment is in the interest of the national security, which finding shall be made a part of the records of such department or agency: Provided, that no person whose employment has been terminated under such authority may thereafter be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

Section 6 (a). Each person who is an applicant for, or an occupant of, a sensitive position shall be subject to investigation, and, except as provided in subsection (b) of this section, no sensitive position shall be occupied until such an investigation has been completed. The scope of such investigation shall be determined by the head of the department or agency concerned, or by his representative, but in no event shall it include less than a national agency check (including a check of the fingerprint files of the FBI) and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: Provided, that such written inquiries may be dispensed with in the case of

any person who has completed a minimum of 5 years of continuous civilian service with the Government (except for breaks in service not in excess of 90 days) if no information exists that reflects unfavorably upon the loyalty, character, integrity, or reliability of such person: And provided further, that in any instance in which the applicant for, or an occupant of, a sensitive position is an alien or shall have access to defense information or material classified "Top Secret" pursuant to Executive Order No. 10501, of November 5, 1953, a full field investigation shall be conducted.

(b). A sensitive position may be occupied for a limited period of time by a person, except an alien, with respect to whom the minimum investigation has not been completed in any instance in which the head of the department or agency, or his representative, finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

(c). In any instance in which it is impossible to complete a full field investigation of an alien because of geographic or political considerations, such alien may occupy a sensitive position when an appropriate substitute investigation has been conducted, and sufficient reliable information has been compiled to support a determination by the head of the department or agency concerned, or his representative, that the occupancy of such sensitive position is not contrary to the purposes of the said act of August 26, 1950, or this order.

(d). Nothing in this section shall be construed as requiring a new investigation with respect to an occupant of a sensitive position if such occupant has been the subject of an investigation conforming to the minimum requirements specified in this section.

Section 7. Investigations relating to applicants for, and occupants of, sensitive positions conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in a sensitive position of the person being investigated is in the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(a) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(b) Establishing or maintaining a close continuing or sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation the interests of which may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(c) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(d) Membership in, or affiliation or close continuous or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(e) Close continuous or sympathetic association with a member or members or affiliates of an organization referred to in paragraph (d) of this section.

(f) Participation in the activities of an organization infiltrated by members of an organization referred to in paragraph (d) of this section under circumstances indicating sympathy for such members or their purposes.

(g) Intentional, unauthorized disclosure to any person of security information, or other information disclosure of which is prohibited by law, or wilful violation or disregard of security regulations.

(h) Performing, or attempting to perform, his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(i) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence or pressure which may cause him to act contrary to the best interests of the national security.

(j) Refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee or grand jury regarding any matter pertaining to loyalty, security, or subversive connections.

(k) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(l) Any deliberate misrepresentations, falsifications, or omission of material facts.

(m) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(n) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(o) Refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee or grand jury regarding any matter other than a matter pertaining to loyalty, security, or subversive connections.

Section 8 (a). There shall be established and maintained in the Civil Service Commission an investigations index covering all persons as to whom investigations have been conducted by any department or agency of the Government under this order. The investigations index shall contain the name of each person so investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning

the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b). The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the investigations index.

(c). The investigation of persons entering, or employed in, the competitive service in a sensitive position shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission.

(d). The investigation of persons (including consultants, however employed) entering the employment of, or employed by, the Government in a sensitive position other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(e). There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information in the nature of the matters described in paragraph (a) to (j), inclusive, of section 7 of this order. In cases so referred to it, the Federal Bureau of Investigation shall conduct a full field investigation.

(f). The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program relating to loyalty or security shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security and the discretion of the investigative agency, be retained on loan by the employing department or agency.

Section 9. Nothing in this order shall be construed as eliminating or modifying in any way the requirement or authority for any investigation or any determination relating to security or other personnel matters which may be otherwise required or authorized by law.

Section 10. The Attorney General shall continue to furnish the information described in paragraph 3 or Part III of Executive Order No. 9835 of March 21, 1947, as amended (revoked by Executive Order No. 10450 of April 27, 1953). Information heretofore furnished by the Attorney General pursuant to section 12 of Executive Order No. 10450 shall remain unaffected.

Section 11. The Civil Service Commission, with the cooperation of the departments and agencies, shall continue to maintain a roster of competent and disinterested Government employees who shall be available to sit as members of security hearing boards. Such boards, composed of not less than three members, shall, in accordance with said act of August 26, 1950, be convened by the head of the department or agency concerned, or his representative, and shall act in an advisory capacity in making their findings and recommendations to the head of such department or agency. No member of a security hearing board shall be an employee of the department or agency convening such board.

Section 12. The Attorney General, or such person as he may designate, is requested to render to the heads of the departments and agencies, or their representatives, such legal advice as may be requisite to enable them to establish and maintain an appropriate program pursuant to this order.

Section 13. Except with respect to postmasters, the provisions of this order shall not apply to any person who occupies a specific office to which he was appointed by the President by and with the advice and consent of the Senate: Provided, that nothing in this section shall be construed as requiring any postmaster position to be designated as sensitive pursuant to section 2 of this order.

Section 14. This order supersedes Executive Order No. 10450 of April 27, 1953, as amended. Any pending proceedings instituted pursuant to the said Executive Order No. 10450 in which suspension has occurred may be continued to a final determination under the authority, and in accordance with the provisions, of that order.

THE WHITE HOUSE,

,1957.

C O P Y

EXECUTIVE ORDER

INVESTIGATIVE REQUIREMENTS RELATING TO
CIVILIAN EMPLOYMENT IN NON-SENSITIVE
POSITIONS IN THE GOVERNMENT

By virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631), the Civil Service Act of 1883, 22 Stat. 403 (5 U.S.C. 632, et seq.), and as President of the United States it is hereby ordered as follows:

Section 1(a). The appointment of each civilian officer or employee to a non-sensitive position in any department or agency of the Government shall be subject to investigation. The term "non-sensitive position" means any position not designated as a sensitive position pursuant to section 2 of Executive Order No. of , 1957. The scope of such investigation shall be determined by the head of the department or agency concerned, or by his representative, but in no event shall it include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate local law enforcement agencies, former employers, and supervisors, references, and schools attended by the person under investigation.

(b). The requirement for written inquiries may be dispensed with in the case of any person who has completed a minimum of five years of continuous civilian service with the Government (except for breaks in service not in excess of ninety days) if no information exists that reflects unfavorably upon such person's loyalty, character, integrity, or reliability.

(c). Nothing in this order shall be construed as requiring a new investigation with respect to an occupant of a non-sensitive position if such occupant has been the subject of an investigation conforming to the minimum requirements specified in this order.

(d). Upon request of the head of a department or agency concerned, the Civil Service Commission may, in its discretion,

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C O P Y ENCLOSURE

C O P Y

authorize such less investigation as the Commission deems appropriate with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States.

Section 2(a). There shall be established and maintained in the Civil Service Commission an investigations index covering all persons as to whom investigations have been conducted by any department or agency of the Government under this order. The investigations index shall contain the name of each person so investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person.

(b). The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the investigations index.

(c). The investigation of persons entering, or employed in, the competitive service in a non-sensitive position shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission.

(d). The investigation of persons (including consultants, however employed) entering the employment of, or employed by, the Government in a non-sensitive position other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(e). The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program relating to loyalty or security shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security and the discretion of the investigative agency, be retained on loan by the employing department or agency.

Section 3. Investigations conducted pursuant to this order shall relate to information of a nature described in section 2.106(a) of title 5 of the Code of Federal Regulations. There shall be referred promptly to the Federal Bureau of Investigation, which shall conduct a full field investigation, all investigations being conducted by any other agencies which develop information of the following-described nature:

(a) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

(b) Establishing or maintaining a close continuing or sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation the interests of which may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(c) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(d) Membership in, or affiliation or close continuous or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(e) Close continuous or sympathetic association with a member or members or affiliates of an organization referred to in paragraph (d) of this section.

(f) Participation in the activities of an organization infiltrated by members of an organization referred to in paragraph (d) of this section under circumstances indicating sympathy for such members or their purposes.

(g) Intentional, unauthorized disclosure to any person of security information, or other information disclosure of which is prohibited by law, or wilful violation or disregard of security regulations.

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C O P Y

(h) Performing, or attempting to perform, his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(i) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(j) Refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee or grand jury regarding any matter pertaining to loyalty, security, or subversive connections.

(k) Any other facts which tend to create a reasonable doubt as to the loyalty of the individual involved to the Government of the United States.

Section 4. Nothing in this order shall be construed as eliminating or modifying in any way the requirement or authority for any investigation or any determination relating to security or other personnel matters which may be otherwise required or authorized by law.

THE WHITE HOUSE,

, 1957.

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C O P Y

Director, FBI

NS:CFS:umc

Mr. Tolson	_____
Mr. Nichols	_____
Mr. Boardman	_____
Mr. Belmont	_____
Mr. Mohr	_____
Mr. Parsons	_____
Mr. Rosen	_____
Mr. Tamm	_____
Mr. Trotter	_____
Mr. Nease	_____
Tele. Room	_____
Mr. Holloman	_____
Misc Gandy	_____

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Executive Orders Relating to Sensitive and Non-Sensitive Positions in the Government.

On February 13, 1957, I forwarded to you two proposed Executive Orders relating, respectively, to sensitive and non-sensitive positions in the Government, together with a proposed letter transmitting these orders to the President, through the Director of the Bureau of the Budget.

The proposed letter referred to the list of organizations designated pursuant to Executive Order 10450 (Attorney General's List), and stated that it was your intention to discontinue the list as of June 30, 1957.

Assistant Attorney General Dowb suggested that this Office prepare an alternative transmittal letter without reference to the list, and the attached letter is presented in accordance with that suggestion. The only difference between the two letters is that the attached letter contains no reference to the list of designated organizations. Selection of the attached letter in lieu of the earlier transmittal letter would not impair your authority under the proposed sensitive order to terminate the list as of June 30, 1957, or as of any other date after the order is issued, since section 10 of the sensitive order has not been changed.

We have been advised that Assistant Attorney General Tompkins concurs in the submission of the attached letter to you for your consideration.

Review of Executive Order #10450

ENCLOSURE

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EX-117

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MAR 13 2 27 PM '57

Nathan Sidel
Acting Assistant Attorney General
Office of Legal Counsel

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Attachment

EXP. PROC.

MAR 19 1957

Mr. Tolson	/
Mr. Nichols	/
Mr. Boardman	/
Mr. Belmont	/
Mr. Mohr	/
Mr. Parsons	/
Mr. Rosen	/
Mr. Tamm	/
Mr. Winterrowd	/
Mr. Nease	/
Tele. Room	/
Mr. Holloman	/
Miss Gandy	/

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Executive order entitled "Security Requirements Relating to Civilian Employment in Sensitive Positions in the Government."

Proposed Executive order entitled "Investigative Requirements Relating to Civilian Employment in Non-Sensitive Positions in the Government."

Revision of

Attached are two proposed Executive orders, a proposed letter transmitting the orders to the President (through the Director of the Bureau of the Budget), a proposed press release, and a statement of differences between Executive Order No. 10450 and the sensitive order.

The proposed letter is the alternate letter submitted to you on March 19, 1957.

The two orders are identical with the orders submitted to you on February 15, 1957, except as modified in accordance with the agreements reached at the meeting in your office March 21, 1957. The changes are as follows:

Sensitive order

Section 7 has been amended to include a new paragraph (a) which adds refusal to testify on matters not involving security or loyalty as an investigative criterion. Since the new criterion is primarily a suitability matter and since paragraphs (a) to (j), inclusive, contain material primarily involving loyalty and security, it was agreed that it would be better to keep the new criterion separate from paragraph (j)

4 ENCLOSURE

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EXP. PROC.

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and to include it as a new paragraph at the end of paragraph (n), since paragraphs (k) through (n), inclusive, contain material primarily involving suitability.

Section 16 of the order has been revised to provide that the Attorney General shall (as distinguished from HAY, in his discretion) continue to furnish the so-called Attorney General's list. In the interest of consistency, the phrase "until otherwise determined by the Attorney General" has been deleted from the last sentence of section 16.

Non-suitability order

Section 2(e) of the earlier order has been deleted, and a new section 3 added. The first sentence of the new section is identical with the first sentence of the former section 2(e). The text of paragraphs (a) through (j), inclusive, is identical with the text of paragraphs (a) through (j), inclusive, of section 7 of the suitability order. Paragraph (k) is a catchall phrase that is similar to a provision of the Civil Service Regulations implementing the Lloyd-Larollette Act (5 CFR 2.106(a)(7)).

W. Wilson White
Assistant Attorney General
Office of Legal Counsel

EXECUTIVE ORDER

**INVESTIGATIVE REQUIREMENTS RELATING TO
CIVILIAN EMPLOYMENT IN NON-SENSITIVE
POSITIONS IN THE GOVERNMENT**

By virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631), the Civil Service Act of 1953, 22 Stat. 403 (5 U.S.C. 632, 25 Stat.), and as President of the United States, it is hereby ordered as follows:

Section 1(a). The appointment of each civilian officer or employee to a non-sensitive position in any department or agency of the Government shall be subject to investigation. The term "non-sensitive position" means any position not designated as a sensitive position pursuant to section 2 of Executive Order No. of , 1957. The scope of such investigation shall be determined by the head of the department or agency concerned, or by his representative, but in no event shall it include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation) and written inquiries to appropriate local law enforcement agencies, former employers, and supervisors, references, and schools attended by the person under investigation.

(b). The requirement for written inquiries may be dispensed with in the case of any person who has completed a minimum of five years of continuous civilian service with

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the Government (except for breaks in service not in excess of ninety days) if no information exists that reflects unfavorably upon such person's loyalty, character, integrity, or reliability.

(c). Nothing in this order shall be construed as requiring a new investigation with respect to an occupant of a non-sensitive position if such occupant has been the subject of an investigation conforming to the minimum requirements specified in this order.

(d). Upon request of the head of a department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as the Commission deems appropriate with respect to part-time, intermittent, temporary, or seasonal employees, or aliens employed outside the United States.

Section 2(a). There shall be established and maintained in the Civil Service Commission an investigations index covering all persons as to whom investigations have been conducted by any department or agency of the Government under this order. The investigations index shall contain the name of each person so investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person.

(b). The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information

appropriate for the establishment and maintenance of the investigations index.

(c). The investigation of persons entering, or employed in, the competitive service in a non-sensitive position shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission.

(d). The investigation of persons (including consultants, however employed) entering the employment of, or employed by, the Government in a non-sensitive position other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(e). The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program relating to loyalty or security shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security and the discretion of the investigative agency, be retained on loan by the employing department or agency.

Section 3. Investigations conducted pursuant to this order shall relate to information of a nature described in section 2.106(a) of title 5 of the Code of Federal Regulations.

There shall be referred promptly to the Federal Bureau of Investigation, which shall conduct a full field investigation, all investigations being conducted by any other agencies which develop information of the following-described nature:

(a) Commission of any act of sabotage, espionage, treason, or sedition, or attempts therefor or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(b) Establishing or maintaining a place containing or sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation the interests of which may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(c) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(d) Membership in, or affiliation or close continuous or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted, or shows, a policy of advocating or approving

the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(e) Close continuous or sympathetic association with a member or members or affiliates of an organization referred to in paragraph (d) of this section.

(f) Participation in the activities of an organization infiltrated by members of an organization referred to in paragraph (d) of this section under circumstances indicating sympathy for such members or their purposes.

(g) Intentional, unauthorized disclosure to any person of security information, or other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(h) Performing, or attempting to perform, his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(i) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(j) Refusal by the individual upon the ground of constitutional privilege against self-incrimination to testify before a congressional committee or grand jury regarding any matter pertaining to espionage, sabotage, or subversive connections.

(c) Any other facts which tend to create a reasonable doubt as to the loyalty of the individual involved to the Government of the United States.

Section 4. Nothing in this order shall be construed as eliminating or modifying in any way the requirement or authority for any investigation or any determination relating to security or other personnel matters which may be otherwise required or authorized by law.

THE WHITE HOUSE,

1957.

PROPOSED PRESS RELEASE

Today the President signed two Executive orders dealing with investigative and security requirements for employment in the executive branch of the Government.

These orders, which replace Executive Order No. 12450 of April 27, 1953, entitled "Security Requirements for Government Employees", have been issued as an interim measure pending completion and implementation of the report of the Commission on Government Security. They are primarily designed to cope with problems concerning the Government-employees security program arising as a result of the decision of the Supreme Court in the case of Galg v. Kohn, and certain administrative instructions given since that decision.

That case held, in effect, that not all positions in the Government are affected with "the national security", and that only those Government employees whose positions are so affected can be removed under the act of August 24, 1950, which is the basic authority for the Government-employees security program.

The first order deals only with positions affected with the national security, and these positions are described as sensitive positions. Under this order, a position will be designated as a sensitive position if the occupant of the

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position (a) has access to defense information or materials classified as confidential, secret, or top secret, (b) exercises or participates in policy-making functions which could adversely affect the national security, or (c) could by his misconduct adversely affect the national security.

The order extends the provisions of the act of August 26, 1950, only to those departments and agencies in which there are sensitive positions. The heads of those departments and agencies are required to investigate all sensitive-position employees and to determine the scope of such investigations. However, the minimum investigative requirements for such positions are a national agency check (including a check of the fingerprint files of the FBI), and written inquiries to appropriate law-enforcement agencies, former employers and supervisors, references, and schools, but inquiries may be waived with respect to persons who have been continuously employed by the Government for 5 years or more if no derogatory information exists with respect to them. If a position permits access to top secret information, a "full-field" investigation is required. Investigations which develop derogatory security or loyalty information will be referred to the Federal Bureau of Investigation for full-field investigations.

The order also provides that the removal of sensitive-position employees is in the interest of the national security

shall be accomplished in accordance with the provisions of the act of August 26, 1950, which safeguards employees by requiring that they be furnished with statements of charges and hearings on such charges. Removal of employees from sensitive positions for reasons other than security considerations will be accomplished under other laws and regulations applicable to Government employees.

The second order provides minimum investigative requirements for occupants of non-sensitive positions. These requirements are similar to the requirements heretofore applicable to non-sensitive positions under Executive Order No. 10450, which is superseded by the first of these two orders. The second order contains no provision for the removal of non-sensitive-position employees. Such removals will be accomplished under existing laws and regulations.

Since the orders are issued as interim measures pending the completion and implementation of the report of the Commission on Government Security, no substantial changes have been made in the existing programs except as required by the Supreme Court decision, and in the interest of precise conformity with the act of August 26, 1950. The orders will provide the departments and agencies with definite guidelines in the operation of the employee-security program, and will

assure consistent treatment of Government employees under
the act of August 26, 1950.

C O P Y

**TECHNICAL AND MINOR POLICY CHANGES
NOT REFERRED TO IN THE LETTER TO
THE PRESIDENT**

Section 1 of E. O. No. 10450 extended the act of August 26, 1950, to all agencies--the new order extends the act to only those agencies in which there are positions affecting the national security. (Technical)

Section 3 of E. O. No. 10450 requires agencies to conduct investigations. In the interest of logical sequence of provisions, investigative requirements are placed in section 6 of the new order. The language of section 3 was revised and the following new minor policy provisions added:

1. The new order permits the waiver of written inquiries with respect to persons who have been employed by the Government for continuous periods of 5 years or more.
2. The new order provides for special investigations for aliens if full-field investigations are impossible because of geographic or political considerations.
3. The new order specifically eliminates the need for new investigations if satisfactory investigations have previously been conducted.

Section 4 of E. O. No. 10450 provides for the re-adjudication of cases processed under E. O. No. 9835. That provision was eliminated because it is obsolete. (Technical)

Sections 5, 6, and 7 of E. O. No. 10450 provide for the suspension and removal of employees. Similar provisions are contained in sections 4 and 5 of the new order. The language of those sections has been revised to precisely conform with the act of August 26, 1950. (Technical)

C O P Y

66-19000-40

ENCLOSURE

C O P Y

Section 8(a) of E. O. No. 10450 established investigation criteria. Similar criteria are contained in section 7 of the new order. The arrangement of the criteria has been changed, and new criteria added. The following chart compares provisions of the old and new sections:

<u>Executive Order No. 10450</u>	<u>New Order</u>
<u>Sec. 8(a)</u>	<u>Sec. 7</u>
(1)(i)	(k)
(1)(ii)	(l)
(1)(iii)	(m)
(1)(iv)	(n)
(1)(v)	(i)
(2)	(a)
(3)	(b)
(4)	(c)
(5)	(d) (term "or close continuous" added)
(6)	(g)
(7)	(h)
(8)	(j) (term "or Grand Jury" added)
	(o)
	(a) New
	(f) New

Subsections (b), (c), and (d) of section 8 of E. O. No. 10450 have been edited and included as subsections (c), (d), and (e) of section 8 of the new order. (Technical)

The subsections 9(a) and (b) of E. O. No. 10450 have been edited and included as subsections 8(a) and (b) of the new order.

Subsection 9(c) of E. O. No. 10450 has been revised and included as subsection (f) of section 8 of the new order. (Technical)

Section 10 of E. O. No. 10450 has been redesignated as section 9 of the new order. (Technical)

Section 11 and a part of section 12 of E. O. No. 10450, relating to cases pending before the Loyalty Review Board, have been eliminated as obsolete.

C O P Y

The last phrase of section 12 of E. O. No. 10450, relating to the Attorney General's list, has been revised and included as section 10 of the new order.

Section 13 of E. O. No. 10450, relating to the furnishing of legal advice by the Attorney General, has been slightly revised and included as section 12 of the new order.

Section 14 of E. O. No. 10450 requires the Civil Service Commission to review the security program of the various agencies. The Commission interpreted this provision as requiring it to assure that each agency establish an appropriate security program. Since that has been accomplished, the provision has been eliminated as obsolete.

Sections 11 and 13 of the new order are based upon existing administrative practices, but no comparable provisions are included in E. O. No. 10450.

- 3 -

C O P Y

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UNITED STATES GOVERNMENT

Memorandum

TO : Mr. J. B. Adams

DATE: 3/10/75

FROM : Legal Counsel *[Signature]*

SUBJECT: TESTIMONY BY THE ATTORNEY
GENERAL AND THE DIRECTOR
BEFORE THE SUBCOMMITTEE ON
CIVIL RIGHTS AND CONSTITUTIONAL
RIGHTS, FEBRUARY 27, 1975

- Assoc. Dir. _____
- Dep. Dir. _____
- Dep. Asst. Dir. _____
- Asst. Dir. _____
- Adm. _____
- Comp. Syst. _____
- Ext. Affairs _____
- Files & Com.
- Gen. Inv. _____
- Ident. _____
- Inspection _____
- Intell. _____
- Laboratory _____
- Plan. & Eval. _____
- Spec. Inv. _____
- Training _____
- Legal Coun. _____
- Telephone Rm. _____
- Director's Sec'y _____

On March 10, 1975, Associate Deputy Attorney General James Wilderotter advised me that the Attorney General had called him this morning and requested a memorandum to be prepared by the FBI interpreting Executive Order 10450 and practices of the FBI under the Order. Mr. Wilderotter said that he understands that the Attorney General will have the FBI's memorandum referred to the Department's Office of Legal Counsel for review and analysis before final submission of both memoranda to the Attorney General.

Mr. Wilderotter also said that the Attorney General mentioned that the Director had said to the Attorney General on several occasions that he would approve the destruction of certain material in FBI files if that were possible. The Attorney General asked that a plan for destruction of material in FBI files should be prepared setting out the standards and criteria that might be used and the mechanics that would be involved.

I discussed with Mr. Wilderotter the temporary prohibition against destroying anything in our files imposed by requests we have received from Senator Mansfield and Congressman Albert, and Mr. Wilderotter agreed that such temporary requests should be maintained, but that they should not interfere with the preparation of an appropriate plan as requested by the Attorney General.

- 62-116435
- 1 - Mr. McDermott
- 1 - Mr. Cleveland
- 1 - Mr. Farrington
- 1 - Mr. Hotis
- 1 - Mr. Mintz

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Memorandum to Mr. Adams
Re: Testimony by the Attorney General
and the Director, etc.

The two requests from the Attorney General grew out of the testimony before the Edwards Committee even though they are not specifically included in the list of requests made officially by the Committee on the day of the testimony.

RECOMMENDATIONS:

1. That the Special Investigative Division prepare an appropriate memorandum to the Attorney General concerning Executive Order 10450 and FBI practices pursuant to that Order.

2. That the Files and Communications Division prepare an appropriate memorandum to the Attorney General describing a plan for destruction of material in FBI files as requested by the Attorney General.

RAE

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UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

exp 5

TO : Clarence M. Kelley
Director, FBI

DATE: MAR 18 1976

FROM : Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

SUBJECT: FBI Role under the Federal Employee Security Program--
E.O. 10450.

This is in response to your memorandum to the Deputy Attorney General on January 23, 1976 concerning the same subject. You posed eight major questions or requests for specific guidance of the FBI's proper role in regard to investigations of persons applying for or holding federal employment. Although several of those questions or requests must await development of other guidelines, this memorandum briefly answers three.

(66-19000-80)

I.

You inquire whether the FBI should conduct checks of relatives and references of applicants for non-sensitive federal employment outside the Department of Justice. In general, it should not.

It is our understanding that the Bureau presently conducts these checks as a service to the Civil Service Commission. The Commission is the federal agency with primary responsibility and authority to conduct employment investigations into the reliability, qualifications, and suitability of job applicants in most cases (§ 8(b)). The FBI's responsibility in this area is limited to the extent required by statute, Executive Order, or by direction of the Attorney General.

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As you note, Executive Order 10450 requires a minimum investigation of each employment applicant, consisting of a national agency check (including a check of FBI fingerprint files) and inquiries of appropriate law enforcement agencies.

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M. C. Lawton
Deputy Assistant Attorney General

former employees and supervisors, references, and schools. The Executive Order makes the employing agency responsible for development and administration of programs under the Order (§ 2), and clearly indicates that decisional authority is vested in the head of the employing agency or department (§§ 3(b), 5, 6) in hiring and suspension matters. Moreover, as to persons entering or employed in the competitive service, § 8(b) states that investigations shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility by agreement or pursuant to law. As to persons not in the competitive service, the hiring or employing agency is primarily responsible for the conduct of employment investigation (§ 8(c)).

Therefore the FBI plays a very limited part in employment investigations for persons outside the Department of Justice. Its responsibility is limited to the conduct of fingerprint file checks, checks of such other law enforcement files and indices as may properly be a part of the national agency check procedure, and to investigations of possible criminal violations or violations under § 8(d) of the Executive Order which are referred to it. In view of this limited role, the Bureau should not conduct checks of employment-applicants' families or references unless required as a part of a full field investigation under § 8(d), an investigation into violations of federal law, or as otherwise directed by statute, Executive Order, or order of the Attorney General. The Bureau should continue to cooperate with the Civil Service Commission and other interested federal agencies in fulfilling its role in supporting their investigations or national agency checks, but should not expand that cooperation beyond its proper scope of file and index checks into active investigation unless one of the specific authorities referred to above exists. In this regard it is important to note that the investigation required by E.O. 10450 is one of the employment applicant, not of his or her associates or relatives.

II.

You also inquire whether the FBI should continue to comply with § 5 of E.O. 10450. That section requires that whenever

the FBI receives information which indicates that retention in employment of any officer or employee of the United States may not be clearly consistent with the interests of national security, that information should be forwarded to the head of the employing agency. You should continue to comply with that section for so long as it remains in force, subject to restrictions on the dissemination of information included in federal law or in applicable guidelines, orders, or policies of the Department of Justice or the Bureau. ||

Dissemination of information under section 5 of the Executive Order must, however, be consistent with a rigorous interpretation of that section and of section 8. Only when such information, as verified, indicates that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security should the information be forwarded to the head of the employing department or agency. It is the impact on national security, not simply the employee's suitability for the particular position, which should be the governing standard in order to allow forwarding of information to the employing agency. The FBI should forward information under authority of E.O. 10450 only when the information is of a sort which bears directly on the question whether continued employment of the subject individual is consistent with national security. This may require preliminary determinations by the FBI in some cases as to whether the employee's position, if known, bears a sufficiently direct relation to the national security that receipt of the particular derogatory information raises a reasonable doubt as to the wisdom of retaining the subject employee in that position or agency. ||

The most significant restriction on dissemination of information by federal agencies is contained in the Privacy Act (5 U.S.C. 552a). That statute forbids disclosures of information concerning individuals unless the disclosure falls within certain defined exceptions. Examination of pertinent exceptions indicates that information of the type described in § 5 of E.O. 10450 will, in most cases, fall within one or more of those exceptions. However, in each case in which the Bureau proposes to forward such information

to an employing or hiring agency it should first determine that the particular information to be disclosed is within one of the allowable exceptions to the Privacy Act (5 U.S.C. 552a(b)(1)-(11)).^{1/}

When information is disclosed to another federal agency for a purpose compatible with the purpose for which it was collected, the disclosure is a routine use of that information under 5 U.S.C. 552a(a)(7) and is authorized by 5 U.S.C. 552a(b)(3). Information acquired in the conduct of employment investigations is acquired for purposes compatible with the purposes of § 5 of E.O. 10450. Information acquired in the conduct of national security or counterintelligence investigations, or investigations of criminal or suspected criminal activities of a type which might bear on the employee's suitability, reliability, or qualifications for federal employment is also compatible with those purposes. Information acquired through other means must be evaluated to determine whether disclosure is compatible with the original purposes for its collection.^{2/}

III.

A question related to the one just discussed is whether the FBI should continue its present practice of conducting limited-purpose inquiries to verify possibly derogatory

^{1/}Information which may indicate the possibility of civil or criminal law violations may fall within 5 U.S.C. 552a(b)(7) if the disclosure is related to law enforcement purposes and if the receiving agency makes a specific written request for the information. In most cases such a request would be initiated only after the employing agency became aware that information of the type described in § 5 of E.O. 10450 was available in the FBI's hands and so this exception will rarely be of concern.

^{2/}We note that a "routine use" notification that verified information received by the FBI may be disseminated under E.O. 10450 § 5 has appeared in the Federal Register in accordance with 5 U.S.C. § 552a(b)(3) and provides requisite notice to persons affected.

information which it has received concerning persons believed to hold federal employment before providing the employing agency with that information under § 5 of E.O. 10450. The Bureau's present practice of verifying information accords with both the Privacy Act and the best interests of federal employees, and may be continued.

Prior to making any dissemination of information held by it concerning individuals, the Bureau should undertake reasonable efforts to assure that the information is complete, accurate, and relevant to the purposes for which it is disclosed. As to the dissemination of information to persons or groups which are not "agencies" under 5 U.S.C. 552e, this rule is a matter of federal law (5 U.S.C. 552a(e)(6)). As to disclosures between federal agencies, it is a matter of sound judgment and responsibility to assure that possibly derogatory information which may adversely affect a federal employee's retention, promotion, or reputation is verified before it is disclosed to the employer. Moreover, a preliminary inquiry to verify such information or the identity of the subject is in the employee's best interests; such inquiries often prove that the information is ill-founded or relates to a person other than a federal employee. They protect the subject from the adverse results which might result from a mistaken or premature distribution of erroneous information or of information concerning another person under a similar name whose identity was uncertain at the time of dissemination.

Therefore the FBI is justified, when it receives information of the sort described in § 5, in conducting an inquiry limited to the purposes of (1) verifying the applicant or employment status of the subject of the information, and (2) ascertaining whether there are sufficient grounds for notifying the employing agency of the § 5 information. Employing agencies should be notified as to known employees when there is a reasonable likelihood that the § 5 information has a basis in fact. Employing agencies should be notified as to persons believed to be employees of those agencies whenever there is a reasonable likelihood that the subject of the

information is in fact a person known to be employed by the agency concerned and that the § 5 information has a basis in fact. Where the § 5 information indicates violation of federal criminal laws within the FBI's investigatory jurisdiction, the FBI may of course commence investigation of those violations independently of any action or authority under the Executive Order.

Assistant Attorney General
Office of Legal Counsel

December 16, 1985

Assistant Director - Legal Counsel
Federal Bureau of Investigation

FEDERAL GOVERNMENT

PERSONNEL SECURITY INVESTIGATIONS
EXECUTIVE ORDER 10450

The purpose of this memorandum is to solicit your opinion concerning the authority of the Federal Bureau of Investigation (FBI) to conduct personnel security investigations, particularly those performed under Executive Order 10450 (EO 10450). This opinion is sought in light of the recent decisions in Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) and Flake v. Bennett, No. 84-3632 (D.D.C. March 28, 1985) and the developments in Hunninen v. Heckler, et al., an action filed in April 1985 and dismissed without prejudice in June 1985.

A second purpose of this memorandum is to suggest revision of EO 10450. Restructuring EO 10450 was contemplated as early as 1956, and has been discussed periodically ever since. The developments of the last few months may provide reason to revise that order.

A) Clark v. Library of Congress

By memorandum to the Solicitor General dated May 9, 1985, the Civil Division recommended that certiorari not be sought in Clark. The memorandum concluded by stating that "we should read the opinion as narrowly as possible, and attempt to restrict it to its specific factual circumstances."

The FBI operates daily under the provisions of EO 10450. This office, therefore, believes there is a present need to define the effects of the Clark opinion on our background investigations, without waiting for

- 1 - Mr. Hotis
- 4 - Mr. Clarke
 - Attn: Mr. O'Connor
 - Attn: Mr. Domzalski
 - Attn: Mr. Nolan
 - Attn: Mr. Lueckenhoff
- 1 - Mr. Monroe
 - Attn: Mr. Stoops

V-264

- 1 - Unit Chief, CLU I
- 1 - Mr. Swecker

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* How carried to D07, Post. A6, OLC on 12-16-85 2:50 pm, by Ed Cozzese
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Mr. Tolson	
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Mr. Callahan	
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Mr. Felt	
Mr. Gale	
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Mr. Sullivan	
Mr. Tavel	
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Assistant Attorney General
Office of Legal Counsel

further judicial interpretation. Further, we believe it unwise to develop a construction of Clark gradually through ad hoc evaluations of factual circumstances as they arise.^{1/} Such a process might eventually lead to contradictions in our policies. If, on the other hand, we gain too much respect for such ad hoc interpretations of Clark, a self-imposed construction of the case which is much more expansive than the restricted reading contemplated by the Civil Division could result.^{2/}

Appearing below are questions designed to provide a definition of the breadth of Clark. Please respond specifically to each.

1) Is the Clark opinion relevant only to membership in the Socialist Workers Party (SWP) and the Young Socialist Alliance (YSA), or does it also apply to membership in other groups? If so, how do we determine whether a particular group is covered by the ruling?

2) Does Clark apply to persons who have had active membership in the SWP or YSA just as it applies to persons such as Harry Clark who had marginal, nonactive participation in the groups? Is this distinction pertinent for participation in other groups if, in fact, Clark applies to membership in them? Further, in light of

^{1/} An example of such an ad hoc reading of Clark is provided by an August 29, 1985 memorandum of the Office of Intelligence Policy and Review to the FBI's Criminal Investigative Division, entitled "Juan Jose Pena: Security of Government Employee Matter."

^{2/} In the memorandum mentioned in note 1 supra, the Office of Intelligence Policy and Review interpreted Clark in a manner more expansive than the narrowest reading possible. Clark was read as being applicable to an organization other than the Socialist Workers Party. The case might instead be construed very narrowly as applying only to the Socialist Workers Party and the Young Socialist Alliance. Once Clark is applied to other organizations, we are confronted with the problem of setting criteria for determining whether organizations are of the type covered by the case.

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Office of Legal Counsel

Clark, is there need in opening investigations pursuant to Section 8(d) of EO 10450 to distinguish between members of organizations, having violent or otherwise unlawful factions or activities, who are involved in or knowledgeable of those factions or activities, and members who are not knowledgeable of the factions or activities? That is, can the FBI initiate an investigation to determine whether, or not, a person known to be a member of such an organization is knowledgeable of the violent or otherwise unlawful factions or activities?

3) Language in Clark can be read to mean that investigative activity of a type less intrusive than a full field investigation would have been permissible with respect to Harry Clark. If you agree with this reading, what is your opinion as to the type of investigation that would have been permissible with respect to Harry Clark?^{3/}

4) If Clark prohibits investigation of a person solely because of his membership in the SWP or YSA, does the ruling also prohibit dissemination of information concerning membership in those organizations? These disseminations can be made pursuant to Section 5 of EO 10450 or in response to a National Agency Check. If, in fact, Clark applies to investigations related to organizations other than the SWP and YSA (see number one above), does the case also prohibit disseminations regarding those organizations? In light of Clark, are there certain criteria which should control the dissemination of information about organizations by the FBI?

5) There is also language in Clark indicating that the opinion applies only to persons holding low-level, nonsensitive positions. A person holding a sensitive position might argue that his First Amendment right to

^{3/} Section 8(d) of EO 10450 mandates that a "full field" investigation be conducted by the FBI in cases such as that of Harry Clark. Full field investigations have traditionally meant thorough investigations of all aspects of the subject's suitability and loyalty, not just narrow inquiries concerning the specific information that led to the Section 8(d) referral.

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Office of Legal Counsel

associate with a "lawful" group such as the SWP is as strong as his right to associate with any other lawful political organization, such as the American Civil Liberties Union or Democratic Party. Is the Clark opinion limited to low-level employees?

6) Language in the case also suggests that it applies only to investigations conducted of persons already holding Government positions, such as Harry Clark. Does the opinion also apply to the basic pre-employment background investigations conducted for most Government employees?

7) Finally, we are concerned as to whether Clark applies not only to investigations performed under Section 8(d) of EO 10450 but also to other background investigations? As you know, the authority to conduct all background investigations performed by the FBI and other agencies stems from EO 10450.

We request that you provide us with your opinion as to the proper reading of Clark. Please address the questions we raised above, and any others you believe to be pertinent.

B) Flake v. Bennett

As with Clark, we request that you provide us guidance in interpreting Flake v. Bennett, and determining its scope. Flake can be read as being limited to a holding that the classification of the senior trial attorney position as critical-sensitive was improper. If the position had instead been classified as nonsensitive, it is likely that plaintiffs would have been subjected only to a National Agency Check. Judge Oberdorfer implied that a National Agency Check would have been permissible. (At page 12 of the slip opinion he noted that plaintiffs would not have "objected" to the less intrusive name check.) If Flake can be read in this manner, EO 10450 is left untouched.^{4/}

^{4/} A National Agency Check is not a full investigation in itself. However, if negative information is developed through the check, common sense dictates that some investigation (footnote 4 continued on next page)

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Office of Legal Counsel

Unfortunately, reasonable readings of Flake could expand its meaning in two ways. First, Flake might stand for the principle that EO 10450 full field investigations cannot be conducted of persons whose positions are classified critical-sensitive solely because the position involves "[f]iduciary, public contact, or other duties demanding the highest degree of public trust" (slip opinion at page 13). Judge Oberdorfer stated that "[r]eliance on such a sweeping criterion is misplaced" (slip opinion at page 13). It appears that Judge Oberdorfer believes there must be some nexus to the National Security for a job to be classified critical-sensitive. Does the Government now need to reclassify all positions classified critical-sensitive on such criteria? Does the FBI have an obligation to satisfy itself that referrals for Section 8(d) investigations do not involve positions classified critical-sensitive only on such criteria?

The major issue presented by Flake, though, is one that has been brewing since 1956. In Cole v. Young, 351 U.S. 536 (1956), the Supreme Court found that the dismissal on security grounds of the plaintiff, a Government employee, was improper. The plaintiff had been subjected to an EO 10450 full field investigation and then was dismissed pursuant to the order. The Court found that EO 10450 stems from the Act of August 26, 1950 ("Act"), 64 Stat. 476, 477 codified in part at 5 United States Code (U.S.C.), §§ 3571, 7531 and 7532. The Act provides for summary suspensions and dismissals of employees holding positions having a relationship to the national security. The Act, as originally promulgated,

(footnote 4 continued)

must be conducted to determine the accuracy and currency of the negative information. If name checks were not simply triggering devices for possible full field investigations, then the Government would be faced with having to decide whether to take administrative action based only on the dated and perhaps incomplete information obtained from the name check. Therefore, even if Flake can be read in the limited manner suggested above in the text, that reading of the case might be based on Judge Oberdorfer's incorrect view of the nature of a National Agency Check.

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pertained to only a few Federal agencies but provided in section three that the President could extend coverage of the Act. In issuing EO 10450 in 1953, President Eisenhower intended to extend the summary suspension and dismissal provisions of the Act throughout Government to all Federal employees regardless of their relationship to the national security.

From 1953 to the time Cole was decided in 1956, many Government employees having no connection to the national security were investigated under EO 10450 and summarily dismissed under the provisions of the Act as embodied in EO 10450. The plaintiff in Cole, a Food and Drug Administration inspector, challenged this practice. The Court ruled plaintiff's dismissal unlawful because the President, in extending the coverage of the Act pursuant to section three, could only extend the Act to employees whose coverage was originally contemplated by Congress, i.e., those with a nexus to the national security.

An issue not directly addressed in Cole leaves us today with our concerns about Flake. The issue is whether the Court, in ruling that EO 10450 was issued to extend the coverage of the Act, and in ruling that the provisions of the Act only applied to positions having a nexus to the national security, also found that EO 10450, in its entirety, applied only to national security positions. In other words, did the Court rule that both EO 10450 dismissals and investigations could only involve employees having a connection to the national security?

Some contemporaneous interpretations of Cole were that the entire order was tied to the national security. Language in Cole also supports this interpretation. For instance, at note 20, the Court stated that President Eisenhower promulgated EO 10450 "solely as an implementation of the 1950 Act." The Court also stated that the "sole purpose" of an EO 10450 investigation is to provide a basis for a "clearly consistent", or dismissal, determination. 351 U.S. at 554-555.

Perhaps the simplest rationale supporting this interpretation of Cole is that if the dismissal provisions of EO 10450 are limited to national security positions, the provisions dealing with investigation

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must be similarly limited since the only logical reason for the investigations is to test whether the dismissal provisions should be employed.

The Department of Justice (DOJ) did not interpret Cole in this manner as stated in a 1957 FBI memorandum:

Immediately after the Cole v. Young decision in June, 1956, the Attorney General advised that it appears the Cole v. Young decision related solely to the manner of terminating employees and in no way affected the Government's right to investigate such employees. He instructed the Bureau to continue its investigation in EO 10450 cases involving employees occupying nonsensitive positions. This we have continued to do....

This view is apparently based on the belief that the President did not intend EO 10450 to act only to extend coverage of the Act. That may have been one purpose of the order, but EO 10450 was also issued to restructure the Government's loyalty program previously operated under Executive Order 9835. This interpretation is supported by the fact that the preamble to EO 10450 cites the Constitution and several statutes in addition to the Act as bases for EO 10450. Critical to this interpretation of Cole is the belief that the Court only meant to limit the dismissal provisions of EO 10450 to national security positions. The view was that the investigative provisions could still be applied to all Government positions. Since the Act deals only with suspensions and dismissals, it is reasonable to read Cole to mean that only so much of EO 10450 specifically dealing with dismissals would be affected by the ruling.

In the years following the acceptance by the Executive Branch of this interpretation of Cole, EO 10450 became to be viewed as having separate "loyalty" and "security" components, and separate "investigative" and "dismissal" provisions. We do not believe that there has ever been a definitive conclusion reached as to exactly which sections and language in EO 10450 belong in each of these components. They seem to run together.

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Office of Legal Counsel

The reasoning underpinning this interpretation of Cole is perhaps best expressed in a report of the Subcommittee on Loyalty-Security of the House Committee on Internal Security (House Report No. 92-1637, 92nd Congress, 2d Session, Jan. 3, 1978). At page 36, the report stated:

Moreover, in support of his authority to promulgate EO 10450, the President did not stop with claims of congressional delegation of authority. He also asserted authority by virtue of powers vested in him by the Constitution of the United States and in his capacity as President of the United States. There were thus two strings to his bow.^{5/}

The FBI has acted in accordance with this interpretation of Cole for 29 years. We would have no reason to question the traditional interpretation of Cole were it not for Flake. Flake addressed the issue left unanswered in Cole of when EO 10450 investigation is allowable. Cole dealt with dismissals under EO 10450, and not investigations, simply because the Cole plaintiff had been dismissed before he filed his action. It would not have made sense if he had challenged the investigation leading to his dismissal rather than the dismissal itself. In Flake, on the other hand, the EO 10450 investigation was challenged before it actually got underway.

^{5/} This conclusion seems to be directly contradictory, however, to language contained in Cole. At note 20, the Court said that "(n)o contention is made by the Government that the Executive Order might be sustained under the President's executive power" and, at any rate, there was no basis for such an argument in that "it is clear from the face of the Executive Order that the President did not intend to override statutory limitations on the dismissal of employees, and promulgated the Order solely as an implementation of the 1950 Act."

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Office of Legal Counsel

Language in Flake makes it appear that Judge Oberdorfer interprets Cole to mean that EO 10450 in its entirety, both investigative and dismissal provisions, can only be applied to positions implicating the national security. In several places in the opinion, Judge Oberdorfer stated that EO 10450 was issued to extend the Act. He mentioned no other purpose for the promulgation of EO 10450. More importantly, Judge Oberdorfer seems to have stated in several passages that EO 10450 and the Act are co-extensive and that investigation under EO 10450 can only relate to national security positions. For example, at page 14 of the slip opinion, Judge Oberdorfer stated that EO 10450's "reach cannot extend beyond the Act's scope." And, at page 15, the following passage appears:

Just as the Act's summary discharge procedure could not be used against the plaintiff in Cole, whose job did not involve the national security, here the full investigation requirement cannot lawfully be imposed on a position the duties of which do not implicate the concerns identified in the Act and the Executive Order.

Thus, Flake can be expanded in two ways beyond the limited reading we prefer. First, the case may hold that positions in the Government cannot be classified critical-sensitive simply because they involve fiduciary or public contact responsibilities. A nexus to the National Security may be required. Second, Flake may hold that EO 10450 investigations can only be conducted with respect to positions implicating the National Security.

C. Hunninen v. Heckler

Hunninen involved a challenge to a Section 8(d) full field investigation of a Public Health Service commissioned officer. Negative information was developed regarding the plaintiff through a National Agency Check, and a referral was made to the FBI under Section 8(d) because of this information. The plaintiff became aware of the intended full field investigation when she was asked to execute a waiver for the investigation. She brought suit against the Department of Health and Human Services (HHS), the Office of Personnel Management (OPM),

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and the FBI to enjoin the investigation and for declaratory relief.

Not long after the action was brought, HHS decided to allow plaintiff to return to work. This decision eventually led to a dismissal of the action without prejudice in May 1985. In August 1985, however, HHS again referred the matter to the FBI for investigation. (The referral was forwarded to the Office of Intelligence Policy and Review at that time for its opinion.) There is very little doubt that Katherine Hunninen will reinstitute her lawsuit if the Government decides that the Section 8(d) investigation should be conducted.

This case is mentioned in this memorandum for two reasons. Clark was essentially a First Amendment case, whereas Judge Oberdorfer stated in Flake that he was not making a constitutional holding, but simply interpreting EO 10450. If reinstated, Hunninen will be based on both. Hunninen is also important in that plaintiff will seek to expand both Clark and Flake to cover the particular factual circumstances at issue. Thus, the Government's ability to minimize the impact of Clark and Flake may already be at stake.

D) EO 10450

Steps were taken both by Congress and the Executive Branch immediately after Cole v. Young was decided to remedy the problems presented by the decision. In Congress, bills were introduced in both houses proposing legislation that would make certain that the summary suspension and dismissal provisions of the Act were extended throughout Government. Such legislation would have eliminated the basis for the Cole decision. The Supreme Court could no longer have said that Congress did not intend the provisions of the Act to extend to all Government employees. Evidently, though, the bills never resulted in legislation.

The Executive Branch reacted to Cole with efforts to establish two new executive orders to replace EO 10450. One of the orders was to pertain only to sensitive positions and was to embody the provisions of the Act. The second order was to concern loyalty investigations and dismissals and was to be applied to all

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Office of Legal Counsel

Government employees. Obviously these proposed orders were never issued. We do not know why.

We suggest that many of the problems presented by Clark, Flake and Hunninen can be resolved through the issuance of two new executive orders. As the Attorney General proposed in 1957, we suggest that one order be confined to sensitive employees and security concerns. It would be tied closely to the Act as interpreted by the Supreme Court in Cole v. Young and could carefully define criteria for determining whether positions involve the national security. The second order would involve loyalty investigations and would apply to all Government employees.

Each order would have its own investigative and dismissal provisions. Both orders could incorporate the constitutional holding of Clark and could reflect, as well, all relevant Supreme Court decisions since 1953.

Even if Flake and Cole do not hold that EO 10450 investigations cannot be performed with respect to nonsensitive positions, the promulgation of new executive orders is still advisable. The courts and other observers have regularly characterized EO 10450 as being written in a confusing manner. The contortions of the order were aggravated by the division of EO 10450 into loyalty and security components following Cole v. Young. It is time to rectify these problems.

The FBI has participated in the efforts of a group established to study the Federal personnel security program under National Security Decision Directive Number 84. We understand that this group has requested advice from the National Security Council on policy issues which is needed for the group to continue its work. Possibly, the issues raised herein could be addressed by this group in its further deliberations.

Finally, we would request that you consult with the FBI during your consideration of the questions presented by this memorandum. Factors posed by current FBI procedures and policies, and by the potential effects of your decisions on those procedures and policies, must be taken into account.

Assistant Attorney General
Office of Legal Counsel

Questions in regard to this memorandum should be addressed to Special Agent Thomas A. Kelley, Deputy Assistant Director, Legal Counsel Division, telephone 324-5020 or to Terry T. O'Connor, Chief, Civil Rights and Special Inquiry Section, Criminal Investigative Division, telephone 324-2801.

- 1 - Office of Intelligence Policy and Review
Attention: Ms. Mary C. Lawton
Counsel for Intelligence Policy
- 2 - Assistant Attorney General
Civil Division
Attention: Ms. Anne L. Weismann
Federal Programs Branch
Attention: Ms. Barbara L. Herwig
Appellate Staff

APPROVED: *[Signature]*

Director	Adm. Servs.	Laboratory
Exec. AD-Adm.	Crim. Inv.	Legal Coun.
Exec. AD-Inv.	Ident.	Off. of Cong. & Public Affs.
Exec. AD-LES	Inspection	Rec. Mgnt.
	Intell.	Tech. Servs.
		Training

[Handwritten initials: JBA, JBA, JBA]