HEARINGS RELATING TO H.R. 15626, H.R. 15649, H.R. 16613, H.R. 16757, H.R. 15018, H.R. 15092, H.R. 15229, H.R. 15272, H.R. 15336, and H.R. 15828, AMENDING THE SUBVERSIVE ACTIVITIES CONTROL ACT OF 1950

PART 2

APPENDIX TO HEARINGS

BEFORE THE

COMMITTEE ON UN-AMERICAN ACTIVITIES HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

APRIL 30, MAY 1, 2, AND 22, 1968

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The House Committee on Un-American Activities is a standing committee of the House of Representatives, constituted as such by the rules of the House, adopted pursuant to Article I, section 5, of the Constitution of the United States which authorizes the House to determine the rules of its proceedings.

RULES ADOPTED BY THE 90TH CONGRESS

House Resolution 7, January 10, 1967

RESOLUTION

Resolved, That the Rules of the House of Representatives of the Eighty-ninth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, as amended, be, and they are hereby, adopted as the Rules of the House of Representatives of the Ninetieth Congress * * *

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RULE X

STANDING COMMITTEES

1. There shall be elected by the House, at the commencement of each Congress,

* * * * * * *

(r) Committee on Un-American Activities, to consist of nine Members.

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RULE XI

POWERS AND DUTIES OF COMMITTEES

* * * * * * *

18. Committee on Un-American Activities.

(a) Un-American activities.

(b) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * * * *

27. To assist the House in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the House shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the House by the agencies in the executive branch of the Government.

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SUPREME COURT OF THE UNITED STATES

No. 8.—October Term, 1967.

United States, Appellant, *v.* Eugene Frank Robel. | On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This appeal draws into question the constitutionality of § 5 (a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U. S. C. § 784 (a)(1)(D),[1] which provides that, when a Communist-action organization [2] is under a final order to register, it shall be unlawful for any member of the organization "to engage in any employment

[1] The Act was passed over the veto of President Truman. In his veto message, President Truman told Congress, "The Department of Justice, the Department of Defense, the Central Intelligence Agency, and the Department of State have all advised me that the bill would seriously damage the security and the intelligence operations for which they are responsible. They have strongly expressed the hope that the bill would not become law." H. R. Doc. No. 708, 81st Cong., 2d Sess., 1 (1950).

President Truman also observed that "the language of the bill is so broad and vague that it might well result in penalizing the legitimate activities of people who are not Communists at all, but loyal citizens." *Id.*, at 3.

[2] Section 3 (3)(a) of the Act, 50 U. S. C. § 782 (3)(a), defines a "Communist-action organization" as:

"any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed,

dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operated primarily to advance the objectives of such world Communist movement . . . ."

in any defense facility." In *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, this Court sustained an order of the SACB requiring the Communist Party of the United States to register as a Communist-action organization under the Act. The Board's order became final on October 20, 1961. At that time appellee, a member of the Communist Party, was employed as a machinist at the Seattle, Washington, shipyard of Todd Shipyards Corporation. On August 20, 1962, the Secretary of Defense, acting under authority delegated by § 5 (b) of the Act, designated that shipyard a "defense facility." Appellee's continued employment at the shipyard after that date subjected him to prosecution under § 5 (a)(1)(D), and on May 21, 1963, an indictment was filed charging him with a violation of that section. The indictment alleged in substance that appellee had "unlawfully and willfully engage[d] in employment" at the shipyard with knowledge of the outstanding order against the Party and with knowledge and notice of the shipyard's designation as a defense facility by the Secretary of Defense. The United States District Court for the Western District of Washington granted appellee's motion to dismiss the indictment on October 5, 1965. To overcome what it viewed as a "likely constitutional infirmity" in § 5 (a)(1)(D), the District Court read into that section "the requirement of active membership and specific intent." Because the indictment failed to allege that appellee's Communist Party membership was of that quality, the indictment was dismissed. The Government, unwilling to accept that narrow construction of § 5 (a)(1)(D) and insisting on the broadest possible application of the statute, initially took its appeal to the Court of Appeals for the Ninth Circuit.[3] On the Government's motion, the case

[3] The Government has persisted in this view in its arguments to this Court. Brief of the Government, pp. 48–56.

was certified here as properly a direct appeal to this Court under 18 U. S. C. § 3731. We noted probable jurisdiction. 384 U. S. 937.[4] We affirm the judgment of the District Court, but on the ground that § 5 (a) (1)(D) is an unconstitutional abridgment of the right of association protected by the First Amendment.[5]

We cannot agree with the District Court that § 5 (a) (1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. The District Court relied on *Scales* v. *United States,* 367 U. S. 203, in placing its limiting construction on § 5 (a) (1)(D). It is true that in *Scales* we read the elements of active membership and specific intent into the membership clause of the Smith Act.[6] However, in *Aptheker* v. *Secretary of State,* 378 U. S. 500, we noted that the Smith Act's membership clause required a defendant to have knowledge of the organization's illegal advocacy, a requirement that "was intimately connected with the construction limiting membership to 'active' members."

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[4] We initially heard oral argument in this case on November 14, 1966. On June 5, 1967, we entered the following order:

"This case is restored to the calendar for reargument and counsel are directed to brief and argue, in addition to the questions presented, the question whether the delegation of authority to the Secretary of Defense to designate 'defense facilities' satisfies pertinent constitutional standards."

We heard additional arguments on October 9, 1967.

[5] In addition to arguing that § 5 (a)(1)(D) is invalid under the First Amendment, appellee asserted the statute was also unconstitutional because (1) it offended substantive and procedural due process under the Fifth Amendment; (2) it contained an unconstitutional delegation of legislative power to the Secretary of Defense; and (3) it is a bill of attainder. Because we agree that the statute is contrary to the First Amendment, we find it unnecessary to consider the other constitutional arguments.

[6] 18 U. S. C. § 2385.

Id., at 511, n. 9. *Aptheker* involved a challenge to § 6 of the Subversive Activities Control Act, which provides that, when a Communist organization is registered or under a final order to register, it shall be unlawful for any member thereof with knowledge or notice thereof to apply for a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminate cast and overly broad scope without substantial rewriting." *Id.*, at 515. We take the same view of § 5 (a)(1)(D). It is precisely because that statute sweeps indiscriminately across all types of associations with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.

In *Aptheker*, we held § 6 unconstitutional because it too broadly and indiscriminately infringed upon constitutionally protected rights. The Government has argued that, despite the overbreadth which is obvious on the face of § 5 (a)(1)(D), *Aptheker* is not controlling in this case because the right to travel is a more basic freedom than the right to be employed in a defense facility. We agree *Aptheker* is not controlling since it was decided under the Fifth Amendment. But we cannot agree with the Government's characterization of the essential issue in this case. It is true that the specific disability imposed by § 5 (a)(1)(D) is to limit the employment opportunities of those who fall within its coverage, and such a limitation is not without serious constitutional implications. See *Greene* v. *McElroy*, 360 U. S. 474, 492. But the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment.[7] Wherever one would place the right to

[7] Our decisions leave little doubt that the right of association is specifically protected by the First Amendment. *E. g.*, *Aptheker* v. *Secretary of State*, *supra*, at 507; *Gibson* v. *Florida Legislative*

travel on a scale of constitutional values, it is clear that those rights protected by the First Amendment are no less basic in our democratic scheme.

The Government seeks to defend the statute on the ground that it was passed pursuant to Congress' war power. The Government argues that this Court has given broad deference to the exercise of that constitutional power by the national legislature. That argument finds support in a number of decisions of this Court.[8] However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426. More specifically in this case, the Government asserts that § 5 (a)(1)(D) is an "expression of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s]."[9] Yet, this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the

Investigation Committee, 372 U. S. 539, 543; *Bates* v. *City of Little Rock,* 361 U. S. 516, 522–523; *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 460. See generally Emerson, Freedom of Association and Freedom of Expression, 74 Yale L. J. 1 (1964).

[8] See, *e. g., Lichter* v. *United States,* 334 U. S. 742, 754–772; *Hirabayashi* v. *United States,* 320 U. S. 81, 93.

[9] Brief for the Government, p. 15.

subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction on freedom can be tolerated. See *Schneider* v. *State,* 308 U. S. 147, 161. The Government emphasizes that the purpose of §5 (a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5 (a)(1)(D) put appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatened the security of a defense facility,[10] or giving up his job.[11] When appellee refused to make that choice, he became subject to a possible criminal penalty of five years' imprisonment and a $10,000 fine.[12] The statute quite literally establishes guilt by association alone, without any need to establish

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[10] The appellee has worked at the shipyard, apparently without incident and apparently without concealing his Communist Party membership, for more than 10 years. And we are told that, following appellee's indictment and arrest, "he was released on his own recognizance and immediately returned to his job as a machinist at the Todd Shipyards, where he has worked ever since." Brief for Appellee, p. 6, n. 8. As far as we can determine, appellee is the only individual the Government has attempted to prosecute under §5 (a)(1)(D).

[11] We recognized in *Greene* v. *McElroy,* 360 U. S., at 492, that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

[12] 50 U. S. C. § 794 (c).

that an individual's association poses the threat feared by the Government in proscribing it.[13] The inhibiting effect on the exercise of First Amendment rights is clear.

It has become axiomatic that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438; see *Aptheker* v. *Secretary of State*, 378 U. S. 500, 512–513; *Shelton* v. *Tucker*, 364 U. S. 479, 488. Such precision is notably lacking in § 5 (a)(1)(D). That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished [14] and membership which cannot be so proscribed.[15] It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims.[16] It is also made irrelevant that an individual who is subject to the penalties of § 5 (a)(1)(D) may occupy a nonsensitive position in a defense facility.[17]

[13] The Government has insisted that Congress, in enacting § 5 (a)(1)(D), has not sought "to punish membership in 'Communist-action' . . . organizations." Brief for the Government, p. 53. Rather, the Government asserts, Congress has simply sought to regulate access to employment in defense facilities. But it is clear the employment disability is imposed only because of such membership.

[14] See *Scales* v. *United States*, 367 U. S. 203.

[15] See *Elfbrandt* v. *Russell*, 384 U. S. 11.

[16] A number of complex motivations may impel an individual to align himself with a particular organization. See *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539, 562–565 (concurring opinion). It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal goals.

[17] See *Cole* v. *Young*, 351 U. S. 536, 546: "[I]t is difficult to justify summary suspensions and nonreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situationed where they could bring about any discernible adverse effects on the Nation's security."

Thus, § 5 (a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights. See *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State, supra; NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288; *NAACP* v. *Button, supra.* This the Constitution will not tolerate.

We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities. We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 160. Spies and saboteurs do exist, and Congress can, of course, prescribe criminal penalties for those who engage in espionage and sabotage.[18] The Government can deny access to its secrets to those who would use such information to harm the Nation.[19] And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials. The Government has told us that Congress, in passing § 5 (a)(1)(D), made a considered

[18] Congress has already provided stiff penalties for those who conduct espionage and sabotage against the United States. 18 U. S. C. §§ 792–798 (espionage); §§ 2151–2156 (sabotage).

[19] The Department of Defense, pursuant to Executive Order 10865, as amended by Executive Order 10909, has established detailed procedures for screening those working in private industry who, because of their jobs, must have access to classified defense information. 32 C. F. R. Part 155. The provisions of those regulations are not before the Court in this case.

judgment that one possible alternative to that statute—an industrial security screening program—would be inadequate and ineffective to protect against sabotage in defense facilities. It is not our function to examine the validity of that congressional judgment. Neither is it our function to determine whether an industrial security screening program exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.[20] *Shelton* v. *Tucker, supra;* cf.

[20] It has been suggested that this case should be decided by "balancing" the governmental interests expressed in § 5 (a) (1) (D) against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. There is, of course, nothing novel in that analysis. Such

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United States v. *Brown*, 381 U. S. 437, 461. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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a course of adjudication was enunciated by Chief Justice Marshall when he declared: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but which consist with the letter and spirit of the constitution,* are constitutional." *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (emphasis added). In this case, the means chosen by Congress are contrary to the "letter and spirit" of the First Amendment.

SUPREME COURT OF THE UNITED STATES

No. 8.—OCTOBER TERM, 1967.

United States, Appellant, *v.* Eugene Frank Robel.	On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

MR. JUSTICE BRENNAN, concurring in the result.

I too agree that the judgment of the District Court should be affirmed but I reach that result for different reasons.

Like the Court, I disagree with the District Court that § 5 (a)(1)(D) can be read to apply only to active members who have the specific intent to further the Party's unlawful objectives. In *Aptheker* v. *Secretary of State,* 378 U. S. 500, we rejected that reading of § 6 of the Act which provides that, when a Communist organization is registered or under final order to register, it shall be unlawful for any member thereof with knowledge or notice of the order to apply for or use a passport. We held that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting." 378 U. S., at 515. I take the same view of § 5 (a)(1)(D).

Aptheker held § 6 of the Act overbroad in that it deprived Party members of the right to travel without regard to whether they were active members of the Party or intended to further the Party's unlawful objectives, and therefore invalidly abridged, on the basis of political associations, the members' constitutionally protected right to travel. Section 5 (a)(1)(D) also treats as irrelevant whether or not the members are active, or know the Party's unlawful purposes, or intend to pursue those

purposes. Compare *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11, 17; *Scales* v. *United States,* 367 U. S. 203; *Schneiderman* v. *United States,* 320 U. S. 118, 136. Indeed, a member such as appellee, who has worked at the Todd Shipyards without complaint or known ground for suspicion for over 10 years, is afforded no opportunity to prove that the statute's presumption that he is a security risk is invalid as applied to him. And no importance whatever is attached to the sensitivity of the jobs held by Party members, a factor long considered relevant in security cases.[1] Furthermore, like § 6, § 5 (a)(1)(D) affects constitutionally protected rights. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Greene* v. *McElroy,* 360 U. S. 474, 492. That right is therefore also included among the "[i]ndividual liberties fundamental to American institutions [which] are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers." *Communist Party* v. *SACB,* 367 U. S. 1, 96. Since employment opportunities are denied by § 5 (a)(1)(D) simply on the basis of political associations the statute also has the potential of curtailing free expression by inhibiting persons from establishing or retaining such associations. See *Wieman* v. *Updegraff,* 344 U. S. 183, 191. "Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in . . . area[s] so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S.

[1] See *Cole* v. *Young,* 351 U. S. 536, 546:
"[I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security."

415, 438; see *Shelton* v. *Tucker,* 364 U. S. 479; 488; *Cantwell* v. *Connecticut,* 310 U. S. 296, 304.

It is true, however, as the Government points out, that Congress often regulates indiscriminately, through preventive or prophylactic measures, *e. g., Board of Governors* v. *Agnew,* 329 U. S. 441; *North American Co.* v. *S. E. C.,* 327 U. S. 686, and that such regulation has been upheld even where fundamental freedoms are potentially affected, *Hirabayashi* v. *United States,* 320 U. S. 81; *Cafeteria Workers* v. *McElroy,* 367 U. S. 886; *Carlson* v. *Landon,* 342 U. S. 524. Each regulation must be examined in terms of its potential impact upon fundamental rights, the importance of the end sought and the necessity for the means adopted. The Government argues that § 5 (a)(1)(D) may be distinguished from § 6 on the basis of these factors. Section 5 (a)(1)(D) limits employment only in "any defense facility," while § 6 deprived every Party member of the right to apply for or to hold a passport. If § 5 (a)(1)(D) were in fact narrowly applied, the restrictions it would place upon employment are not as great as those placed upon the right to travel by § 6.[2] The problems presented by the

[2] The Government also points out that § 5 (a)(1)(D) applies only to members of "Communist-action" organizations, while § 6 applied also to members of "Communist-front" organizations, groups which the Government contends are less dangerous to the national security under Congress' definitions, and whose members are therefore presumably less dangerous. This distinction is, however, open to some doubt. Even if a "front" organization, which is defined as an organization either dominated by or primarily operated for the purpose of aiding and supporting "action" organizations, could in some fashion be regarded as less dangerous, *Aptheker* held § 6 invalid because it failed to discriminate among affected persons on the bases of their activity and commitment to unlawful purposes, and nothing in the opinion indicates the result would have been different if Congress had been indiscriminate in these respects with regard only to "Communist-action" group members.

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employment of Party members at defense facilities, moreover, may well involve greater hazards to national security than those created by allowing Party members to travel abroad. We may assume, too, that Congress may have been justified in its conclusion that alternatives to § 5 (a)(1)(D) were inadequate.[3] For these reasons, I am not persuaded to the Court's view that overbreadth is fatal to this statute, as I agreed it was in other contexts; see, *e. g., Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *NAACP* v. *Button,* 371 U. S. 415.

However, acceptance of the validity of these distinctions and recognition of congressional power to utilize a prophylactic device such as § 5 (a)(1)(D) to safeguard against espionage and sabotage at essential defense facilities, would not end inquiry in this case. Even if the statute is not overbroad on its face—because there may be "defense facilities" so essential to our national

[3] The choice of a prophylactic measure "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U. S. 479, 488. Since I would affirm on another ground, however, I put aside the question whether existing security programs were inadequate to prevent serious, possibly catastrophic consequences.

Congress rejected suggestions of the President and the Department of Justice that existing security programs were adequate with only slight modifications. See H. R. Doc. No. 679, 81st Cong., 2d Sess., 5 (1950); Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities before the House Un-American Activities Committee, 81st Cong., 2d Sess., 2122–2125 (1950). Those programs cover most of the facilities within the reach of § 5 (a)(1)(D) and make Party membership an important factor governing access. 32 CFR § 155.5. They provide measures to prevent and punish subversive acts. The Department of Defense, moreover, had screened some 3,000,000 defense contractor employees under these procedures by 1956, Brown, Loyalty and Security 179–180 (1958), thereby providing at least some evidence of its capacity to handle this problem in a more discriminating manner.

security that Congress could constitutionally exclude all Party members from employment in them—the congressional delegation of authority to the Secretary of Defense to designate "defense facilities" creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms and therefore, in my view, renders this statute invalid. Because the statute contains no meaningful standard by which the Secretary is to govern his designations, and no procedures to contest or review his designations, the "defense facility" formulation is constitutionally insufficient to mark "the field within which the [Secretary] is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus* v. *United States,* 321 U. S. 414, 425.

The Secretary's role in designating "defense facilities" is fundamental to the potential breadth of the statute, since the greater the number and types of facilities designated, the greater is the indiscriminate denial of job opportunities, under threat of criminal punishment, to Party members because of their political associations. A clear, manageable standard might have been a significant limitation upon the Secretary's discretion. But the standard under which Congress delegated the designating power is so indefinite as to be meaningless. The statute defines "facility" broadly enough to include virtually every place of employment in the United States; the term includes "any plant, factory or other manufacturing, producing or servicing establishment, airport, airport facility, vessel, pier, waterfront-facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division or department of any of the foregoing." And § 5 (b) grants the Secretary of Defense untrammelled discretion to designate as a "defense facility" any facility "with respect to the operation of which he finds and de-

termines that the security of the United States requires . . ." that Party members should not be employed there. Congress could easily have been more specific.[4] Instead, Congress left the Secretary completely at large in determining the relevance and weight to be accorded such factors as the importance and secrecy of the facility and of the work being done there, and the indispensability of the facility's service or product to the national security.

Congress ordinarily may delegate power under broad standards. *E. g., Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163, 183; *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591; *NBC* v. *United States,* 319 U. S. 190. No other general rule would be feasible or desirable. Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems. "The

[4] Congress, in fact, originally proposed to limit the Secretary's discretion in designating "defense facilities." H. R. 9490, passed by both the House and Senate, provided that the Secretary should determine and designate each "defense plant" as defined in § 3 (7) of the Act. The difference between that version and § 5 (a) (1) (D) adopted at conference is commented upon in Conf. Rep. No. 3112, 81st Cong., 2d Sess., 50 (1950):

"Under section 3 (7) a defense plant was defined as any plant, factory, or other manufacturing or service establishment, or any part thereof, engaged in the production or furnishing, for the use of the Government of any commodity or service determined and designated by the Secretary of Defense to be of such character as to affect the military security of the United States.

"Section 3 (7), and the provisions of section 5 relating to the designation of defense plants by the Secretary of Defense, have been modified in the conference substitute so as to broaden the concept of defense plants to cover any appropriately designated plant, factory or other manufacturing, producing, or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. Because of this broader coverage, section 3 (7) has been changed so as to define the two terms 'facility' and 'defense facility.' "

Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function. . . ." *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421; *Currin* v. *Wallace,* 306 U. S. 1, 15. It is generally enough that, in conferring power upon an appropriate authority, Congress indicate its general policy, and act in terms or within a context which limits the power conferred. See, *e. g., Arizona* v. *California,* 373 U. S. 546, 584–585; *FCC* v. *RCA Communications, Inc.,* 346 U. S. 86; *Lichter* v. *United States,* 334 U. S. 742; *Yakus* v. *United States, supra,* 321 U. S., at 424; *Bandini Petroleum Co.* v. *Superior Court,* 284 U. S. 8; *FTC* v. *Gratz,* 253 U. S. 421; *Buttfield* v. *Stranahan,* 192 U. S. 470. Given such a situation, it is possible for affected persons, within the procedural structure usually established for the purpose, to be heard by the implementing agency and to secure meaningful review of its action in the courts, and for Congress itself to review its agent's action to correct significant departures from Congress' intention.

The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does § 5 (a)(1)(D). See *Barenblatt* v. *United States,* 360 U. S. 109, 140, n. 7 (dissenting opinion, BLACK, J.). This is because the numerous deficiencies connected with vague legislative directives, whether to a legislative committee, *United States* v. *Rumely,* 345 U. S. 41, to an executive officer, *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, to a judge and jury, *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 465, or to private persons, *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, see *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, are far more serious when liberty and the exercise of fundamental rights are at stake. See also *Gojack* v. *United States,* 384 U. S. 702; *Kunz* v. *New York,* 340 U. S. 290;

Winters v. *New York,* 333 U. S. 507; *Thornhill* v. *Alabama,* 310 U. S. 88; *Hague* v. *C. I. O.,* 307 U. S. 496; *Herndon* v. *Lowry,* 301 U. S. 242.

First. The failure to provide adequate standards in § 5 (a)(1)(D) reflects Congress' failure to have made a "legislative judgment," *Cantwell* v. *Connecticut, supra,* 310 U. S., at 307, on the extent to which the prophylactic measure should be applied. Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict . . ." in protected areas. *NAACP* v. *Button, supra,* 371 U. S., at 432. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene* v. *McElroy,* 360 U. S. 474, 507.

Congress has the resources and the power to inform itself, and is the appropriate forum where the conflicting pros and cons should have been presented and considered. But instead of a determination by Congress reflected in guiding standards of the types of facilities to which § 5 (a)(1)(D) should be applied, the statute provides for a resolution by the Secretary of Defense acting on his own accord. It is true that the Secretary presumably has at his disposal the information and expertise necessary to make reasoned judgments on which facilities are important to national security. But that is not the question to be resolved under this statute. Compare *Hague* v. *CIO,* 307 U. S. 496. Rather, the Secretary is in effect determining which facilities are so important to the national security that Party members, active or inactive, well-intentioned

or ill, should be prohibited from working within them in any capacity, sensitive or innocuous, under threat of criminal prosecution. In resolving this conflict of interests, the Secretary's judgment, colored by his overriding obligation to protect the national defense, is not a constitutionally acceptable substitute for Congress' judgment, in the absence of further, limiting guidance.[5]

The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. *Cantwell* v. *Connecticut, supra,* 310 U. S., at 304. Before we can decide whether it is an undue infringement of protected rights to send a person to prison for holding employment at a certain type facility, it ought at least to appear that Congress authorized the proscription as warranted and necessary. Such congressional determinations will not be assumed. "They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubt-

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[5] The Secretary has published criteria which guide him in applying the statute:

"The list of 'defense facilities' is comprised of (1) facilities engaged in important classified military projects; (2) facilities producing important weapons systems, subassemblies and their components; (3) facilities producing essential common components, intermediates, basic materials and raw materials; (4) important utility and service facilities; and (5) research laboratories whose contributions are important to the national defense. The list, which will be amended from time to time as necessary, has been classified for reasons of security."

Department of Defense Release No. 1363–62, Aug. 20, 1962. These broad standards, which might easily justify applying the statute to most of our major industries, cannot be read into the statute to limit the Secretary's discretion, since they are subject to unreviewable amendment.

ful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene* v. *McElroy, supra,* 360 U. S., at 507.

Second. We said in *Watkins* v. *United States,* 354 U. S. 178, 205, that Congress must take steps to assure "respect for constitutional liberties" by preventing the existence of "a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power." Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated, *Speiser* v. *Randall,* 357 U. S. 513; *Marcus* v. *Search Warrant,* 367 U. S. 717, 730; *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205, 213, even when Congress acts pursuant to its "great powers," *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 164. Without procedural safeguards, regulatory schemes will tend through their indiscriminate application to inhibit the activity involved. See *Marcus* v. *Search Warrant, supra,* 367 U. S., at 734–735.

It is true that "[a] construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty* v. *Phillips,* 319 U. S. 182, 188. However, the text and history of this section compels the conclusion that Congress deliberately chose not to provide for protest either to the Secretary or the courts from any designation by the Secretary of a facility as a "defense facility." The absence of any provision in this regard contrasts strongly with the care that Congress took to provide for the determination by the SACB that the Party is a Communist-action organization, and for judicial review of that determination. The Act "requires the registration only of organizations which . . . are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to

advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence." *Communist Party* v. *SACB, supra,* 367 U. S., at 86–87. In contrast, the Act nowhere provides for an administrative hearing on the Secretary's designation, either public or private, nor is his finding subject to review. A Party member charged with notice of the designation must quit the Party or his job; he cannot contest the Secretary's action on trial if he retains both and is prosecuted.[6]

This is persuasive evidence that the matter of the designation of "defense facilities" was purposely committed by Congress entirely to the discretionary judgment of the Secretary. Unlike the opportunities for hearing and judicial review afforded the Party itself, the Party member was not to be heard by the Secretary to protest the designation of his place of employment as a "defense facility," nor was the member to have recourse to the courts. This pointed distinction, as in the case of the statute before the Court in *Schilling* v. *Rogers,*

[6] The statute contemplates only four significant findings before criminal liability attaches: (1) that the Communist Party is a "Communist-action organization"; (2) that defendant is a member of the Communist Party; (3) that defendant engaged in employment at a "defense facility"; and (4) that he had notice that his place of employment was a "defense facility." The first finding was made by the Subversive Activities Control Board. The third finding—that the shipyard is a "defense facility"—was made by the Secretary of Defense. The fourth finding refers to the notice requirement which is no more than a presumption from the posting required of the employer by § 5 (b). Thus the only issue which a defendant can effectively contest is whether he is a Communist Party member. In view of the result which I would reach, however, I need not consider appellee's argument that this affords defendants only the shadow of a trial, and violates due process.

363 U. S. 666, 674, is compelling evidence "that in this Act Congress was advertent to the role of the courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation." This clear indication of the congressional plan, coupled with a flexibility—as regards the boundaries of the Secretary's discretion—so unguided as to be entirely unguiding, must also mean that Congress contemplated that an affected Party member was not to be heard to contend even at his criminal trial that the Secretary acted beyond the scope of his powers, or that the designation of the particular facility was arbitrary and capricious. Cf. *Estep* v. *United States,* 327 U. S. 114.

The legislative history of the section confirms this conclusion. That history makes clear that Congress was concerned that neither the Secretary's reasons for a designation nor the fact of the designation should be publicized. This emerged after President Truman vetoed the statute. In its original form the Act required the Secretary to "designate and proclaim, and from time to time revise, a list of facilities . . . to be promptly published in the Federal Register . . . ." § 5 (6). The President commented in his veto message, "[s]pies and saboteurs would willingly spend years of effort seeking to find out the information that this bill would require the Government to hand them on a silver platter." H. R. Doc. No. 708, 81st Cong., 2d Sess., 2 (1950). Shortly after this Court sustained the registration provisions of the Act in *SACB* v. *Communist Party, supra,* the Act was amended at the request of the Secretary to eliminate the requirement that the list of designated facilities be published in the Federal Register. 76 Stat. 91. Instead, the list is classified information. Whether or not such classification is practically meaningful—in light of the fact that notice of a designation must be posted in

the designated facility—the history is persuasive against any congressional intention to provide for hearings or judicial review that might be attended with undesired publicity. We are therefore not free to imply limitations upon the Secretary's discretion or procedural safeguards that Congress obviously chose to omit. Compare *Cole* v. *Young,* 351 U. S. 536; *United States* v. *Rumely, supra; Ex parte Endo,* 323 U. S. 283, 299; *Japanese Immigrant Case,* 189 U. S. 86, 101; see *Green* v. *McElroy, supra,* 360 U. S., at 507.

Third. The indefiniteness of the delegation in this case also results in inadequate notice to affected persons. Although the form of notice provided for in § 5 (b) affords affected persons reasonable opportunity to conform their behavior to avoid punishment, it is not enough that persons engaged in arguably protected activity be reasonably well advised that their actions are subject to regulation. Persons so engaged must not be compelled to conform their behavior to commands, no matter how unambiguous, from delegated agents whose authority to issue the commands is unclear. *Marcus* v. *Search Warrant, supra,* 367 U. S., at 736. The legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that his command is within his authority and is not his own arbitrary fiat. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Scull* v. *Virginia,* 359 U. S. 344; *Watkins* v. *United States, supra,* 354 U. S., at 208–209. There is no way for persons affected by § 5 (a)(1)(D) to know whether the Secretary is acting within his authority, and therefore no fair basis upon which they may determine whether or not to risk disobedience in the exercise of activities normally protected.

Section 5 (a)(1)(D) denies significant employment rights under threat of criminal punishment to persons simply because of their political associations. The Gov-

ernment makes no claim that Robel is a security risk. He has worked as a machinist at the shipyards for many years, and we are told is working there now. We are in effect invited by the Government to assume that Robel is a law abiding citizen, earning a living at his chosen trade. The justification urged for punishing him is that Congress may properly conclude that members of the Communist Party, even though nominal or inactive members and believing only in change through lawful means, are more likely than other citizens to engage in acts of espionage and sabotage harmful to our national security. This may be so. But in areas of protected freedoms, regulation based upon mere association and not upon proof of misconduct or even of intention to act unlawfully, must at least be accompanied by standards or procedural protections sufficient to safeguard against indiscriminate application. "If . . . 'liberty' is to be regulated, it must be pursuant to the law-making functions of Congress . . . [a]nd if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." *Kent* v. *Dulles,* 357 U. S. 116, 129.

SUPREME COURT OF THE UNITED STATES

No. 8.—OCTOBER TERM, 1967.

United States, Appellant, v. Eugene Frank Robel. } On Appeal From the United States District Court for the Western District of Washington.

[December 11, 1967.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, dissenting.

The Court holds that because of the First Amendment a member of the Communist Party who knows that the Party has been held to be a Communist-action organization may not be barred from employment in defense establishments important to the security of the Nation. It therefore refuses to enforce the contrary judgments of the Legislative and Executive Branches of the Government. Respectfully disagreeing with this view, I dissent.

The constitutional right found to override the public interest in national security defined by Congress is the right of association, here the right of respondent Robel to remain a member of the Communist Party after being notified of its adjudication as a Communist-action organization. Nothing in the Constitution requires this result. The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to asemble, and to petition for redress of grievances.[1] While the right of

[1] If men may speak as individuals, they may speak in groups as well. If they may assemble and petition, they must have the right to associate to some extent. In this sense the right of association simply extends constitutional protection to First Amendment rights when exercised with others rather than by an individual alone. In *NAACP* v. *Alabama,* the Court said that the freedom to associate for the advancement of beliefs and ideas is constitutionally protected and that it is "immaterial whether the beliefs sought to be advanced

association has deep roots in history and is supported by the inescapable necessity for group action in a republic as large and complex as ours, it has only recently blossomed as the controlling factor in constitutional litigation; its contours as yet lack delineation. Although official interference with First Amendment rights has drawn close scrutiny, it is now apparent that the right of association is not absolute and is subject to significant regulation by the State. The law of criminal conspiracy restricts the purposes for which men may associate and the means they may use to implement their plans. Labor unions, and membership in them, are intricately controlled by statutes, both federal and state, as are political parties and corporations.

The relevant cases uniformly reveal the necessity for accommodating the right of association and the public interest. *NAACP* v. *Alabama,* 357 U. S. 449 (1958),

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by association pertain to political, economic, religious or cultural matters . . . ." 357 U. S. 449, 460 (1958). That case involved the propagation of ideas by a group as well as litigation as a form of petition. The latter First Amendment element was also involved in *NAACP* v. *Button,* 371 U. S. 415 (1963); *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964); and *United Mine Workers* v. *Illinois Bar Assn., ante,* p. ——. The activities in *Eastern R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961), although commercially motivated, were aimed at influencing legislative action. Whether the right to associate is an independent First Amendment right carrying its own credentials and will be carried beyond the implementation of other First Amendment rights awaits a definitive answer. In this connection it should be noted that the Court recently dismissed, as not presenting a substantial federal question, an appeal challenging Florida regulations which forbid a Florida accountant from associating in his work, whether as partner or employee, with any nonresident accountant; out-of-state associations are barred from the State unless every partner is a qualified Florida accountant, and in practice only Florida residents can become qualified there. *Mercer* v. *Hemmings,* 36 U. S. L. Week 3167 (Oct. 23, 1967).

which contained the first substantial discussion of the right in an opinion of this Court, exemplifies the judicial approach. There, after noting the impact of official action on the right to associate, the Court inquired "whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." 357 U. S., at 463. The same path to decision is evident in *Bates* v. *City of Little Rock,* 361 U. S. 516 (1960); *NAACP* v. *Button,* 371 U. S. 415 (1963); and *Railroad Trainmen* v. *Virginia Bar,* 377 U. S. 1 (1964). Only last week, in *United Mine Workers* v. *Illinois Bar Assn., ante,* p. ——, the Court weighed the right to associate in an organization furnishing salaried legal services to its members against the State's interest in insuring adequate and personal legal representation, and found the State's interest insufficient to justify its restrictions.

Nor does the Court mandate a different course in this case. Apparently "active" members of the Communist Party who have demonstrated their commitment to the illegal aims of the Party may be barred from defense facilities. This exclusion would have the same deterrent effect upon associational rights as the statute before us, but the governmental interest in security would override that effect. Also, the Court would seem to permit barring respondent, although not an "active" member of the Party, from employment in "sensitive" positions in the defense establishment. Here, too, the interest in anticipating and preventing espionage or sabotage would outweigh the deterrent impact of job disqualification. If I read the Court correctly, associating with the Communist Party may at times be deterred by barring members from employment and nonmembership may at times be

imposed as a condition of engaging in defense work. In the case before us the Court simply disagrees with the Congress and the Defense Department, ruling that Robel does not present a sufficient danger to the national security to require him to choose between membership in the Communist Party and his employment in a defense facility. Having less confidence than the majority in the prescience of this remote body when dealing with threats to the security of the country, I much prefer the judgment of Congress and the Executive Branch that the interest of respondent in remaining a member of the Communist Party, knowing that it has been adjudicated a Communist-action organization, is less substantial than the public interest in excluding him from employment in critical defense industries.

The national interest asserted by the Congress is real and substantial. After years of study, Congress prefaced the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. §§ 781–798, with its findings that there exists an international Communist movement which by treachery, deceit, espionage, and sabotage seeks to overthrow existing governments; that the movement operates in this country through Communist-action oreganizations which are under foreign domination and control and which seek to overthrow the Government by any necessary means, including force and violence; that the Communist movement in the United States is made up of thousands of adherents, rigidly disciplined, operating in secrecy, and employing espionage and sabotage tactics in form and manner evasive of existing laws. Congress therefore, among other things, defined the characteristics of Communist-action organizations, provided for their adjudication by the SACB, and decided that the security of the United States required the exclusion of Communist-action organization members from employment in certain defense facilities. After long and com-

plex litigation, the SACB found the Communist Party to be a Communist-action organization within the meaning of the Act. That conclusion was affirmed both by the Court of Appeals, *Communist Party* v. *SACB,* 107 U. S. App. D. C. 279, 277 F. 2d 78 (1959), and this Court, 367 U. S. 1 (1961). Also affirmed were the underlying determinations, required by the Act, that the Party is directed or controlled by a foreign government or organization, that it operates primarily to advance the aims of the world Communist movement, and that it sufficiently satisfies the criteria of Communist-action organizations specified by § 792 (e), including the finding by the Board that many Party members are subject to or recognize the discipline of the controlling foreign government or organization. This Court accepted the congressional appraisal that the Party posed a threat "not only to existing government in the United States, but to the United States as a sovereign, independent nation . . . ." 367 U. S., at 95.

Against this background protective measures were clearly appropriate. One of them, contained in § 784 (a)(1)(D), which became activated with the affirmance of the Party's designation as a Communist-action organization, makes it unlawful "[f]or any member of such organization, with knowledge or notice . . . that such order has become final . . . to engage in any employment in any defense facility . . . ." A defense facility is any of the specified types of establishment "with respect to the operation of which [the Secretary of Defense] finds and determines that the security of the United States requires" that members of such organizations not be employed. Given the characteristics of the Party, its foreign domination, its primary goal of government overthrow, the discipline which it exercises over its members, and its propensity for espionage and sabotage, the exclusion of members of the Party who know the Party is a

Communist-action organization from certain defense plants is well within the powers of Congress.

Congress should be entitled to take suitable precautionary measures. Some Party members may be no threat at all, but many of them undoubtedly are, and it is exceedingly difficult to identify those in advance of the very events which Congress seeks to avoid. If Party members such as Robel may be barred from "sensitive positions," it is because they are potential threats to security. For the same reason they should be excludable from employment in defense plants which Congress and the Secretary of Defense consider of critical importance to the security of the country.

The statute does not prohibit membership in the Communist Party. Nor are respondent and other Communists excluded from all employment in the United States, or even from all defense plants. The touchstones for exclusion are the requirements of national security, and the facilities designated under this standard amount to only about one percent of all the industrial establishments in the United States.

It is this impact on associational rights, although specific and minimal, which the Court finds impermissible. But as the statute's dampening effect on associational rights is to be weighed against the asserted and obvious government interest in keeping members of Communist-action groups from defense facilities, it would seem important to identify what interest Robel has in joining and remaining a member of a group whose primary goals he may not share. We are unenlightened, however, by the opinion of the Court or by the record in this case, as to the purposes which Robel and others like him may have in associating with the Party. The legal aims and programs of the Party are not identified or appraised nor are Robel's activities as a member of

the Party. The Court is left with a vague and formless concept of associational rights and its own notions of what constitutes an unreasonable risk to defense facilities.

The Court says that mere membership in an association with knowledge that the association pursues unlawful aims cannot be the basis for criminal prosecution, *Scales* v. *United States,* 367 U. S. 203 (1961), or for denial of a passport, *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). But denying the opportunity to be employed in some defense plants is a much smaller deterrent to the exercise of associational rights than denial of a passport or a criminal penalty attached solely to membership, and the Government's interest in keeping potential spies and saboteurs from defense plants is much greater than its interest in keeping disloyal Americans from traveling abroad or in committing all Party members to prison. The "delicate and difficult judgment" to which the Court refers should thus result in a different conclusion from that reached in the *Scales* and *Aptheker* cases.[2]

The Court's motives are worthy. It seeks the widest bounds for the exercise of individual liberty consistent with the security of the country. In so doing it arro-

[2] I cannot agree with my Brother BRENNAN that Congress delegated improperly when it authorized the Secretary of Defense to determine "with respect to the operation of which [defense facilities] . . . the security of the United States requires the application of the provisions of subsection (a) of this section." Rather I think this is precisely the sort of application of a legislative determination to specific facts within the administrator's expertise that today's complex governmental structure requires and that this Court has frequently upheld. *E. g., Yakus* v. *United States,* 321 U. S. 414 (1944). I would reject also appellee's contention that the statute is a bill of attainder. See *United States* v. *Brown,* 381 U. S. 437, 462 (1965) (WHITE, J., dissenting).

gates to itself an independent judgment of the requirements of national security. These are matters about which judges should be wary. James Madison wrote:

> "Security against foreign danger is one of the primitive objects of civil society. . . .
>
> ". . . The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." [3]

[3] The Federalist No. 41 (Cooke ed. 1961) 269-270.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

Syllabus. 360 U. S.

GREENE *v.* McELROY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 180. Argued April 1, 1959.—Decided June 29, 1959.

Petitioner, an aeronautical engineer, was general manager of a private corporation engaged in developing and producing for the Armed Forces goods involving military secrets, under contracts requiring the corporation to exclude from its premises persons not having security clearances. Under regulations promulgated by the Secretary of Defense without explicit authorization by either the President or Congress, and after administrative hearings in which he was denied access to much of the information adverse to him and any opportunity to confront or cross-examine witnesses against him, petitioner was deprived of his security clearance on the grounds of alleged Communistic associations and sympathies. As a consequence, the corporation discharged him and he was unable to obtain other employment as an aeronautical engineer. He sued for a judgment declaring that the revocation of his security clearance was unlawful and void and an order restraining the Secretaries of the Armed Forces from acting pursuant to it. *Held:* In the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. Pp. 475–508.

(a) Neither Executive Order No. 10290 nor Executive Order No. 10501 empowers any executive agency to fashion security programs whereby persons are deprived of their civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest. Pp. 500–502.

(b) Neither the National Security Act of 1947 nor the Armed Services Procurement Act of 1947, even when read in conjunction with 18 U. S. C. § 798, making it a crime to communicate to unauthorized persons information concerning cryptographic or intelligence activities, and 50 U. S. C. § 783 (b), making it a crime

for an officer or employee of the United States to communicate classified information to agents of foreign governments or officers and members of "Communist organizations," constitutes an authorization to create an elaborate clearance program under which persons may be seriously restrained in their employment opportunities through a denial of clearance without the safeguards of cross-examination and confrontation. Pp. 502–504.

(c) Congressional ratification of the security clearance procedures cannot be implied from the continued appropriation of funds to finance aspects of the program fashioned by the Department of Defense. Pp. 504–505.

(d) In this area of questionable constitutionality, this Court will not hold that a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted and cross-examined, when neither the President nor Congress has explicitly authorized such procedure. Pp. 506–508.

103 U. S. App. D. C. 87, 254 F. 2d 944, reversed and cause remanded.

Carl W. Berueffy argued the cause and filed a brief for petitioner.

Assistant Attorney General Doub argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Samuel D. Slade* and *Bernard Cedarbaum.*

David I. Shapiro filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case involves the validity of the Government's revocation of security clearance granted to petitioner, an aeronautical engineer employed by a private manufacturer which produced goods for the armed services. Petitioner was discharged from his employment solely as a consequence of the revocation because his access to classified information was required by the nature of his job. After his discharge, petitioner was unable to secure

employment as an aeronautical engineer and for all practical purposes that field of endeavor is now closed to him.

Petitioner was vice president and general manager of Engineering and Research Corporation (ERCO), a business devoted primarily to developing and manufacturing various mechanical and electronic products. He began this employment in 1937 soon after his graduation from the Guggenheim School of Aeronautics and, except for a brief leave of absence, he stayed with the firm until his discharge in 1953. He was first employed as a junior engineer and draftsman. Because of the excellence of his work he eventually became a chief executive officer of the firm. During his career with ERCO, he was credited with the expedited development of a complicated electronic flight simulator and with the design of a rocket launcher, both of which were produced by ERCO and long used by the Navy.

During the post-World War II period, petitioner was given security clearances on three occasions.[1] These were required by the nature of the projects undertaken by ERCO for the various armed services.[2] On November 21,

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[1] Petitioner was given a Confidential clearance by the Army on August 9, 1949, a Top Secret clearance by the Assistant Chief of Staff G-2, Military District of Washington on November 9, 1949, and a Top Secret clearance by the Air Materiel Command on February 3, 1950.

[2] ERCO did classified contract work for the various services. In 1951, in connection with a classified research project for the Navy, it entered into a security agreement in which it undertook "to provide and maintain a system of security controls within its . . . own organization in accordance with the requirements of the Department of Defense Industrial Security Manual . . . ." The Manual, in turn, provided in paragraphs 4 (e) and 6:

"The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military

GREENE *v.* McELROY.

Opinion of the Court.

1951, however, the Army-Navy-Air Force Personnel Security Board (PSB) advised ERCO that the company's clearances for access to classified information were in jeopardy because of a tentative decision to deny petitioner access to classified Department of Defense information and to revoke his clearance for security reasons.[3] ERCO was invited to respond to this notification. The corporation, through its president, informed PSB that petitioner had taken an extended furlough due to the Board's action. The ERCO executive also stated that in his opinion petitioner was a loyal and discreet United States citizen and that his absence denied to the firm the services of an outstanding engineer and administrative executive. On December 11, 1951, petitioner was informed by the Board that it had "decided that access by you to contract work and information [at ERCO] . . . would be inimical to

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department concerned or his duly authorized representative, in the interest of security, may designate in writing.

. . . . . .

"No individual shall be permitted to have access to classified matter unless cleared by the Government or the Contractor, as the case may be, as specified in the following subparagraphs and then he will be given access to such matter only to the extent of his clearance. . . ."

[3] The PSB was created pursuant to an interim agreement dated October 9, 1947, between the Army, Navy, and Air Force and pursuant to a memorandum of agreement between the Provost Marshal General and the Air Provost Marshal, dated March 17, 1948. "It was a three-man board, with one representative from each of the military departments . . . . Its functions were to grant or deny clearance for employment on aeronautical or classified contract work when such consent was required, and to suspend individuals, whose continued employment was considered inimical to the security interests of the United States, from employment on classified work." Report of the Commission on Government Security, 1957, S. Doc. No. 64, 85th Cong., 1st Sess. 239. It established its own procedures which were approved by the Secretaries of the Army, Navy, and Air Force. See "Procedures Governing the Army-Navy-Air Force Personnel Security Board, dated 19 June 1950."

the best interests of the United States." Accordingly, the PSB revoked petitioner's clearances. He was informed that he could seek a hearing before the Industrial Employment Review Board (IERB), and he took this course.[4] Prior to the hearing, petitioner received a letter informing him that the PSB action was based on information indicating that between 1943 and 1947 he had associated with Communists, visited officials of the Russian Embassy, and attended a dinner given by an allegedly Communist Front organization.[5]

On January 23, 1952, petitioner, with counsel, appeared before the IERB. He was questioned in detail concerning his background and the information disclosed in the IERB letter. In response to numerous and searching questions he explained in substance that specific "suspect" persons with whom he was said to have associated were actually friends of his ex-wife. He explained in some detail that during his first marriage, which lasted from

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[4] The IERB was a four-member board which was given jurisdiction to hear and review appeals from decisions of the PSB. Its charter, dated 7 November 1949 and signed by the Secretaries of the Army, Navy, and Air Force, contemplated that it would afford hearings to persons denied clearance. And see "Procedures Governing Appeals to the Industrial Employment Review Board, dated 7 November 1949."

[5] The letter read, in part:

"That over a period of years, 1943–1947, at or near Washington, D. C., you have closely and sympathetically associated with persons who are reported to be or to have been members of the Communist Party; that during the period 1944–1947 you entertained and were visited at your home by military representatives of the Russian Embassy, Washington, D. C.; that, further, you attended social functions during the period 1944–1947 at the Russian Embassy, Washington, D. C.; and on 7 April 1947 attended the Southern Conference for Human Welfare, Third Annual Dinner, Statler Hotel, Washington, D. C. (Cited as Communist Front organization, Congressional Committee on Un-American Activities)."

1942 through 1947, his then wife held views with which he did not concur and was friendly with associates and other persons with whom he had little in common. He stated that these basic disagreements were the prime reasons that the marriage ended in failure. He attributed to his then wife his attendance at the dinner, his membership in a bookshop association which purportedly was a "front" organization, and the presence in his home of "Communist" publications. He denied categorically that he had ever been a "Communist" and he spoke at length about his dislike for "a theory of Government which has for its object the common ownership of property." Lastly, petitioner explained that his visits to persons in various foreign embassies (including the Russian Embassy) were made in connection with his attempts to sell ERCO's products to their Governments. Petitioner's witnesses, who included top-level executives of ERCO and a number of military officers who had worked with petitioner in the past, corroborated many of petitioner's statements and testified in substance that he was a loyal and discreet citizen. These top-level executives of ERCO, whose right to clearance was never challenged, corroborated petitioner's testimony concerning his reasons for visiting the Russian Embassy.

The Government presented no witnesses. It was obvious, however, from the questions posed to petitioner and to his witnesses, that the Board relied on confidential reports which were never made available to petitioner. These reports apparently were compilations of statements taken from various persons contacted by an investigatory agency. Petitioner had no opportunity to confront and question persons whose statements reflected adversely on him or to confront the government investigators who took their statements. Moreover, it seemed evident that the Board itself had never questioned the investigators and

had never seen those persons whose statements were the subject of their reports.

On January 29, 1952, the IERB, on the basis of the testimony given at the hearing and the confidential reports, reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on Secret contract work.

On March 27, 1953, the Secretary of Defense abolished the PSB and IERB and directed the Secretaries of the three armed services to establish regional Industrial Personnel Security Boards to coordinate the industrial security program.[6] The Secretaries were also instructed to establish uniform standards, criteria, and procedures.[7]

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[6] The Boards were abolished pursuant to a memorandum of March 27, 1953, issued by the Secretary of Defense to the Secretaries of the Army, Navy, and Air Force and to the Chairman of the Munitions Board. It provided in part:

"5. The Department of the Army, Navy and Air Force shall establish such number of geographical regions within the United States as seems appropriate to the work-load in each region. There shall then be established within each region an Industrial Personnel Security Board. This board shall consist of two separate and distinct divisions, a Screening Division and an Appeal Division, with equal representation of the Departments of the Army, Navy and Air Force on each such division. The Appeal Division shall have jurisdiction to hear appeals from the decision of the Screening Division and its decisions shall be determined by a majority vote which shall be final, subject only to reconsideration on its own motion or at the request of the appellant for good cause shown or at the request of the Secretary of any military department."

[7] The memorandum from the Secretary of Defense also provided:

"6. The Secretaries of the Army, Navy and Air Force, shall within thirty days (30), establish such geographical regions and develop joint uniform standards, criteria, and detailed procedures to implement the above-described program. In developing the standards, criteria, and procedures, full consideration shall be given to the rights of individuals, consistent with security requirements. After approval by

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Cases pending before the PSB and IERB were referred to these new Boards.[8] During the interim period between the abolishment of the old program and the implementation of the new one, the Secretaries considered themselves charged with administering clearance activities under previously stated criteria.[9]

On April 17, 1953, respondent Anderson, the Secretary of the Navy, wrote ERCO that he had reviewed petitioner's case and had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded this notification. He requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified information." He also advised the corporation that petitioner's case was being referred to the Secretary of Defense with the recommendation that the IERB's decision of January 29, 1952, be overruled. ERCO had no choice but to comply with the request.[10]

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the Secretaries of the Army, Navy, and Air Force, the standards, criteria, and procedures shall govern the operations of the Board."

[8] The memorandum provided:

"7. All cases pending before the Army-Navy-Air Force Personnel Security Board and the Industrial Employment Review Board shall be referred for action under this order to the appropriate Industrial Personnel Security Board."

[9] The memorandum further provided:

"4. The Criteria Governing Actions by the Industrial Employment Review Board, dated 7 November 1949, as revised 10 November 1950, and approved by the Secretaries of the Army, Navy, and Air Force, shall govern security clearances of industrial facilities and industrial personnel by the Secretaries of the Army, Navy and Air Force until such time as uniform criteria are established in connection with paragraph 6 of this memorandum."

[10] See note 2, *supra*.

This led to petitioner's discharge.[11] ERCO informed the Navy of what had occurred and requested an opportunity to discuss the matter in view of petitioner's importance to the firm.[12] The Navy replied that "[a]s far as the Navy

[11] The Chairman of the Board of ERCO, Colonel Henry Berliner, later testified by affidavit as follows:

"During the year 1953, and for many years previous thereto, I was the principal stockholder of Engineering and Research Corporation, a corporation which had its principal place of business at Riverdale, Maryland. I was also the chairman of the board, and the principal executive officer of this corporation.

"I am acquainted with William Lewis Greene. Prior to the month of April, 1953, Mr. Greene was Vice-President in charge of engineering and General Manager of Engineering and Research Corporation. He has been employed by this corporation since 1937. His progress in the company had been consistent. He was one of our most valued and valuable employees, and was responsible for much of the work which Engineering and Research Corporation was doing. In April, 1953, the company received a letter from the Secretary of the Navy advising us that clearance had been denied to Mr. Greene and advising us that it would be necessary to bar him from access to our plant. In view of his position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him. There was no other reason for Mr. Greene's discharge, and in the absence of the letter referred to, he could have continued in the employment of Engineering and Research Corporation indefinitely."

[12] The President of ERCO wrote to the Secretary of the Navy as follows:

"The Honorable R. B. Anderson
"Secretary of the Navy
"Washington 25, D. C.

"My dear Mr. Secretary:

"Receipt is acknowledged of your letter of April 17, 1953 in which you state that you have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified security information is inconsistent with the best interests of National Security.

"You request this company to exclude Mr. Greene from our plants,

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Department is concerned, any further discussion on this problem at this time will serve no useful purpose."

Petitioner asked for reconsideration of the decision. On October 13, 1953, the Navy wrote to him stating that it had requested the Eastern Industrial Personnel Security Board (EIPSB) to accept jurisdiction and to arrive at a final determination concerning petitioner's status.[13] Var-

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factories or sites and to bar him from information, in the interests of protecting Navy classified projects and classified security information.

"In accordance with your request, please be advised that since receipt of your letter this company has excluded Mr. Greene from any part of our plants, factories or sites and barred him access to all classified security information.

"For your further information, Mr. Greene tendered his resignation as an officer of this corporation and has left the plant. We shall have no further contact with him until his status is clarified although we have not yet formally accepted his resignation.

"Mr. Greene is Vice President of this company in charge of engineering. His knowledge, experience and executive ability have proven of inestimable value in the past. The loss of his services at this time is a serious blow to company operations. Accordingly, we should like the privilege of a personal conference to discuss the matter further.

"Furthermore, you state that you are referring the case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of January 29, 1952 be overruled. If it is appropriate, we should like very much to have the privilege of discussing the matter with the Secretary of Defense.

"Please accept our thanks for any official courtesies which you are in a position to extend.

"Respectfully yours,
"Engineering and Research Corporation
"By /s/ L. A. Wells"

[13] On May 4, 1953, pursuant to the memorandum of the Secretary of Defense dated March 27, 1953, see note 6, *supra*, the Secretaries of the military departments established regional Industrial Personnel Security Boards governed by generalized standards, criteria, and procedures.

ious letters were subsequently exchanged between petitioner's counsel and the EIPSB. These resulted finally in generalized charges, quoted in the margin, incorporating the information previously discussed with petitioner at his 1952 hearing before the IERB.[14]

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[14] The specifications were contained in a letter to petitioner's counsel dated April 9, 1954, which was sent nineteen days before the hearing. That letter provided in part:

"Security considerations permit disclosure of the following information that has thus far resulted in the denial of clearance to Mr. Greene:

"1. During 1942 SUBJECT was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

"2. SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

"3. During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the 'Daily Worker'; 'Soviet Russia Today'; 'In Fact'; and Karl Marx's 'Das Kapital.'

"4. Many apparently reliable witnesses have testified that during the period of SUBJECT's first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party 'line'; presented 'fellow-traveller' arguments; was apparently influenced by 'Jean's wild theories'; etc. [Nothing in the record establishes that any witness "testified" at any hearing on these subjects and everything in the record indicates that they could have done no more than make such statements to investigative officers.]

"5. In about 1946 SUBJECT invested approximately $1000. in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party 'line.' [This station is now Station WGMS, Washington's "Good Music Station." Petitioner stated that he invested money in the station

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On April 28, 1954, more than one year after the Secretary took action, and for the two days thereafter, petitioner presented his case to the EIPSB and was cross-examined in detail. The hearing began with a

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because he liked classical music and he considered it a good investment.]

"6. On 7 April 1947 SUBJECT and his wife Jean attended the Third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front. [This dinner was also attended by many Washington notables, including several members of this Court.]

"7. Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov, Col. Pavel F. Berezin, Major Pavel N. Asseev, Col. Ilia M. Saraev, and Col. Anatoly Y. Golkovsky. [High-level executives of ERCO, as above noted, testified that these associations were carried on to secure business for the corporation.]

"8. During 1946 and 1947 SUBJECT had frequent sympathetic association with Dr. Vaso Syrzentic of the Yugoslav Embassy. Dr. Syrzentic has been identified as an agent of the International Communist Party. [Petitioner testified that he met this individual once in connection with a business transaction.]

"9. During 1943 SUBJECT was in contact with Col. Alexander Hess of the Czechoslovak Embassy, who has been identified as an agent of the Red Army Intelligence. [This charge was apparently abandoned as no adverse finding was based on it.]

"10. During 1946 and 1947 SUBJECT maintained close and sympathetic association with Mr. and Mrs. Nathan Gregory Silvermaster and William Ludwig Ullman. Silvermaster and Ullman have been identified as members of a Soviet Espionage Apparatus active in Washington, D. C., during the 1940's. [Silvermaster was a top economist in the Department of Agriculture and the direct superior of petitioner's ex-wife who then worked in that department.]

"11. SUBJECT had a series of contacts with Laughlin Currie during the period 1945–48. Currie has also been identified as a member of the Silvermaster espionage group. [Petitioner met Currie in the executive offices of the President at a time when Currie was a Special Assistant to the President.]

"12. During the period between 1942 and 1947 SUBJECT maintained frequent and close associations with many Communist Party

statement by the Chairman, which included the following passage:

> "The transcript to be made of this hearing will not include all material in the file of the case, in that, it will not include reports of investigation conducted by the Federal Bureau of Investigation or other investigative agencies which are confidential. Neither will it contain information concerning the identity of confidential informants or information which will reveal the source of confidential evidence. The transcript will contain only the Statement of Reasons, your answer thereto and the testimony actually taken at this hearing."

Petitioner was again advised that the revocation of his security clearance was based on incidents occurring between 1942 and 1947, including his associations with alleged Communists, his visits with officials of the Russian Embassy, and the presence in his house of Communist literature.

Petitioner, in response to a question, stated at the outset of the hearing that he was then employed at a salary of $4,700 per year as an architectural draftsman and that he had been receiving $18,000 per year as Vice President and General Manager of ERCO. He later explained that

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members, including R——— S———, and his wife E———, B——— W——— and his wife M———, M——— P———, M——— L. D———, R——— N——— and I——— S———. [These persons were apparently friends of petitioner's ex-wife.]

"13. During substantially the same period SUBJECT maintained close association with many persons who have been identified as strong supporters of the Communist conspiracy, including S——— J. R———, S——— L———, O——— L———, E——— F——— and V——— G———. [These persons were apparently friends of his ex-wife.]

"It is noted that all of the above information has previously been discussed with Mr. Greene at his hearing before the Industrial Employment Review Board, and that a copy of the transcript of that hearing was made available to you in August of last year."

after his discharge from ERCO he had unsuccessfully tried to obtain employment in the aeronautics field but had been barricaded from it because of lack of clearance.[15]

Petitioner was subjected to an intense examination similar to that which he experienced before the IERB in 1952. During the course of the examination, the Board injected new subjects of inquiry and made it evident that it was relying on various investigatory reports and statements of confidential informants which were not made available to petitioner.[16] Petitioner reiterated in great detail the

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[15] Petitioner stated by affidavit in support of his motion for summary judgment that "[a]fter my discharge from Engineering and Research Corporation, I made every possible effort to secure other employment at a salary commensurate with my experience, but I was unable to do so because all of my work history had been in the field of aeronautics. In spite of everything I could do, the best position I could obtain was a draftsman-engineer in an architectural firm. I was obliged to go to work for a salary of $4,400 per year, because the basis upon which a higher salary would be justified was experience in a field which was not particularly useful in the type of work which I was able to obtain. As a result of the actions of the defendants complained of, the field of aeronautical engineering was closed to me."

[16] For instance, the following questions were asked in connection with the so-called "left wing" radio station in which petitioner owned stock, petitioner's acquaintanceship with alleged subversives, and petitioner's business relationships with foreign governments:

"Q. We have information here, Mr. Greene, that one particular individual specifically called your attention to the fact that [Congressman] Rankin and [Senator] Bilbo had characterized this station as a Communist station, run by and for Communists?

. . . . . .

"Q. We have information here, this has come from an informant characterized to be of known reliability in which he refers to conversations he had with you about January of 1947 in which you told him that you had visited M——— P——— the previous evening and had become rather chummy with him, do you wish to comment on that?

. . . . . .

"Q. Concerning your relationship with S——— I———, we have

explanations previously given before the IERB. He was subjected to intense cross-examination, however, concerning reports that he had agreed with the views held by his ex-wife.

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information here from an informant characterized as being one of known reliability, in which S——— L——— told this informant that shortly following her Western High School speech in 1947, she remarked to you that probably many people will learn things about Russia and she quoted you as replying, 'Well I hope they learn something good, at least.' Do you wish to say anything about that?

. . . . . .

"Q. Information we have, Mr. Greene, indicates first of all, that you didn't meet these Russians in 1942 but you met them in early 1943.

. . . . . .

"Q. Now, we have further information, Mr. Greene, indicating that the initiative of these contacts came from Col. Berezin.

. . . . . .

"Q. We have information here indicating that as a matter of fact, sir, we do know that the meeting between you and Col. Berezin was arranged through Hess and Hochfeld as you indicated. We also have information from a source identified as being one of known reliability referring to a conversation that this source had with Hess in April 1943 in which Hess stated that he had been talking to one Harry, not further identified but presumed to be Hochfeld and that Harry said to Hess that he had a young engineer who is a good friend of ours and of our cause and Harry wanted Hess to set up a meeting between Berezin and yourself. Can you give us some reason why Harry might have referred to you as a good friend of our cause?

. . . . . .

"Q. Of course, we can make certain assumptions as to why Col. Berezin might have wanted to meet you back in December 1942 when we look at a statement like this indicating that you were considered a good friend of their's and of their cause. Of course, some weight is lent to this assumption by the fact that your wife was strongly pro-Communist and after she left you she became very active in Communist affairs, in case you don't know that, I'll pass it on to you."

And the following questions were asked of various witnesses presented

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Petitioner again presented a number of witnesses who testified that he was loyal, that he had spoken approvingly of the United States and its economic system, that he was a valuable engineer, and that he had made valuable and significant contributions to this country's war efforts during World War II and the Korean War.

Soon after the conclusion of the hearing, the EIPSB notified petitioner that it had affirmed the Secretary's action and that it had decided that the granting of clearance to petitioner for access to classified information was "not clearly consistent with the interests of national security." Petitioner requested that he be furnished with a detailed statement of findings supporting the Board's decision. He was informed, however, that security con-

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by petitioner evidently because the Board had confidential information that petitioner's ex-wife was "eccentric."

"Q. Now you were in Bill's home, that red brick house that you're talking about.

. . . . . .

"Q. Was there anything unusual about the house itself, the interior of it, was it dirty?

. . . . . .

"Q. Were there any beds in their house which had no mattresses on them?

. . . . . .

"Q. Did you ever hear it said that Jean slept on a board in order to keep the common touch?

. . . . . .

"Q. When you were in Jean's home did she dress conventionally when she received her guests?

. . . . . .

"Q. Let me ask you this, conventionally when somebody would invite you for dinner at their home would you expect them, if they were a woman to wear a dress and shoes and stockings and the usual clothing of the evening or would you expect them to appear in overalls?"

siderations prohibited such disclosure.[17] On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board.[18] On March 12, 1956, almost three years after the Secretary's action and nearly one year after the second hearing, he received a letter from the Director of the Office of Industrial Personnel Security Review informing him that the EIPSB had found that from 1942–1947 petitioner associated closely with his then wife and her friends, knowing that they were active in behalf of and sympathized with the Communist Party, that during part of this period petitioner maintained a sympathetic association with a number of officials of the Russian Embassy, that during this period petitioner's political views were similar to those of his then wife, that petitioner had been a member of a suspect bookshop association, had invested money in a suspect radio station, had attended a suspect dinner, and had, on occasion, Communist publications in his home, and that petitioner's credibility as a witness in the proceedings was doubtful. The letter also stated that the doubts concerning petitioner's credibility affected the Board's evaluation of his trustworthiness and that only trustworthy persons could be afforded access to classified information.[19] The EIPSB determination was affirmed.

After the EIPSB decision in 1954, petitioner filed a complaint in the United States District Court for the Dis-

[17] The notification stated:

"Security considerations prohibit the furnishing to an appellant of a detailed statement of the findings on appeal inasmuch as the entire file is considered and comments made by the Appeal Division panel on security matters which could not for security reasons form the basis of a statement of reasons."

[18] This Board was created by the Secretary of Defense on February 2, 1955, and given power to review adverse decisions rendered by the regional boards.

[19] This was the first time that petitioner was charged or found to be untrustworthy.

trict of Columbia asking for a declaration that the revocation was unlawful and void and for an order restraining respondents from acting pursuant to it.[20] He also asked for an order requiring respondents to advise ERCO that the clearance revocation was void. Following the affirmance of the EIPSB order by the Industrial Personnel Review Board, petitioner moved for summary judgment in the District Court. The Government cross-filed for dismissal of the complaint or summary judgment. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed that disposition, 103 U. S. App. D. C. 87, 254 F. 2d 944.

The Court of Appeals recognized that petitioner had suffered substantial harm from the clearance revocation.[21] But in that court's view, petitioner's suit presented no "justiciable controversy"—no controversy which the courts could finally and effectively decide. This conclusion followed from the Court of Appeals' reasoning that the Executive Department alone is competent to evaluate the competing considerations which exist in determining the persons who are to be afforded security clearances.

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[20] The complaint was filed before the establishment of the Industrial Personnel Security Review Board. See note 18, *supra*.

[21] The Court of Appeals stated: "We have no doubt that Greene has in fact been injured. He was forced out of a job that paid him $18,000 per year. He has since been reduced, so far as this record shows, to working as an architectural draftsman at a salary of some $4,400 per year. Further, as an aeronautical engineer of considerable experience he says (without real contradiction) that he is effectively barred from pursuit of many aspects of his profession, given the current dependence of most phases of the aircraft industry on Defense Department contracts not only for production but for research and development work as well. . . . Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene." 103 U. S. App. D. C. 87, 95–96, 254 F. 2d 944, 952–953.

The court also rejected petitioner's claim that he was deprived of his livelihood without the traditional safeguards required by "due process of law" such as confrontation of his accusers and access to confidential reports used to determine his fitness. Central to this determination was the court's unwillingness to order the Government to choose between disclosing the identities of informants or giving petitioner clearance.

Petitioner contends that the action of the Department of Defense in barring him from access to classified information on the basis of statements of confidential informants made to investigators was not authorized by either Congress or the President and has denied him "liberty" and "property" without "due process of law" in contravention of the Fifth Amendment. The alleged property is petitioner's employment; the alleged liberty is petitioner's freedom to practice his chosen profession. Respondents admit, as they must, that the revocation of security clearance caused petitioner to lose his job with ERCO and has seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. Although the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment, *Dent* v. *West Virginia*, 129 U. S. 114; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Peters* v. *Hobby*, 349 U. S. 331, 352 (concurring opinion); cf. *Slochower* v. *Board of Education*, 350 U. S. 551; *Truax* v. *Raich*, 239 U. S. 33, 41; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589–590; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, respondents contend that the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment.

Alternatively, respondents urge that even if petitioner has been restrained in the enjoyment of constitutionally protected rights, he was accorded due process of law in that he was permitted to utilize those procedural safeguards consonant with an effective clearance program, in the administration of which the identity of informants and their statements are kept secret to insure an unimpaired flow to the Government of information concerning subversive conduct. But in view of our conclusion that this case should be decided on the narrower ground of "authorization," we find that we need not determine the answers to these questions.[22]

The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination.

Prior to World War II, only sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense. Report of the Commission on Government Security, 1957, S. Doc. No. 64, 85th Cong., 1st Sess. 236. During World War II the War Department instituted a

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[22] We note our agreement with respondents' concession that petitioner has standing to bring this suit and to assert whatever rights he may have. Respondents' actions, directed at petitioner as an individual, caused substantial injuries, *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 152 (concurring opinion), and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests. Cf. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

formalized program to obtain the discharge from war plants of persons engaged in sabotage, espionage, and willful activity designed to disrupt the national defense program. *Id.*, at 237. In 1946, the War Department began to require contractors, before being given access to classified information, to sign secrecy agreements which required consent before their employees were permitted access to Top Secret or Secret information. *Id.*, at 238. At the outset, each armed service administered its own industrial clearance program. *Id.*, at 239. Later, the PSB and IERB were established by the Department of Defense and the Secretaries of the armed services to administer a more centralized program. *Ibid.* Confusion existed concerning the criteria and procedures to be employed by these boards. *Ibid.* Eventually, generalized procedures were established with the approval of the Secretaries which provided in part that before the IERB "[t]he hearing will be conducted in such manner as to protect from disclosure information affecting the national security or tending to compromise investigative sources or methods . . . ." See "Procedures Governing Appeals to the Industrial Employment Review Board, dated 7 November 1949," note 4, *supra*, § 4 (c). After abolition of these boards in 1953, and the establishment of the IPSB, various new sets of procedures were promulgated which likewise provided for the non-disclosure of information "tending to compromise investigative sources or methods or the indentity of confidential informants." [28]

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[28] The Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, recommended by the Secretaries of the Army, Navy, and Air Force, and approved by the Secretary of Defense, provided:

"§ 67.1–4. *Release of information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might com-

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All of these programs and procedures were established by directives issued by the Secretary of Defense or the Secretaries of the Army, Navy, and Air Force. None was the creature of statute or of an Executive Order issued by the President.[24]

Respondents maintain that congressional authorization to the President to fashion a program which denies security clearance to persons on the basis of confidential information which the individuals have no opportunity to confront and test is unnecessary because the President has inherent authority to maintain military secrets inviolate. And respondents argue that if a statutory grant of power is necessary, such a grant can readily be *inferred* "as a necessarily implicit authority from the generalized provisions" of legislation dealing with the armed services.

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promise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information. In addition, in a case involving a contractor employee the contractor concerned will be advised only of the final determination in the case to grant, deny, or revoke clearance, and of any decision to suspend a clearance granted previously pending final determination in the case. The contractor will not be given a copy of the Statement of Reasons issued to the contractor employee except at the written request of the contractor employee concerned."

[24] See "Charter of the Industrial Employment Review Board, dated 7 November 1949," note 4, *supra;* "Charter of the Army-Navy-Air Force Personnel Security Board, dated 19 June 1950," note 3, *supra;* Memorandum issued by the Secretary of Defense to the Secretaries of the Army, Navy, and Air Force and to the Chairman of the Munitions Board, dated March 27, 1953, notes 6, 7, 8 and 9, *supra;* "The Industrial Personnel and Facility Security Clearance Program," effective May 4, 1953, note 13, *supra;* "The Industrial Personnel Security Review Regulation," 20 Fed. Reg. 1553, 32 CFR Part 67 (1958 Supp.); Industrial Security Manual for Safeguarding Classified Information, 20 Fed. Reg. 6213, 21 Fed. Reg. 2814.

But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.[25] They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with

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[25] When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him." Acts 25:16.

Professor Wigmore explains in some detail the emergence of the principle in Anglo-American law that confrontation and cross-examination are basic ingredients in a fair trial. 5 Wigmore on Evidence (3d ed. 1940) § 1364. And see O'Brian, National Security and Individual Freedom, 62.

the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *e. g., Mattox* v. *United States,* 156 U. S. 237, 242–244; *Kirby* v. *United States,* 174 U. S. 47; *Motes* v. *United States,* 178 U. S. 458, 474; *In re Oliver,* 333 U. S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. *E. g., Southern R. Co.* v. *Virginia,* 290 U. S. 190; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292; *Morgan* v. *United States,* 304 U. S. 1, 19; *Carter* v. *Kubler,* 320 U. S. 243; *Reilly* v. *Pinkus,* 338 U. S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. 168–169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies,

lapses of recollection, and bias,[26] but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the in-

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[26] For instance, in the instant case, to establish the charge that petitioner's "personal political sympathies were in general accord with those of his wife," the EIPSB apparently relied on statements made to investigators by "old" friends of petitioner. Thus, the following questions were asked petitioner:

"Q. I'd like to read to you a quotation from the testimony of a person who had identified himself as having been a very close friend of yours over a long period of years. He states that you, as saying to him one day that you were reading a great deal of pro-Communist books and other literature. Do you wish to comment on that?

. . . . . .

"Q. Incidentally this man's testimony concerning you was entirely favorable in one respect. He stated that he didn't think you were a Communist but he did state that he thought that you had been influenced by Jean's viewpoints and that he had received impressions definite that it was your wife who was parlor pink and that you were going along with her.

. . . . . .

"Q. This same friend testified that he believed that you were influenced by Jean's wild theories and he decided at that time to have no further association with you and your wife . . . .

. . . . . .

"Q. . . . Here's another man who indicates that he has been a friend of yours over a long period of time who states that he was a visitor in your home on occasions and that regarding some of these visits, he met some of your wife's friends, these people we've been talking about in the past and that one occasion, he mentioned in particular, the topic of conversation was China and that you set forth in the conversation and there seemed general agreement among all of you at that time that the revolutionists in China were not actually Communists but were agrarian reformists which as you probably know is part of the Communist propaganda line of several years back. . . .

. . . . . .

"Q. Mr. Greene we've got some information here indicating that during the period of your marriage to your first wife that she was

formant said without even examining the investigator personally."

We must determine against this background, whether the President or Congress has delegated to the Depart-

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constantly finding fault with the American institutions, opposing the American Capitalistic System and never had anything but praise for the Russians and everything they attempted to do. Did you find that to be the case?

. . . . . .

"Q. We have a statement here from another witness with respect to yourself in which he states that you felt that the modern people in this country were too rich and powerful, that the capitalistic system of this country was to the disadvantage of the working people and that the working people were exploited by the rich.

. . . . . .

"Q. I have a statement from another one of your associates to the effect that you would at times, present to him a fellow-traveler argument. This man indicated to us that he was pretty well versed on the Communist Party line himself at that time and found you parroting arguments which he assumed that you got from your wife. Do you wish to comment on that?"

Confrontation of the persons who allegedly made these statements would have been of prime importance to petitioner, for cross-examination might have shown that these "witnesses" were hazy in recollecting long-past incidents, or were irrationally motivated by bias or vindictiveness.

[27] This is made clear by the following testimony of Jerome D. Fenton, Director, Industrial Personnel Security, Department of Defense, before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, given on November 23, 1955:

"[Q.] . . . What other type of evidence is received by the hearing boards besides the evidence of persons under oath?

"[A.] The reports from the various governmental investigative agencies.

"[Q.] And the reports of the various governmental investigations might, themselves, be hearsay, might they not?

"[A.] I think that is a fair statement.

"[Q.] In fact, they might be, as the Court of Appeals for the Ninth District [*sic*] said with respect to the port security program, second,

ment of Defense the authority to by-pass these traditional and well-recognized safeguards in an industrial security clearance program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions. Respondents cite two Executive Orders which they believe show presidential delegation. The first, Exec. Order No. 10290, 16 Fed. Reg. 9795, was entitled "Prescribing Regulations Establishing Minimum Standards For The Classification, Transmission, And Handling, By Departments And

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or third, or fourth-hand hearsay, might they not? [This question refers to the opinion of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708.]

. . . . . .

"[A.] The answer is 'Yes.'

. . . . . .

"[Q.] Can you tell me what type of help is given to the hearing board in these reports with respect to the matter of evaluation? What is the nature of the evaluation that is used for this purpose?

"[A.] Well, each board has a person who is called a security adviser, who is an expert in that particular area. Each screening board has one, and those individuals are well-trained people who know how to evaluate reports and evaluate information. They know how to separate the wheat from the chaff, and they assist these boards.

"[Q.] This expert, then, has to take the report and make his own determination in assisting the board as to the reliability of a witness that he has never seen, or perhaps hasn't even had the opportunity to see the person who interviewed the witness?

"[A.] Well, he has nothing to do with the witness; no.

"[Q.] What is that?

"[A.] He has not interviewed the witness; no."

Hearings before Subcommittee on Constitutional Rights, Senate Judiciary Committee, on S. Res. 94, 84th Cong., 2d Sess. 623-624. And cf. Richardson, The Federal Employee Loyalty Program, 51 Col. L. Rev. 546, and Hearings before a Subcommittee of the Senate Foreign Relations Committee on S. Res. 231, 81st Cong., 2d Sess. 327-339 (statement of J. Edgar Hoover, Director, Federal Bureau of Investigation).

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Opinion of the Court.

Agencies of the Executive Branch, Of Official Information Which Requires Safeguarding In The Interest Of The Security Of The United States." It provided, in relevant part:

"PART V—DISSEMINATION OF CLASSIFIED SECURITY INFORMATION

"29. *General.* a. No person shall be entitled to knowledge or possession of, or access to, classified security information solely by virtue of his office or position.

"b. Classified security information shall not be discussed with or in the presence of unauthorized persons, and the latter shall not be permitted to inspect or have access to such information.

"c. The head of each agency shall establish a system for controlling the dissemination of classified security information adequate to the needs of his agency.

"30. *Limitations on dissemination*—a. *Within the Executive Branch.* The dissemination of classified security information shall be limited to persons whose official duties require knowledge of such information. Special measures shall be employed to limit the dissemination of 'Top Secret' security information to the absolute minimum. Only that portion of 'Top Secret' security information necessary to the proper planning and appropriate action of any organizational unit or individual shall be released to such unit or individual.

"b. *Outside the Executive Branch.* Classified security information shall not be disseminated outside the Executive Branch by any person or agency having access thereto or knowledge thereof except under conditions and through channels authorized by

the head of the disseminating agency, even though such person or agency may have been solely or partly responsible for its production."

The second, Exec. Order No. 10501, 18 Fed. Reg. 7049, which revoked Exec. Order No. 10290, is entitled "Safeguarding Official Information In The Interests Of The Defense Of The United States" and provides in relevant part:

"Sec. 7. *Accountability and Dissemination.*

. . . . . .

"(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production."

Clearly, neither of these orders empowers any executive agency to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest.[28]

Turning to the legislative enactments which might be deemed as delegating authority to the Department of Defense to fashion programs under which persons may be

[28] No better, for this purpose, is Exec. Order No. 8972, 6 Fed. Reg. 6420, filed on December 12, 1941, which empowered the Secretary of War "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities . . . ." Even if that order is relevant authority for programs created after World War II, which is doubtful, it provides no specific authorisation for non-confrontation hearings.

seriously restrained in their employment opportunities through a denial of clearance without the safeguards of cross-examination and confrontation, we note the Government's own assertion, made in its brief, that "[w]ith petitioner's contention that the Industrial Security Program is not explicitly authorized by statute we may readily agree . . . ."

The first proffered statute is the National Security Act of 1947, as amended, 5 U. S. C. § 171 *et seq.* That Act created the Department of Defense and gave to the Secretary of Defense and the Secretaries of the armed services the authority to administer their departments. Nowhere in the Act, or its amendments, is there found specific authority to create a clearance program similar to the one now in effect.

Another Act cited by respondents is the Armed Service Procurement Act of 1947, as amended. It provides in 10 U. S. C. § 2304 that:

> "(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
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> . . . . . .
>
> "(12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components."

It further provides in 10 U. S. C. § 2306:

> "(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to this limitation and subject to subsections (b)–(e), the head of an agency may, in negotiating contracts under section 2304 of this title, make any kind of contract that he considers will promote the best interests of the United States."

Respondents argue that these statutes, together with 18 U. S. C. § 798, which makes it a crime willfully and knowingly to communicate to unauthorized persons information concerning cryptographic or intelligence activities, and 50 U. S. C. § 783 (b), which makes it a crime for an officer or employee of the United States to communicate classified information to agents of foreign governments or officers and members of "Communist organizations," reflect a recognition by Congress of the existence of military secrets and the necessity of keeping those secrets inviolate.

Although these statutes make it apparent that Congress recognizes the existence of military secrets, they hardly constitute an authorization to create an elaborate clearance program which embodies procedures traditionally believed to be inadequate to protect affected persons.[29]

Lastly, the Government urges that if we refuse to adopt its "inferred" authorization reasoning, nevertheless, congressional ratification is apparent by the continued appropriation of funds to finance aspects of the program fashioned by the Department of Defense. Respondents refer us to Hearings before the House Committee on Appropriations on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess. 774–781. At those hearings, the Committee was asked to approve the appropriation of funds to finance a program under which reimbursement for lost wages would be made to employees of government contractors who were temporarily denied, but later granted, security clearance. Apparently, such reim-

[29] As far as appears, the most substantial official notice which Congress had of the non-confrontation procedures used in screening industrial workers was embodied in S. Doc. No. 40, 84th Cong., 1st Sess., a 354-page compilation of laws, executive orders, and regulations relating to internal security, printed at the request of a single Senator, which reproduced, among other documents and without specific comment, the Industrial Personnel Security Review Regulation.

bursements had been made prior to that time out of general appropriations. Although a specific appropriation was eventually made for this purpose, it could not conceivably constitute a ratification of the hearing procedures, for the procedures were in no way involved in the special reimbursement program.[30]

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[30] At the hearings to which we have been referred, the following passage from the testimony of the Department of Defense representative constitutes the only description made to the Committee concerning the procedures used in the Department's clearance program:

"In connection with the procurement programs of the Department of Defense, regulations have been prescribed to provide uniform standards and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals, to have access to classified defense information. The regulations also establish administrative procedures governing the disposition of cases in which a military department, or activity thereof, has made a recommendation or determination (a) with respect to the denial, suspension, or revocation of a clearance of a contractor or contractor employee; and (b) with respect to the denial or withdrawal of authorization for access by certain other individuals.

"While the Department of Defense assumes, unless information to the contrary is received, that all contractors and contractor employees are loyal to the Government of the United States, the responsibilities of the Military Establishment necessitate vigorous application of policies designed to minimize the security risk incident to the use of classified information by such contractors and contractor employees. Accordingly, measures are taken to provide continuing assurance that no contractor or contractor employee will be granted a clearance if available information indicates that the granting of such clearance may not be clearly consistent with the interests of national security. At the same time, every possible safeguard within the limitations of national security will be provided to ensure that no contractor or contractor employee will be denied a clearance without an opportunity for a fair hearing." *Id.*, at 774.

This description hardly constitutes even notice to the Committee of the nature of the hearings afforded. Thus the appropriation could not "plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo*, 323 U. S. 283, 303, n. 24. Likewise,

Respondents' argument on delegation resolves itself into the following: The President, in general terms, has authorized the Department of Defense to create procedures to restrict the dissemination of classified information and has apparently acquiesced in the elaborate program established by the Secretary of Defense even where application of the program results in restraints on traditional freedoms without the use of long-required procedural protections. Similarly, Congress, although it has not enacted specific legislation relating to clearance procedures to be utilized for industrial workers, has acquiesced in the existing Department of Defense program and has ratified it by specifically appropriating funds to finance one aspect of it.

If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. Thus, even in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination. But this case does not present that situation. We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted

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appropriations of specific amounts for the Munitions Board or its successors, agencies with multifold objectives, without any mention of the uses to which the funds could be put, cannot be considered as a ratification of the use of the specified hearing procedures.

notions of fair procedures.[31] Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Cf. Watkins* v. *United States,* 354 U. S. 178; *Scull* v. *Virginia,* 359 U. S. 344. Such decisions cannot be assumed by acquiescence or non-action. *Kent* v. *Dulles,* 357 U. S. 116; *Peters* v. *Hobby,* 349 U. S. 331; *Ex parte Endo,* 323 U. S. 283, 301–302. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, see *Peters* v. *Hobby, supra,* but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, *e. g., The Japanese Immigrant Case,* 189 U. S. 86, 101; *Dismuke* v. *United States,* 297 U. S. 167, 172; *Ex parte Endo,* 323 U. S. 283, 299–300; *American Power Co.* v. *Securities and Exchange Comm'n,* 329 U. S. 90, 107–

[31] It is estimated that approximately three million persons having access to classified information are covered by the industrial security program. Brown, Loyalty and Security (1958), 179–180; Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (1956), 64.

108; *Hannegan* v. *Esquire*, 327 U. S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *United States* v. *Rumely*, 345 U. S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.

In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Accordingly, the judgment is reversed and the case is remanded to the District Court for proceedings not inconsistent herewith.

It is so ordered.

MR. JUSTICE FRANKFURTER, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER concur in the judgment on the ground that it has not been shown that either Congress or the President authorized the procedures whereby petitioner's security clearance was revoked, intimating no views as to the validity of those procedures.

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Opinion of HARLAN, J.

MR. JUSTICE HARLAN, concurring specially.

What has been written on both sides of this case makes appropriate a further word from one who concurs in the judgment of the Court, but cannot join its opinion.

Unlike my brother CLARK who finds this case "both clear and simple," I consider the constitutional issue it presents most difficult and far-reaching. In my view the Court quite properly declines to decide it in the present posture of the case. My unwillingness to subscribe to the Court's opinion is due to the fact that it unnecessarily deals with the very issue it disclaims deciding. For present purposes no more need be said than that we should not be drawn into deciding the constitutionality of the security-clearance revocation procedures employed in this case until the use of such procedures in matters of this kind has been deliberately considered and expressly authorized by the Congress or the President who alone are in a position to evaluate in the first instance the totality of factors bearing upon the necessity for their use. That much the courts are entitled to before they are asked to express a constitutional judgment upon an issue fraught with such important consequences both to the Government and the citizen.

Ample justification for abstaining from a constitutional decision at this stage of the case is afforded by the Court's traditional and wise rule of not reaching constitutional issues unnecessarily or prematurely. That rule indeed has been consistently followed by this Court when faced with "confrontation" issues in other security or loyalty cases. See *Peters* v. *Hobby*, 349 U. S. 331; *Vitarelli* v. *Seaton*, 359 U. S. 535; cf. *Service* v. *Dulles*, 354 U. S. 363; *Kent* v. *Dulles*, 357 U. S. 116. Adherence to that rule is, as I understand it, the underlying basis of today's decision, and it is on that basis that I join the judgment of the Court.

It is regrettable that my brother CLARK should have so far yielded to the temptations of colorful characterization as to depict the issue in this case as being whether a citizen has "a constitutional right to have access to the Government's military secrets," and to suggest that the Court's action today requires "the President's Cabinet members to revoke their refusal to give" the petitioner "access to military secrets," despite any views they may have as to his reliability. Of course this decision involves no such issue or consequences. The basic constitutional issue is not whether petitioner is entitled to access to classified material, but rather whether the particular procedures here employed to deny clearance on security grounds were constitutionally permissible. With good reason we do not reach that issue as matters now stand. And certainly there is nothing in the Court's opinion which suggests that petitioner must be given access to classified material.

MR. JUSTICE CLARK, dissenting.

To me this case is both clear and simple. The respondents, all members of the President's Cabinet, have, after a series of hearings, refused to give Greene further access to certain government military information which has been classified "secret." The pertinent Executive Order defines "secret" information as

> "defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelli-

gence operations." Exec. Order No. 10501, Nov. 5, 1953, 18 Fed. Reg. 7049, 3 CFR (1949–1953 Comp.), p. 979, § 1 (b).

Surely one does not have a constitutional right to have access to the Government's military secrets.[1] But the Court says that because of the refusal to grant Greene further access, he has lost his position as vice president and general manager, a chief executive officer, of ERCO, whose business was devoted wholly to defense contracts with the United States,[2] and that his training in aeronautical engineering, together with the facts that ERCO engages solely in government work and that the Government is the country's largest airplane customer, has in some unaccountable fashion parlayed his employment with ERCO into "a constitutional right." What for anyone else would be considered a privilege at best has for Greene been enshrouded in constitutional protection. This sleight of hand is too much for me.

But this is not all. After holding that Greene has constitutional protection for his private job, the Court has ordered the President's Cabinet members to revoke their refusal to give Greene access to military secrets.[3] It

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[1] My brother HARLAN very kindly credits me with "colorful characterization" in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the Brief for the United States. See pp. 2, 17, 19, 29, 59.

[2] ERCO agreed in its government contract, as was well known to Greene, to exclude any individual from any part of its plant at which work under the contract was being performed who had not been cleared by the Navy for access to military secrets.

[3] Brother HARLAN states that I suggest "that the Court's action today requires 'the President's Cabinet members to revoke their refusal to give' the petitioner 'access to military secrets,' despite any views they may have as to his reliability . . . ." Government officials, well versed in the application of this Court's judgments to the practicalities

strikes down the present regulations as being insufficiently authorized by either the President or the Congress because the procedures fail to provide for confrontation or cross-examination at Board hearings. Let us first consider that problem.

I. THE CONSTITUTIONAL ISSUE.

After full consideration the Court concludes "that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." In so doing, as I shall point out, it holds for naught the Executive Orders of both President Roosevelt and President Truman and the directives pursuant thereto of every Cabinet officer connected with our defense since 1942 plus the explicit order of General Dwight D. Eisenhower as Chief of Staff in 1946. In addition, contrary to the Court's conclusion, the Congress was not only fully informed but had itself published the very procedures used in Greene's case.

I believe that the Court is in error in holding, as it must, in order to reach this "authorization" issue, that Greene's "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference" is protected by the Fifth Amendment. It cites four cases in support of this proposition and says compare four others. As I read those cases not

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of government operation, say that the relief which Greene seeks here—and which the Court now grants—is "in substance, a mandatory injunction requiring that the Government show him (or, in practice, allow contractors to show him) defense secrets, notwithstanding the judgment of the executive branch that such disclosure might jeopardize the national safety." Brief for the United States, 48.

one is in point.* In fact, I cannot find a single case in support of the Court's position. Even a suit for damages on the ground of interference with private contracts does not lie against the Government. The Congress specifically exempted such suits from the Tort Claims Act. 28 U. S. C. § 2680 (h). But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year.

In holding that the Fifth Amendment protects Greene the Court ignores the basic consideration in the case, namely, that no person, save the President, has a constitutional right to access to governmental secrets. Even though such access is necessary for one to keep a job

* *Dent* v. *West Virginia*, 129 U. S. 114 (1889), held that a West Virginia statute did not deprive one previously practicing medicine of his rights without due process by requiring him to obtain a license under the Act. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957), likewise a license case, did not pass upon the "right" or "privilege" to practice law, merely holding that on the facts the refusal to permit Schware to take the examination was "invidiously discriminatory." In *Peters* v. *Hobby*, 349 U. S. 331 (1955), the Court simply held the action taken violated the Executive Order involved. The concurring opinion, DOUGLAS, J., p. 350, went further but alone on the question of "right." The Court did not discuss that question, much less pass upon it. *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), held that the summary dismissal without further evidence by New York of a school teacher because he had pleaded the Fifth Amendment before a United States Senate Committee violated due process. The case merely touched on the "right" to plead the Fifth Amendment, not to "property" rights. *Truax* v. *Raich*, 239 U. S. 33 (1915); *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); and *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888), were equal protection cases wherein discrimination was claimed. Greene alleges no discrimination.

in private industry, he is still not entitled to the secrets. It matters not if as a consequence he is unable to secure a specific job or loses one he presently enjoys. The simple reason for this conclusion is that he has no constitutional right to the secrets. If access to its secrets is granted by the Government it is entirely permissive and may be revoked at any time. That is all that the Cabinet officers did here. It is done every day in governmental operation. The Court seems to hold that the access granted Greene was for his benefit. It was not. Access was granted to secure for the Government the supplies or services it needed. The contract with ERCO specifically provided for the action taken by the Cabinet officers. Greene as General Manager of ERCO knew of its provisions. If every person working on government contracts has the rights Greene is given here the Government is indeed in a box. But as was said in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128 (1940):

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . . Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government."

The Court refuses to pass on the constitutionality of the procedures used in the hearings. It does say that the hearings provided for in the program permit the restraint of "employment opportunities through a denial of clearance without the safeguards of confrontation and cross-examination." I think the Court confuses admin-

istrative action with judicial trials. This Court has long ago and repeatedly approved administrative action where the rights of cross-examination and confrontation were not permitted. *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (1948); *Carlson* v. *Landon*, 342 U. S. 524 (1952); *United States* v. *Nugent*, 346 U. S. 1 (1953); *United States* v. *Reynolds*, 345 U. S. 1 (1953); *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950); *Shaughnessy* v. *Mezei*, 345 U. S. 206 (1953); and *Jay* v. *Boyd*, 351 U. S. 345 (1956).

At no time since the programs now in vogue were established in 1942 have the rights of cross-examination and confrontation of witnesses been required. In fact the present regulations were patterned after the Employee Loyalty Program, first inaugurated upon the passage of the Hatch Act in 1939, in which the rights of confrontation and cross-examination have never been recognized. Every Attorney General since that time has approved these procedures, as has every President. And it should be noted, though several cases here have attacked the regulations on this ground, this Court has yet to strike them down.[5]

I shall not labor the point further than to say that in my opinion the procedures here do comport with that fairness required of administrative action in the security field. A score of our cases, as I have cited, support me in this position. Not one is to the contrary. And the action of the Court in striking down the program for lack of specific authorization is indeed strange, and hard for me to understand at this critical time of national emergency. The defense establishment should know—and now—whether its program is constitutional and, if not, wherein

[5] See *Bailey* v. *Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, affirmed by an equally divided Court, 341 U. S. 918 (1951); *Peters* v. *Hobby*, 349 U. S. 331 (1955).

it is deficient. I am sure that it will remember that in other times of emergency—no more grave than the present—it was permitted, without any hearing whatsoever—much less with confrontation and cross-examination—to remove American citizens from their homes on the West Coast and place them in concentration camps. See *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944). My examination of the Japanese exclusion orders indicates clearly that the Executive Order was a general authorization just as the two here. Congress at the time only created criminal offenses for violation of exclusion or curfew orders of the military commander. Likewise we have criminal statutes here. And while the Japanese orders were in time of war, those involved here had their inception in war and have been continued during the national emergency declared by the President. No one informed in present world affairs would say that our safety is less in jeopardy today. In fact we are now spending nearly as much money to protect it as during the war period. In this light it is inescapable that the existing authorizations are entirely sufficient. Let us examine them.

II. THE PRESIDENT AND THE CONGRESS HAVE GRANTED SUFFICIENT AUTHORITY TO THE CABINET OFFICERS.

Since 1941 the industrial security program has been in operation under express directives from the President. Within a week after the attack on Pearl Harbor, President Roosevelt issued Exec. Order No. 8972, 6 Fed. Reg. 6420, Dec. 12, 1941, which authorized both the Secretary of War and the Secretary of the Navy "to establish and maintain military guards and patrols, *and to take other appropriate measures,* to protect from injury and destruction national-defense material, national-defense premises, and national-defense utilities, . . ." (Emphasis added.)

GREENE *v.* McELROY.

CLARK, J., dissenting.

In 1942, under the authority of that Executive Order, the Secretary of War undertook the formulation and execution of a program of industrial security.[6] The procedures in operation from 1942 and 1943 are outlined in a 1946 publication of the Department of War entitled "Suspension of Subversives from Privately Operated Facilities of Importance to the Security of the Nation's Army and Navy Programs."[7] Interestingly enough, the instructions were issued in time of peace, did not give the suspect a hearing, and were signed by the then Chief of Staff—now President—Dwight D. Eisenhower.

In 1947, the National Security Act, 61 Stat. 495, effected a reorganization of the military departments and placed the Secretary of Defense at the head of the National Military Establishment. Section 305 (a) of the Act transferred to the new organization "[a]ll laws, orders, regulations, and other actions applicable with respect to any function . . . transferred under this Act . . . ." Section 213 created a Munitions Board

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[6] Report of the Commission on Government Security (1957), S. Doc. No. 64, 85th Cong., 1st Sess. 237, n. 7.

[7] War Department Pamphlet No. 32-4 (1946) provided both criteria and procedures for removal of subversives. The basic criterion was "good cause to suspect an employee of subversive activity . . . ," the latter being defined as "sabotage, espionage, or any other wilful activity intended to disrupt the national defense program." The basic procedure for removal was set out in ¶ 10:

"10. When adequate investigation has revealed that there is good cause to suspect an employee of subversive activity on a national defense project of importance to Army or Navy procurement, the vital success of the project, as well as the security of the loyal employees, may require that the Army or Navy, without revealing the nature or source of its evidence, request the immediate removal of such individual from the project. To this end the cooperation of the organizations representative of organized labor is solicited for the following program: . . ."

Clearly this procedure did not anticipate confrontation or cross-examination.

within the military establishment and under the supervision of the Secretary of Defense. Among its functions were

> "(1) to coordinate the appropriate activities within the National Military Establishment with regard to industrial matters, including procurement . . . plans . . . ; (2) to plan for the military aspects of industrial mobilization; . . . and (10) to perform such other duties as the Secretary of Defense may direct." [8]

In his first report to the President in 1948, Secretary of Defense Forrestal reported that:

> ". . . the Munitions Board is responsible for necessary action to coordinate internal security within the National Military Establishment with regard to industrial matters. This work is being planned and in some phases carried forward by the following programs:
>
> . . . . . .
>
> "*c.* Development of plans and directives to protect classified armed forces information in the hands of industry from potential enemies;
>
> "*d.* Establishment of uniform methods of handling of personnel clearances and secrecy agreements . . . ." First Report of the Secretary of Defense (1948) 102–103.

The forerunner of the exact program now in effect was put in operation in 1948 under the supervision of that Board. And, in the Annual Report to the President, in 1949, the Secretary, then Louis Johnson, reported that

> "*Industrial Security.*—A program to coordinate and develop uniform practices to protect classified mili-

[8] The National Security Act Amendments of 1949, 63 Stat. 578, amended § 213 so as to delete subparagraph 10.

> tary information placed in the hands of industry under procurement and research contracts was continued by the Munitions Board. Criteria were developed for the granting or denial of personnel and facility clearances in the performance of classified contracts. Work was started to establish a central security clearance register to centralize clearance data for ready reference by all departments and to prevent duplication in making clearance investigations. A joint Personnel Security Board administers this program, and the Industrial Employment Review Board hears appeals from security clearance denials." Second Report of the Secretary of Defense, for the Fiscal Year 1949 (1950), 85.

Transmitted with that report to the President was the Annual Report of the Secretary of the Army, where the number of security cases processed by the Army-Navy-Air Force Personnel Board, and the number of appeals handled by the Industrial Employment Review Board were detailed.[9]

Again in 1950 the Secretary of Defense informed the President, in a report required by law, of the status of the industrial security program.

> "In the past 6 months, the Munitions Board activated the Industrial Employment Review Board, established procedures under which the latter will operate, and developed a set of uniform criteria stipulating the circumstances under which security clearances will be denied. The Munitions Board also established a Central Index Security Clearance File to serve as a clearing house for all individual and facility clearances and denials, [and] developed a standard security requirements check list . . . .

[9] Annual Report of the Secretary of the Army for the Fiscal Year 1949 (1950), 192.

> Uniform standards for security investigations of facility and contractors' personnel are being developed . . . . A standard military security agreement is being coordinated to bind potential suppliers to security regulations before a classified contract is awarded, and a manual to give security guidance to industry is being prepared." Semiannual Report of the Secretary of Defense, July 1 to Dec. 31, 1949 (1950), 97.

The President, in 1953, in Reorganization Plan No. 6, 67 Stat. 638, transferred all of the "functions of the Munitions Board" to the Secretary of Defense and dissolved that Board. Since then the program has been in operation under the authority of the Secretary. Also in 1953, the President issued Exec. Order No. 10450, Apr. 27, 1953, 18 Fed. Reg. 2489, 3 CFR (1949–1953 Comp.), p. 936. That order dealt with the criteria and procedures to be used in the Federal Loyalty Security Program, which had been instituted under Exec. Order No. 9835, 12 Fed. Reg. 1935, 3 CFR (1943–1948 Comp.), p. 630, Mar. 21, 1947. The latter order made clear that federal employees suspected of disloyalty had no right of confrontation.[10] And the regulations promulgated under the order provided no such right. See 13 Fed. Reg. 9365, 5 CFR (1949), § 210, Dec. 31, 1948. These procedures were revised under Exec. Order No. 10450, *supra*, although again, confrontation and cross-examination were not provided. See

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[10] Part IV, § 2 of Exec. Order No. 9835 specifically stated that: ". . . the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. . . ."

19 Fed. Reg. 1503, 32 CFR, p. 288, Mar. 19, 1954. Thus, it was clear that the President had not contemplated that there would be a right of confrontation in the Federal Loyalty Security Program. And the report of the Secretary of the Army—transmitted to the President by the Secretary of Defense—made clear that the criteria of Exec. Order No. 10450 were being utilized not only where the loyalty of a government employee was in doubt, but also in carrying out the industrial security program. Semiannual Report of the Secretary of the Army, Jan. 1, 1954, to June 30, 1954, 135–136.

Thus we see that the program has for 18 years been carried on under the express authority of the President, and has been regularly reported to him by his highest Cabinet officers. How the Court can say, despite these facts, that the President has not sufficiently authorized the program is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand.

Furthermore, I think Congress has sufficiently authorized the program, as it has been kept fully aware of its development and has appropriated money to support it. During the formative period of the program, 1949–1951, the Congress, through appropriation hearings, was kept fully informed as to the activity. In 1949 D. F. Carpenter, Chairman of the Munitions Board, appeared before a Subcommittee of the House Committee on Appropriations to testify concerning the requested appropriation for the Board. While the report indicates much of the testimony was "off the record," it does contain specific references to the program here under attack.[11] Significantly the appropriation bill for 1950 included an item

[11] House of Representatives, Hearings before the Subcommittee of the Committee on Appropriations on the National Military Establishment Appropriation Bill for 1950, 81st Cong., 1st Sess. 91.

of $11,300,000 for the maintenance, *inter alia*, of the Board.

Again, in 1950 General Timberlake, a member of the Board, testified:

> "Then we are going to intensify the industrial mobilization planning within the Department of Defense, with particular emphasis on industrial security . . . ." House of Representatives, Hearings before a Subcommittee of the Committee on Appropriations on the Supplemental Appropriation for 1951, 81st Cong., 2d Sess. 264.

While, again, some of the testimony was "off the record" it was sufficiently urgent and detailed for the Congress to appropriate additional funds for the Board for 1951.[12]

By the 1953 Reorganization Plan, the functions of the Munitions Board were transferred to various Assistant Secretaries of Defense. The industrial security program was put under the Assistant Secretary of Defense for Manpower, Personnel, and Reserve Forces. Of course, this office received an appropriation each year. These hearings, to cite but two, certainly indicate an awareness

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[12] The reason for the dearth of legislative reference to the program appears in some 1955 hearings on an appropriation bill. Under consideration at the time was a proposal for a fund to reimburse contractor employees who had been suspended during a security check and subsequently cleared. General Moore testified that, in the past, such reimbursement had been made by the service secretaries out of their contingency funds. Then followed this colloquy:

"Mr. Mahon. Under that [the contingency fund] you can buy a boy a top, or a toy, provided the Secretary of Defense thinks it is proper?

"Gen. Moore. That is right, and we come down here and explain to this committee with respect to this in a very secret session how much we have spent and precisely what we have spent it for." House of Representatives, Hearings before the Subcommittee of the Committee on Appropriations on Department of Defense Appropriations for 1956, 84th Cong., 1st Sess. 780.

on the part of Congress of the existence of the industrial security program, and the continued appropriations hardly bespeak an unwillingness on the part of Congress that it be carried on. In 1955, the Eighty-fourth Congress, on the motion of Senator Wiley for unanimous consent, caused to be printed the so-called Internal Security Manual, S. Doc. No. 40, 84th Cong., 1st Sess. It is a compilation of all laws, regulations, and congressional committees relating to the national security. Contained in the volume is the "Industrial Personnel Security Review Regulation," *i. e.*, a verbatim copy of the regulations set up by the Secretary of Defense on February 2, 1955. This Manual outlined in detail the hearing procedures which are here condemned by the Court. And it is important to note that the final denial of Greene's clearance was by a Board acting under these very regulations. Still not one voice was raised either within or without the Halls of Congress that the Defense Department had exceeded its authority or that contractor employees were being denied their constitutional rights. In other cases we have held that the inaction of the Congress, in circumstances much less specific than here, was a clear ratification of a program as it was then being carried out by the Executive. Why, I ask, do we not do that here where it is so vital? We should not be "that blind Court . . . that does not see what '[a]ll others can see and understand . . . .'" *United States* v. *Rumely*, 345 U. S. 41, 44 (1953).

While it certainly is not clear to me, I suppose that the present fastidiousness of the Court can be satisfied by the President's incorporating the present industrial security program into a specific Executive Order or the Congress' placing it on the statute books. To me this seems entirely superfluous in light of the clear authorization presently existing in the Cabinet officers. It also subjects the Government to multitudinous actions—and perhaps large

damages—by reason of discharges made pursuant to the present procedures.

And I might add a *nota bene*. Even if the Cabinet officers are given this specific direction, the opinion today, by dealing so copiously with the constitutional issues, puts a cloud over both the Employee Loyalty Program and the one here under attack. Neither requires that hearings afford confrontation or cross-examination. While the Court disclaims deciding this constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DEXTER C. SHOULTZ, Plaintiff,	)	
vs.	)	No. 47330
ROBERT S. McNAMARA, Secretary of Defense, and Does One Through Ten, Defendants.	)	MEMORANDUM OF OPINION

Plaintiff, a holder of a security clearance, employed by Lockheed Missiles and Space Company of Sunnyvale, California, seeks to enjoin the defendants, Secretary of Defense Robert S. McNamara and other Defense Department officials, from suspending plaintiff's secret security clearance pursuant to the provisions of Section V. B. of Department of Defense Directive 5220.6, effective January 6, 1967.[1/] Both parties move for

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1/ "In the course of an investigation, interrogation, examination, or hearing, the applicant may be requested to answer relevant questions, or to authorize others to release relevant information about himself. The applicant is expected to give full, frank, and truthful answers to such questions, and to authorize others to furnish relevant information. The applicant may elect on constitutional or other grounds not to comply. However, such a wilful failure or refusal to furnish or to authorize the furnishing of relevant and material information may prevent the Department of Defense from reaching the affirmative finding required by reference (a) in which event any security clearance then in effect shall be suspended by the Assistant Secretary of Defense (Administration), or his designee, and the further processing of his case discontinued." Section V. B. of Department of Defense Directive 5220.6.

summary judgment and agree that there is no dispute as to the material facts. A minute order was entered on February 2, 1968, granting plaintiff's motion and denying defendants' motion.

The facts will not be fully repeated in this memorandum; instead, the Court adopts the statement of facts filed by defendants herein, augmented by the admitted allegations of the complaint and supplement to complaint filed herein, and such facts as do not appear in this memorandum are incorporated by this reference.

Plaintiff has been employed by Lockheed Aircraft Corporation and its subsidiary, Lockheed Missiles and Space Company, since 1960. Since June of 1966, he has been employed in the capacity of a computer programmer. Since 1956, with a brief exception not material here, plaintiff has held a security clearance at the access level of "Secret".

On or about October 13, 1967, plaintiff's security clearance was "suspended" under Section V. B. of Department of Defense Directive 5220.6 (hereinafter cited as Section V. B.). Further proceedings with respect thereto were discontinued because of plaintiff's earlier refusal to answer questions which he felt were irrelevant, immaterial or incompetent, or all of these, at a Defense Department interview held on June 30, 1967, in San Francisco, California. Almost immediately thereafter, plaintiff was informed by his employer that solely because of the suspension of his clearance he could no longer be employed by Lockheed but would be placed on "prolonged leave of absence" without pay until such time as his clearance status was settled.

On November 16, 1967, this Court issued a Temporary Restraining Order enjoining defendants from continuing the suspension of plaintiff's security clearance under Section V. B.; and at the hearing on the application for the Restraining Order and on

subsequent occasions, the parties consented to extensions of the Restraining Order until February 4, 1968.

The crux of this case is the validity of Section V. B. and the procedures contained therein under which plaintiff's security clearance was to be suspended./ First, Plaintiff asserts that this Section is invalid because it is not expressly authorized by Congress or the President. Secondly, plaintiff asserts that if Section V. B. is authorized, it deprives plaintiff of a security clearance without Due Process of law.

Plaintiff relies on Greene v. McElroy, 360 U.S. 474 (1959), in support of his argument that Section V. B. is invalid for lack of specific authorization. In Greene v. McElroy, supra, the Supreme Court defined the issue before it in that case as "whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chose professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." (Id., at 508.)

This Court believes that the teaching of Greene is that an agency of the federal government cannot, without affording the traditional forms of fair procedure, take administrative action which effectively deprives an individual of his means of livelihood on loyalty or security grounds unless, at the least, Congress (or the President, if he is the source of the power) has expressly authorized the lesser procedure. See Garrot v. United States, 340 F.2d 615, 618 (Ct. Cl. 1965).

At the outset, defendants attempt to distinguish Greene by asserting that the suspension here is not a final revocation because plaintiff has it within his power to reopen the proceedings

at any time he chooses to answer the questions which he declined to answer at his interview. Accordingly, defendants argue that Greene does not require specific authorization by the President or Congress for the Department of Defense to have included in Directive 5220.6 "normally accepted administrative practices" which permit suspension of a security clearance without a hearing and related procedural rights when the suspension does not amount to a "final" revocation.

In formulating the Greene test, the Supreme Court stressed the effect on the individual's livelihood of the challenged administrative action. Greene v. McElroy, supra, at 500, 502, 506-7, 508; Garrott v. United States, 340 F.2d 615, 619 (Ct. Cl. 1965). Here, it is undisputed that under Section V. B., once a security clearance has been suspended, there is no further administrative or judicial remedy to challenge the suspension. Further processing of the case is discontinued. Defendants argue that the suspension remains in effect and further processing is discontinued only for as long as plaintiff refuses to answer the propounded questions. The Court is of the opinion, however, that this remedy is illusory. In effect, it requires plaintiff to submit to procedures which he believes are unauthorized and unconstitutional, thus rendering moot his objections to the procedures, in order to obtain a hearing with the procedural safeguards of Sections 3, 4 and 5 of Executive Order 10865.[2/] In these

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2/ Executive Order 10865 (25 Fed. Reg. 1583), entitled "Safeguarding Classified Information Within Industry", sets up comprehensive procedures to provide the "maximum possible safeguards" to protect the interests of a holder of a security clearance. It was issued in 1960 by President Eisenhower after Greene v. McElroy. It will be discussed in more detail elsewhere in this memorandum.

circumstances, the Court believes that this "suspension" which has entailed a discontinuance of the processing of plaintiff's clearance, has the same final effect on plaintiff's livelihood that the Supreme Court was concerned about in Greene. Moreover, although plaintiff's employer was informed by the defendants that the suspension of plaintiff's security clearance was not intended to prevent utilization of plaintiff upon any non-classified work that may be available to plaintiff, defendants admit that plaintiff was informed by authorized agents of Lockheed that solely because of the suspension of his clearance he could no longer be employed by Lockheed and that he would be placed on "prolonged leave of absence" without pay until such time as his clearance status was settled. In light of these facts, the Court feels that plaintiff has suffered a serious deprivation of his "right to hold specific private employment and to follow a chosen profession . . . [which come] . . . within the 'liberty' and 'property' concepts of the Fifth Amendment." Greene v. McElroy, supra, 360 U.S. 474, at 492. This Court is of the opinion that to hold otherwise would be honoring unduly the semantic difference between "final revocation" and "suspension", and would be disregarding the effect on plaintiff's livelihood so strongly emphasized in the Greene case.

The Court must next inquire whether the governmental action that was taken here deprived plaintiff of traditional forms of fair procedure which are associated with procedural Due Process. The salient facts can be briefly summarized. Plaintiff was notified that "the Screening Board [of the Department of Defense] has some new information that might affect . . . [his] . . . continued eligibility for a clearance", and that the Screening

Board was going to "use this information to re-examine the status" of plaintiff's clearance.[3/] It was indicated to plaintiff that this new information had been "developed by the investigation conducted in his case".[4/] Plaintiff was requested to attend an interview at which he would be questioned about "matters germane to his [continued] eligibility for a security clearance." Plaintiff was also informed that, "[i]n particular, the Board desires that he be questioned in order to determine the extent ofhis participation in Cuban affairs."[5/] No further notice of the purpose and scope of the inquiry was given to plaintiff, nor was he apprised of the nature of the "new information" possessed by the Screening Board which had prompted the re-examination of his security clearance. Plaintiff was informed that he could be represented by counsel at the interview and that he would be afforded an opportunity to make a statement in his own behalf. His counsel was provided before the interview with a copy of Defense Department Directive 5220.6, including Section V. B., and plaintiff was informed that the provisions of Section V. B. would be applicable. Further, plaintiff was told that if he

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3/ Letter to plaintiff's counsel dated March 14, 1967, from Solis Horwitz, Assistant Secretary of Defense (Administration) Exhibit B to the Complaint).

4/ Letter to plaintiff's counsel dated April 14, 1967, from James E. Stauffer, Department Counsel (Department of Defense) (Exhibit A to Defendant's Statement of Material Facts).

5/ Letter to plaintiff's counsel dated February 1, 1967, from William Scanlon, Director, Administrative Staff (Department of Defense)(Exhibit A to Complaint).

refused "to answer questions relevant to his continued eligibility for security clearance, his existing clearance will be suspended and further processing of his case will be discontinued."

At the outset of the interview on June 30, 1967, plaintiff stated his name, address and employer in response to questions propounded by the Department Counsel who was conducting the interview. Thereafter, he declined to answer all other questions on the grounds that they were irrelevant, incompetent or immaterial, or all of these. There was no hearing officer or other impartial person present at the interview to make rulings on these objections. After each objection, the Department Counsel proceeded to the next question.

By letter dated October 13, 1967, plaintiff was informed by the Department of Defense in pertinent part that:

> "Having reviewed the transcript of that interview, the Screening Board has concluded that Mr. Shoultz's refusal to answer the questions addressed to him by Department Counsel denies the Board information it considers essential to a determination of his continued eligibility for security clearance. The conclusion by the Screening Board that the additional information is essential was based upon its evaluation of facts developed by investigation. Without that information the Board is unable to reach the affirmative finding required by Section2 of Executive Order 10865 dated February 20, 1960, i.e., that it is clearly consistent with the national interest to continue his clearance."

Almost immediately, plaintiff was notified by his employer that he would be terminated solely because of the suspension.

The Court is of the opinion that, as in Greene, there are serious constitutional problems inherent in the suspension procedure as outlined above which is sanctioned by Section V. B. In Hannah v. Larche, 363 U.S. 420 (1960), the Supreme Court stated: "Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account." (Id., at

442.) In that case, it was held that the rights to know the specific charges that are being investigated and the identity of the complainants, and the right to confrontation and cross-examination of the complainants and other witnesses were not constitutionally required at a Civil Rights Commission investigative hearing. The Court emphasized the "purely investigative nature of the Commission proceedings" (Id., ad 451) and distinguished between such a proceeding and one where the government agency involved is charged with making "determinations in the nature of adjudications affecting legal rights." (Ibid.) The Court stated that in contrast to this latter type of governmental action, as occurred in Greene v. McElroy, supra, "the Civil Rights Commission does not make any binding orders or issue 'clearances' or licenses having legal effect. Rather, it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action de novo." (Id., at 452.)

Closely viewed, the personal interview is neither a purely investigative nor an adjudicatory hearing. Because of the direct effects it can have, it is a hyrbrid proceeding. The investigating officer, called the Department Counsel, is not empowered to make any determinations affecting an individual's security clearance. Yet the suspension which was ordered here was clearly more than a collateral or incidental effect of the interview. It was expressly sanctioned by Section V. B. for refusal to answer relevant questions. Plaintiff's clearance was ordered to be suspended precisely as he had been forewarned. This action of the Screening Board under Section V. B. transforms the personal interview into something more than a purely investigative hearing.

This two-stage process, like the governmental action in Greene, "was determining whether [plaintiff] could have a security clearance--a license in a real sense, and one that had a significant impact upon his employment." Hannah v. Larche, supra, 363 U.S. 420, at 452.

The lesser procedures sanctioned here by Section V. B. must be viewed in light of the drastic impact which they have on an individual's livelihood after a refusal to answer questions at a personal interview. The finality of this impact has heretofore been discussed. The only avenue available to plaintiff to reopen the proceedings is to submit to the lesser procedures provided by Section V. B. Finally, when viewing these procedures, the Court attaches significance to the fact that Defense Department Directive 5220.6 contains an alternative procedure of a Statement of Reasons and a full hearing which would more adequately protect plaintiff's procedural rights.[6/]

Based on the foregoing analysis, the Court feels that Section V. B., in sanctioning the procedures which took place here, raises serious constitutional questions. In summation, Section V. B. permits an indefinite, if not effectively permanent, suspension of

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6/ Section VIII. Further, subsection 8 thereof provides for a summary procedure when the Secretary of Defense "determines personally that the provisions of this Directive cannot be invoked consistently with the national security."

an individual's security clearance, thereby nullifying employment opportunity, without any statement of charges or other specific notice, without any opportunity to answer specific facts alleged to be jeopardizing an individual's security clearance, without any confrontation or cross-examination, and without any factual basis given as the reason for the suspension.

The Court is not dissuaded from the opinion by the defendant's argument that a suspension so long as there is a refusal to furnish relevant information is reasonable and procedurally proper. The instant case does not present the question whether the refusal on unprivileged grounds to answer questions in a properly convened hearing could serve as the basis for the type of suspension which was prescribed here. Defendants strenuously rely on Konigsberg v. State Bar, 366 U.S. 36 (1961) and on In Re Anastaplo, 366 U.S. 82 (1961). The government action involved in each of those cases occurred after the refusal to answer questions by an applicant for admission to a state bar in the midst of a hearing fully consonant with procedural Due Process requirements. Also, it is significant that those administrative decisions were subject to judicial review.

Nor is the Court persuaded by the cases which defendants cite which stand for the proposition that an incomplete initial or renewal application entitles a governmental agency to discontinue processing the application.[7/] In reaching this conclusion

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7/ Borrow v. FCC, 285 F.2d 666 (D.C. Cir. 1960), cert. denied, 364 U.S. 892 (1960); Cronan v. FCC, 285 F.2d 288 (D.C. Cir. 1960), cert. denied, 364 U.S. 892 (1961); Blumenthal v. FCC, 318 F.2d 276 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963); Schneider v. Roland, 263 F. Supp. 496 (W.D. Wash. 1967), rev'd. on other grounds, 36 Law Week (January 16, 1968).

the Court is persuaded by the emphasis which the Supreme Court placed in Greene upon the right to be free from unreasonable governmental action by which "affected persons may lose their jobs and may be restrained in following their chose professions . . ."(Greene v. McElroy, supra, 360 U.S. 474, at 493) (emphasis added).

Having exposed the serious constitutional problems in Section V. B., this Court must next inquire whether "the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." (Id., at 507). Plaintiff asserts, and defendants do not contend otherwise, that Congress has never enacted an industrial security clearance program. Therefore, if Section V. B. is authorized, the authorization must specifically appear in an Executive Order issued by the President.

The defendants do not point to any Executive Order as specifically authorizing the procedures of Section V. B. In their Memorandum of Points and Authorities defendants argue that the authority and responsibility for the protection of official information affecting the national security is granted and delegated by Executive Order 10501, 18 Fed. Reg. 7049, 50 U.S.C. § 401 note. That Order, however, does not specifically authorize the procedure sanctioned by Section V. B. Defendants also discuss Executive Order 10865, 25 Fed. Reg. 1583, 50 U.S.C. § 401 note, as being relevant. Section 3 of that Order provides, "[e]xcept as provided in Section 9 of this Order", a security clearance may not be finally denied or revoked "unless the applicant has been given the following": (1) a comprehensive and detailed written statement of reasons; (2) an opportunity to reply in writing;

(3) an opportunity to appear personally at a hearing; (4) a reasonable opportunity to prepare for the appearance; (5) to be represented by counsel; (6) an opportunity to confront and cross-examine his accusers (except, as provided in Section 4, when the head of the department declares that such disclosure "would be substantially harmful to the national interest"); and (7), a written notice of a final decision which contains findings as to each allegation in the statement of reasons. This section clearly does not authorize the procedure of Section V. B. and the Court feels that by inference Section V. B. is inconsistent with this Section of the Executive Order. Section 9 provides for a revocation or denial of a security clearance under lesser procedural protection "only when the head of a department determines that the procedures prescribed in Sections 3, 4, and 5 cannot be invoiced sonsistently with the national security". Defendants do not contend that this section has been complied with here or that it authorizes the procedure of SectionV. B. Finally, Sections 1(a) and 2, the sections of Executive Order 10865 which generally restate the authority and responsibility of the executive department heads to protect classified information and issue appropriate regulations, do not constitute the specific authorization for Section V. B. which is required by Greene v. McElroy, supra. As defendants point to no other Executive Orders which might provide the requisite authorization, this Court concludes that Section V. B. is invalid as not being authorized. This ruling makes it unnecessary for this Court to decide the other ground advanced by plaintiff in support of his motion for summary judgment.

For the foregoing reasons, plaintiff's motion for summary judgment has been granted and defendants' cross-motion for summary judgment has been denied. Defendants and each of them, their agents and subordinates are permanently enjoined from suspending plaintiff's security clearance for classified materials described in the complaint in this action under the provisions of Section V. B. of Department of Defense Directive 5220.6, dated December 7, 1966. This Order does not prevent defendants from taking appropriate action to safeguard the national security under Section 9 of the Executive Order 10865 or any other authorized provisions of Directive 5220.6, if they be so advised. 8/

Dated: February 9, 1968.

United States District Judge

8/ It is interesting to note that plaintiff was asked to attend an interview regarding his security clearance by the Defense Department at least as early as November 30, 1966. His clearance was not ordered to be suspended until on or about October 13, 1967.

SUPREME COURT OF THE UNITED STATES

No. 196.—October Term, 1967.

Herbert Schneider, Appellant, *v.* Willard Smith, Commandant, United States Coast Guard.	On Appeal From the United States District Court for the Western District of Washington.

[January 16, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellant, who has served on board American-flag commercial vessels in various capacities, is now qualified to act as a second assistant engineer on steam vessels. But between 1949 and 1964 he was employed in trades other than that of a merchant seaman. In October 1964 he applied to the Commandant of the Coast Guard for a validation of the permit or license which evidences his ability to act as a second assistant engineer.

Under the Magnuson Act, 50 U. S. C. § 191 (b), the President is authorized, if he finds that "the security of the United States is endangered by . . . subversive activity," to issue rules and regulations "to safeguard against destruction, loss, or injury from sabotage or other subversive acts" all "vessels" in the territories or waters subject to the jurisdiction of the United States.[1]

[1] Section 191 provides in part:

"Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—

"(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect such vessels at any time, to place guards thereon, and, if necessary in his

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President Truman promulgated Regulations, 33 CFR, pt. 6, which gives the Commandant of the Coast Guard authority to grant or withhold validation of any permit or license evidencing the right of a seaman to serve on a merchant vessel of the United States. § 6.10–3. He is directed not to issue such validation, unless he is satisfied that "the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States." § 6.10–1.

The questionnaire, which appellant in his application was required to submit, contained the following inquiry which he answered:

> "ITEM 4. Do you now advocate, or have you ever advocated, the overthrow or alteration of the Government of the United States by force or violence or by unconstitutional means?
>
> "Answer: No."

The questionnaire contained the following inquiries which related to his membership and participation in organizations which were on the special list of the Attorney General as authorized by Executive Order 10450, 18 Fed. Reg. 2489:

> "ITEM 5. Have you ever submitted material for publication to any of the organizations listed in Item 6 below?

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opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof.

"(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

"Answer. No.

"ITEM 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below? [There followed a list of more than 250 organizations.]

"Answer. Yes.

"If your answer is 'yes,' give full details in Item 7.

"ITEM 7. (Use this space to explain Items 1 through 6. Attach a separate sheet if there is not enough space here.)

"Answer. I have been a member of many political & social organizations, including several named on this list.

"I cannot remember the names of most of them and could not be specific about any.

"To the best of my knowledge, I have not been a member of or participated in the activities of these organizations for ten years."

Upon receiving the questionnaire returned by the appellant, the Commandant advised him that the information was not sufficient and that answers to further interrogatories were necessary.[2]

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[2] "1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

"(a) List the names of the political and social organizations to which you belonged, and location.

"(b) Furnish approximate dates of membership.

"(c) Furnish full particulars concerning the extent of your activities and participation in the organizations (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.).

"(d) Your reason for discontinuing the membership.

"(e) Your present attitude toward the principles and objectives of the organizations.

"If your answer is 'YES' to the following Questions, *explain fully* in the space provided at the end of the Interrogatories:

"2. Are you now, or have you ever been a member of or affiliated

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In reply, appellant, speaking through his counsel, admitted to the Commandant that he had been a member of the Communist Party as well as other organizations on the Attorney General's list and that he had subscribed to People's World. He said that he had joined the Party because of his personal philosophy and idealistic goals, but later quit it and the other organizations due to fundamental disagreement with Communist methods and techniques. But beyond that he said he would not answer because "it would be obnoxious to a truly free citizen to answer the kinds of questions under compulsion that you require." The Commandant declined to process the application further, relying upon 33 CFR § 121.05 (d)(2) which authorizes him to hold the application in abeyance, if an applicant fails or refuses to furnish the additional information.

Appellant thereupon brought this action for declaratory relief that the provisions of the Magnuson Act in question and the Commandant's actions thereunder were unconstitutional, praying that the Commandant be directed to approve his application and that he be enjoined

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with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates?

"....

(Answer 'Yes' or 'No.')

"3. Have you at any time been a subscriber to the 'People's World'?

".... If your answer is 'Yes,' give dates.

(Answer 'Yes' or 'No.')

4. "Have you at any time engaged in any activities in behalf of the 'People's World'? ....

(Answer 'Yes' or 'No.')

"If your answer is 'Yes,' furnish details.

"5. What is your present attitude toward the Communist Party?

"6. What is your present attitude toward the principles and objectives of Communism?

"7. What is your attitude toward the form of Government of the United States?

from interfering with appellant's employment upon vessels flying the American flag.

A three-judge court was convened and the complaint was dismissed. 263 Fed. Supp. 496. The case is here on appeal, 28 U. S. C. § 1253. We postponed the question of jurisdiction to the merits. 389 U. S. 810.

We agree, as does appellee, that the case was one to be heard by a three-judge court and that accordingly we have jurisdiction of this appeal. For appellant did raise the question as to whether the statute was unconstitutional because of vagueness and abridgment of First Amendment rights and also questioned whether the power to install a screening program was validly delegated. A three-judge court was accordingly proper. *Baggett* v. *Bullitt,* 377 U. S. 360; *Zemel* v. *Rusk,* 381 U. S. 1.

The Magnuson Act gives the President no express authority to set up a screening program for personnel on merchant vessels of the United States. As respects "any foreign-flag vessels" the power to control those who "go or remain on board" is clear. 50 U. S. C. § 191 (a). As respects personnel of our own merchant ships, the power exists under the Act only if it is found in the power to "safeguard" vessels and waterfront facilities against "sabotage or other subversive acts," that is, under § 191 (b). The Solicitor General argues that the power to exclude persons from vessels "clearly implies authority to establish a screening procedure for determining who shall be allowed on board." But that power to exclude is contained in § 191 (a) which, as noted, applies "to foreign-flag vessels," while, as we have said, the issue tendered here must find footing in § 191 (b).[3]

[3] It is true that Senator Magnuson when discussing this measure stated that it "will give the President the authority to invoke the same kind of security measures which were invoked in World War I and World War II." 96 Cong. Rec. 10795. And from that Solicitor-

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We agree with the District Court that keeping our merchant marine free of saboteurs is within the purview of this Act. Our question is the much narrower one.

The Regulations prescribe the standards by which the Commandant is to judge the "character and habits of life" of the employee to determine whether his "presence on board" the vessel would be "inimical to the security of the United States":

> "(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.
>
> "(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

General argues that the Act authorizes the broad sweeping personnel screening programs which were in force during World War II.

But this reference by Senator Magnuson apparently was to § 191 (a) which, as noted, covers "any foreign-flag vessels." When it came to § 191 (b) Senator Magnuson did not speak in terms of any screening program, but said:

"It [the bill] also has this purpose, which I think is a good one: As I have said before, the last stronghold of subversive activity in this country, in my opinion, or at least the last concentrated stronghold, has been around our water-fronts. It would be impossible for destruction to come to any great port of the United States, of which there are many, as the result of a ship coming into port with an atomic bomb or with biological or other destructive agency, without some liaison ashore. This would give authority to the President to instruct the FBI, in cooperation with the Coast Guard, the Navy, or any other appropriate governmental agency, to go to our water fronts and pick out people who might be subversives or security risks to this country. I think it goes a long way toward taking care of the domestic situation, as related to this subject, particularly in view of the large amount of talk we have had in the Senate within the past few days about Communists. The bill also protects that last loophole which is left, by which there might be some actual destruction along the shores of the United States." 96 Cong. Rec. 11321.

"(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

"(d) Deliberate unauthorized disclosure of classified defense information.

"(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." 33 CFR § 121.03.

If we assume *arguendo* that the Act authorizes a type of sceening program directed at "membership" or "sympathetic association," the problem raised by it and the Regulations would be kin to the one presented in *Shelton* v. *Tucker,* 364 U. S. 479, where a teacher to be hired by a public school of Arkansas had to submit an affidavit "listing all organizations to which he at the time belongs and to which he has belonged during the past five years." *Id.,* 481.

We held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed; that an unlimited and indiscriminate search of the employee's past which interferes with his associational freedom is unconstitutional. *Id.,* 487–490.

If we gave § 191 (b) the broad construction the Solicitor General urges, we would face here the kind of issue present in *Shelton* v. *Tucker, supra,* whether government can probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seaman on our merchant vessels.

A saboteur on a mechant vessel may, of course, be dangerous. But no charge of appellant being a saboteur was made. Indeed, no conduct of appellant was at issue

before the Commandant. The propositions tendered in the complaint were (1) plaintiff is now and always has been loyal to the United States; (2) he has not been active in any organization on the Attorney General's list for the past 10 years; (3) he has never committed any act of sabotage or espionage or any act inimical to the security of the United States. Those propositions were neither contested by the Commandant nor conceded. He took the position that admission of evidence on those propositions was "irrelevant and immaterial."

We are loathe to conclude that Congress, in its grant of authority to the President to "safeguard" vessels and waterfront facilities from "sabotage or other subversive acts," undertook to reach into the First Amendment area. The provision of the Act in question, 50 U. S. C. § 191 (b), speaks only in terms of actions, not ideas or beliefs or reading habits or social, educational, or political associations.

The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people. The First Amendment's ban against Congress "abridging" freedom of speech, the right peacably to assemble and to petition, and the "associational freedom" (*Shelton* v. *Tucker, supra,* at 490) that goes with those rights create a preserve where the views of the individual are made inviolate. This is the philosophy of Jefferson that "[T]he opinions of men are not the object of civil government nor under its jurisdiction. . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ." [4]

[4] A Bill for Establishing Religious Freedom, Jefferson Cyclopedia 976 (1900).

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No act of sabotage or espionage or any act inimical to the security of the United States is raised or charged in the present case.

In *United States* v. *Rumely,* 345 U. S. 41, the Court construed the statutory word "lobbying" to include only direct representation to Congress, its members, and its committees, not all activities tending to influence, encourage, promote, or retard legislation. *Id.,* at 47. Such an interpretation of the statute, it was said, was "in the candid service of avoiding a serious constitutional doubt" (*ibid.*)—doubts that were serious "in view of the prohibition of the First Amendment." *Id.,* at 46.

The holding in *Rumely* was not novel. It is part of the stream of authority which admonishes courts to construe statutes narrowly so as to avoid constitutional questions.[5]

The Court said in *Rumely,* "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience teaches us to tread warily in this domain." 345 U. S., at 46.

The present case involves investigation, not by Congress but by the Executive Branch, stemming from congressional delegation. When we read that delegation with an eye to First Amendment problems, we hesitate to conclude that Congress told the Executive to ferret out the ideological strays in the maritime industry. The words it used—"to safeguard . . . from sabotage or other subversive acts"—refer to actions, not to ideas or

[5] *United States* v. *Delaware & H. Co.,* 213 U. S. 366, 407–408; *United States* v. *Harris,* 347 U. S. 612, 618, n. 6; *International Machinists* v. *Street,* 367 U. S. 740, 749; *Lynch* v. *Overholser,* 369 U. S. 705, 710–711; *United States* v. *National Dairy Corp.,* 372 U. S. 29, 32.

beliefs. We would have to stretch those words beyond their normal meaning to give them the meaning the Solicitor General urges. *Rumely,* and its allied cases, teach just the opposite—that statutory words are to be read narrowly so as to avoid questions concerning the "associational freedom" that *Shelton* v. *Tucker* protected and concerning other rights within the purview of the First Amendment.

Reversed.

MR. JUSTICE BLACK, while concurring in the Court's judgment and opinion, also agrees with the statement in MR. JUSTICE FORTAS' concurring opinion that the statute under consideration, if construed to authorize the interrogatories involved, is offensive to the First Amendment.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 196.—October Term, 1967.

Herbert Schneider, Appellant, *v.* Willard Smith, Commandant, United States Coast Guard.	On Appeal From the United States District Court for the Western District of Washington.

[January 16, 1968.]

Mr. Justice Fortas, concurring.

I concur in the opinion of the Court. Reversal is dictated because the interrogatories which petitioner refused to answer offend the First Amendment. *Shelton* v. *Tucker*, 364 U. S. 479 (1960). (They also pass the outermost bounds of reason. No agency may be permitted to require of a person, subject to heavy penalty, sworn essays as to his "attitude toward the form of government of the United States" or "full particulars," under oath, without time limit, as to contributions made and functions attended with respect to 250 organizations.) I agree that since Congress did not specifically authorize a personnel screening program, authority to impose procedures of the comprehensive type here involved, necessarily impinging on First Amendment freedoms, may not be inferred from dubious general language. The fault, however, is not that there was an inadequate or improper delegation, but that Congress did not authorize the type of investigation which was launched. Needless to say, Congress has constitutional power to authorize an appropriate personnel screening program and to delegate to executive officials the power to implement and administer it. See *United States* v. *Robel*, —— U. S. —— (1967).

Mr. Justice Stewart, agreeing with the separate views of Mr. Justice Fortas, concurs in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 196.—OCTOBER TERM, 1967.

Herbert Schneider, Appellant, *v.* Willard Smith, Commandant, United States Coast Guard.	On Appeal From the United States District Court for the Western District of Washington.

[January 16, 1968.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, concurring in the result.

I agree with the Court that the Magnuson Act did not authorize the inqury undertaken by the Coast Guard Commandant and that therefore the judgment of the District Court must be reversed. I express no opinion as to the scope of inqury which Congress could constitutionally provide with respect to applicants for the position of merchant seaman.

December 7, 1966
NUMBER 5220.6

ASD(A)

Department of Defense Directive

SUBJECT Industrial Personnel Security Clearance Program

References: (a) Executive Order 10865, Safeguarding Classified Information Within Industry, dated February 20, 1960, as amended by Executive Order 10909, (Appendix A)
(b) DoD Directive 5220.6, Subject: Industrial Personnel Access Authorization Review Regulation, dated July 28, 1960 (cancelled)
(c) DoD Directive 5220.22, DoD Industrial Security Program, dated July 30, 1965
(d) DoD Directive 5515.9, Settlement of Claims Under the Provisions of the Federal Tort Claims Act (28 U.S. Code; Sections 2671-2680) (Delegation to the Secretary of the Army) dated November 15, 1961
(e) DoD Directive 5210.8, Policy on Investigation and Clearance of DoD Personnel for Access to Classified Defense Information, dated February 15, 1962

I. PURPOSE

In accordance with reference (a) this Directive establishes the standard and criteria for making security clearance determinations when persons employed in private industry require access to classified defense information, and sets forth procedures which shall be followed for cases arising under the DoD Industrial Personnel Security Clearance Program (hereinafter referred to as the Program).

II. CANCELLATION

Reference (b) is hereby superseded and cancelled, effective 30 days from the date hereof.

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III. DEFINITIONS

A. Department of Defense components includes the Military Departments and Defense Agencies and, as appropriate, their subordinate organizations.

B. Agencies refers to Executive Departments and agencies outside of the Department of Defense which have agreed to process industrial personnel security clearances under this Directive.

C. Agency Case. A case arising out of the release of classified information to or within industry by any Agency.

D. Agency Head. The head of any of the Agencies in B. above.

E. Applicant. A person eligible to have the status of his clearance determined under this Directive.

F. Contractor. An industrial, educational, commercial, or other organization which has executed a Department of Defense Security Agreement.

G. Examiner. An official designated by the Department of Defense to conduct hearings and make determinations under the Program.

H. Hearing. A proceeding convened and conducted by an Examiner in accordance with this Directive for the purpose of determining an applicant's eligibility for a clearance.

I. Security Clearance or Clearance. An authorization for a contractor or person employed by a contractor to have access to specified levels of classified defense information provided his duties so require.

J. Statement of Reasons. A statement issued by the Department of Defense setting out the reasons why an applicant's security clearance should be denied, suspended, or revoked.

IV. APPLICABILITY AND SCOPE

A. The provisions of this Directive are applicable to all Department of Defense components.

B. By mutual agreement, the provisions of this Directive also extend to other Agencies. These agencies include the Department of State, Department of Treasury, Department of Commerce, General Services Administration, National Science Foundation, Small Business Administration, Federal Aviation Agency, National Aeronautics and Space Administration, and such other Agencies as may agree to process industrial security clearance cases under this Directive.

C. All applicants in private industry who require access to classified defense information shall as a minimum be investigated in accordance with the standards set forth in reference (e).

D. This Directive applies to cases in which the applicant is eligible to be considered for a clearance, and a Department of Defense activity has recommended either (1) that such clearance be denied or revoked, or (2) that such clearance be suspended under section IX. A. below.

E. In cases where an applicant's clearance has been suspended or a Statement of Reasons issued, the subsequent termination of employment will not affect the applicant's right to pursue these procedures.

F. The Program may be extended to other cases at the direction of the Assistant Secretary of Defense (Administration).

G. The Program does not extend to cases involving access to communications analysis material or information, to cases in which a clearance is administratively withdrawn without prejudice upon a finding that the applicant is not eligible, or to cases in which an interim clearance is withdrawn during an investigation.

V. POLICY

A. Access to classified information shall be granted or continued only to those individuals who have been determined eligible based upon a finding that to do so is clearly consistent with the national interest.

B. In the course of an investigation, interrogation, examination, or hearing, the applicant may be requested to answer relevant questions, or to authorize others to release relevant information about himself. The applicant is expected to give full, frank, and truthful answers to such questions, and to authorize others to furnish relevant information. The applicant may elect on constitutional or other grounds not to comply. However, such a wilful failure or refusal to furnish or to authorize the furnishing of relevant and material information may prevent the Department of Defense from reaching the affirmative finding required by reference (a) in which event any security clearance then in effect shall be suspended by the Assistant Secretary of Defense (Administration), or his designee, and the further processing of his case discontinued.

C. Inquiries concerning an applicant will be limited to matters relevant to a determination whether granting access to classified information is clearly consistent with the national interest, and shall not be directed to the applicant's opinions about: (1) religious beliefs and affiliations; (2) racial matters; (3) political candidates or parties other than those included in section VI. D. below; (4) the constitutionality or wisdom of legislative policies.

D. Determinations under this Directive shall be in terms of the national interest and shall in no sense be determinations as to the loyalty of the applicant; nor shall they be considered a bar to employment in a position not requiring access to classified information.

E. The conduct described in section VI. below may, in the light of all the surrounding circumstances, be the basis for denying or revoking a clearance. The conduct varies in implication, degree of seriousness, and significance depending upon all the factors in a particular case. Therefore, the ultimate determination must be an over-all common sense one based upon all the information which may properly be considered under this Directive including, but not limited to, such factors as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

VI. CRITERIA

The criteria for determining eligibility for a clearance shall relate, but not be limited to, the following:

A. The attempt or commission of any act of sabotage, espionage, treason, or sedition, 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 continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or with an espionage agent or other representative of a foreign nation whose interests 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 sympathetic association with, or participation in the activities of 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. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

F. 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.

G. Participation in the activities of an organization established as a front for an organization referred to in D., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

H. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

I. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

J. Sympathetic association with a member, or members, or an organization referred to in D., above. Ordinarily, this will not include chance or occasional meetings nor contacts limited to normal business or official relations.

K. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in A. through J., above. A close continuing association may be deemed to exist where the individual lives at the same premises as, frequently visits, or frequently communicates with, such person.

L. Close continuing association of the type described in A. through K., above, even though later separated by distance, where the circumstances indicate that renewal of the association is probable.

M. Wilful violation or disregard of security regulations.

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

O. Any deliberate misrepresentations, falsifications or omission of material facts from a Personnel Security Questionnaire, Personal History Statement, or similar document.

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

Q. Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.

R. 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 cases.

S. Any facts or circumstances which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest. Such facts may include: The presence of a close relative of the applicant or of the applicant's spouse in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives which may be likely to cause action contrary to the national interest. The term close relative includes parents, brothers, sisters, offspring and spouse.

T. Excessive indebtedness, recurring financial difficulties, unexplained affluence or repetitive unexplained absences.

U. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional Committee, Federal or State court, or Federal administrative body, regarding charges of his alleged disloyalty or other conduct relevant to his security eligibility.

VII. ADMINISTRATION

A. The Assistant Secretary of Defense (Administration) shall provide over-all policy guidance for the Program and is responsible for its administration, including the organization and composition of the various boards and staffs, and the establishment of field offices. The Assistant Secretary of Defense (Administration), or his designee, may issue such supplemental instructions and guidance as may be desirable for efficient and equitable operation of the Program or to accomplish the objectives set out in reference (a).

B. An Office shall be established in the Office of the Assistant Secretary of Defense (Administration), to administer the Program and shall include an Administrative Staff, Department Counsel, Screening Board, Field Offices, and an Appeal Board.

C. DoD components designated to support boards, staffs, and field offices will provide, from resources available to the designated DoD component, financing, personnel and personnel spaces, office facilities, and related administrative support.

D. The Assistant Secretary of Defense (Administration), or his designee, is authorized to issue in appropriate cases, invitations and travel orders to persons to appear and testify who have provided oral or written statements adverse to the applicant relating to a controverted issue. The Assistant Secretary of Defense (Administration), or his designee, is authorized to issue instructions regarding the issuance of travel orders, payment of travel expenses, and reimbursement for actual expenses as provided by section 6 of reference (a).

E. Screening Board members will be designated by the Assistant Secretary of Defense (Administration), or his designee. The Screening Board will be divided into panels of three members each; one member of each panel will be designated as chairman. In an agency case, the Agency Head may appoint one member from his agency to such a panel.

F. Examiners, who must be qualified civilian attorneys, will be designated by the Assistant Secretary of Defense (Administration), or his designee. A single Examiner will be assigned to each case. Examiners will be assigned to such locations as will best serve the needs of the Program.

G. Qualified attorneys will be designated by the Assistant Secretary of Defense (Administration), or his designee, to act as counsel for the Department of Defense in cases in which hearings are held. Department Counsel will present the Department's case at the hearing and will conduct examinations and cross-examinations of those persons testifying, as appropriate. Other functions of Department

Counsel include (1) providing advice and assistance to the Screening Board as required, and (2) taking appeals to and arguing cases before the Appeal Board on behalf of the Department. Department Counsel will not participate in the deliberations or determinations of any of the Boards, nor present any argument or other representation to an Examiner or to the Appeal Board with respect to any case pending before such Examiner or Board unless the applicant involved is provided with advance notice of intention and reasonable opportunity to be heard.

H. Appeal Board members will be designated by the Assistant Secretary of Defense (Administration), or his designee. The Appeal Board will be divided into panels of three members each. One member of each panel will be designated as chairman. In an agency case, the Agency Head may appoint one member from his Agency to such a panel.

I. The Screening Board, the Examiners, and the Appeal Board shall operate under the authority, direction, and control of the Assistant Secretary of Defense (Administration).

VIII. PROCEDURES

A. Screening Board

1. Where a Department of Defense component recommends that an industrial security clearance be denied or revoked, the applicant's case and the recommendation of the Defense component will be referred to the Screening Board. As an interim measure, where a determination is made that the applicant's continued access to classified information, pending action by the Screening Board, would constitute an immediate threat to the national interest, an existing clearance will be suspended. This interim suspension authority, however, is limited to statutory appointees, and the Deputy Director for Contract Administration Services, Defense Supply Agency; where there is

significant evidence of espionage or sabotage, emergency suspension action may be taken by an authorized subordinate after consulting with appropriate investigative agency officials. The Assistant Secretary of Defense (Administration) shall be notified promptly of all suspension actions taken under this paragraph together with the basis therefor.

2. With respect to any case pending before it, the Screening Board may direct (a) further investigation, specifying the particular matters to be investigated; (b) written interrogatories; (c) interviews with the applicant or other persons; (d) a medical examination of the applicant; or (e) recommend to the Assistant Secretary of Defense (Administration), or his designee, the suspension of the applicant's clearance pending further proceedings.

3. Determinations of the Screening Board will be made by majority vote.

4. Where the Screening Board determines that clearance at the level requested is clearly consistent with the national interest, a written determination will be prepared, the Defense component concerned notified, and any outstanding suspension rescinded.

5. Where the Screening Board determines that the case does not warrant a favorable determination, it will prepare a Statement of Reasons informing the applicant of the grounds upon which his clearance may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits.

6. The Statement of Reasons shall be forwarded to the applicant by the Assistant Secretary of Defense (Administration), or his designee, with a letter of instructions clearly outlining subsequent actions required of the applicant, including information on his right to counsel and right to appeal.

7. To be entitled to a hearing the applicant must submit within twenty (20) days after receipt of the Statement of Reasons a detailed written answer under oath or affirmation which shall admit or deny specifically each allegation and each supporting fact contained in the Statement of Reasons. A general denial or other similar answer is not sufficient. The answer must be sufficiently responsive to permit the Department of Defense to determine the issues that are controverted. Where an applicant is without knowledge or information sufficient to form a belief as to the truth of an allegation contained in the Statement of Reasons, he may, after setting out fully the circumstances so state, and it may have the effect of a denial, upon a showing that he has made reasonable inquiries as to the matters alleged and has been unable to obtain the requisite information or knowledge. If the Assistant Secretary of Defense (Administration), or his designee, finds that the applicant's answer does not meet the above requirements, he shall suspend any security clearance then in effect, and shall discontinue further proceedings.

8. An applicant who answers the Statement of Reasons as prescribed above is entitled to a hearing before an Examiner at which he may be represented by counsel of his own choosing, and for which he shall have a reasonable time to prepare. At that hearing he may present evidence in his own behalf and may cross-examine adverse witnesses either orally or in writing as hereinafter provided.

9. Where the applicant answers the Statement of Reasons but does not request a hearing, the case will be assigned to one of the Examiners for final determination based upon all available information including the applicant's answer.

10. Should the applicant not answer the Statement of Reasons, the Department of Defense component which forwarded the case shall be directed to deny or revoke the clearance, and the applicant shall be so advised.

B. Examiner and Prehearing Procedures

1. The applicant who requests and is granted a hearing will be notified of the time and place of the hearing by the Examiner to whom the case is referred. Upon request either of the applicant or Department Counsel, postponements may be granted in the discretion of the Examiner. Dilatory postponements will not be allowed. Normally the hearing will be held in the city where the Examiner's office is located. Where the circumstances warrant convening at a different location, the Examiner may schedule the hearing elsewhere.

2. Department Counsel is authorized to consult directly with the applicant or his counsel for the purpose of reaching agreement with respect to matters in issue. Stipulations entered into shall be binding upon the applicant and the Department of Defense for the purpose of these proceedings.

3. The applicant is responsible for producing witnesses and other evidence in his own behalf at the hearing. Upon request, the Department Counsel and the Examiner may provide assistance upon a showing that it is practicable and necessary.

4. Department Counsel is responsible for producing witnesses and information relied upon by the Department to establish those facts alleged in the Statement of Reasons which have been controverted. All Department of Defense components shall cooperate fully with Department Counsel so that the Department's responsibilities under this paragraph may be fulfilled.

5. Where an applicant answers the Statement of Reasons but fails, without good and sufficient cause, to appear at the time and place set for the proceeding, the Examiner shall return the case to the Assistant Secretary of Defense (Administration), or his designee, who will direct the denial or revocation of the clearance, as appropriate, and advise the applicant.

C. Hearing

1. The purpose of a hearing under the Program is to ascertain all the relevant facts in the case in order that a fair and impartial determination may be reached. The rules, including the rules of evidence, governing court proceedings or administrative hearings conducted under the Administrative Procedure Act are not applicable to hearings under this Directive.

2. The hearing will be conducted in an orderly manner. It may be attended only by the Examiner, the applicant and his counsel, authorized personnel of the DoD and necessary clerical personnel. Unless the Examiner rules otherwise, a witness may be present only when testifying. Should the conduct of the applicant or counsel impair the orderly progress of the hearing or should the Examiner's rulings be ignored or flouted deliberately, the Examiner is authorized in his discretion to recess the hearing forthwith. Further proceedings may be held only after satisfactory assurances are made to the Assistant Secretary of Defense (Administration), or his designee, that the rulings of the Examiner will be followed. Otherwise the recess will continue indefinitely, during which time the applicant will be ineligible for a clearance.

3. The Examiner will notify all witnesses testifying that 18 United States Code 1001 makes it a criminal offense punishable by a maximum of five years imprisonment, $10,000 fine, or both, knowingly and wilfully to make a false statement or

representation to any department or agency of the United States as to any matter within the jurisdiction of any department or agency of the United States. Written interrogatories must be sworn to before a notary public or other official authorized to administer oaths.

4. After a hearing has been convened, and the Statement of Reasons and the applicant's answer thereto have been entered into the record, the applicant shall have the right to make a general opening statement and to present his case.

5. The Examiner may require the applicant to respond to relevant questions, to undergo a medical examination, or to authorize the release of relevant information in the possession of other parties. Should the applicant refuse, the Examiner shall refer the case to the Assistant Secretary of Defense (Administration) for action in accordance with the provisions of section V. B., above.

6. When appropriate, the Examiner will amend the Statement of Reasons to make it conform to the information presented and enter the amendment into the record. When such amendments are made, the Examiner will grant the applicant such additional time as the Examiner deems appropriate to answer such amendments and present evidence pertaining thereto.

7. The Examiner may recess the hearing at the request of the applicant or his counsel, Department Counsel, or upon his own motion.

8. A verbatim transcript (in triplicate) will be made of the hearing and made a permanent part of the record. The transcript will not include information introduced in accordance with provisions of D. 4., and 5., below. The applicant will

be furnished without cost one copy of the transcript, less the exhibits. Corrections will be allowed by the Examiner solely for the purpose of conforming the transcript to the actual testimony.

9. Whenever the Examiner concludes that he requires further information in making a determination, he may request that a further investigation or examination be conducted. Information thus developed shall be made available to the Examiner subject to the provisions of this Directive.

D. The Case Record

1. The record of a case shall consist of all information presented in accordance with this Directive by the DoD and by or on behalf of the applicant. Irrelevant, immaterial, and unduly repetitious material shall be excluded in the discretion of the Examiner.

2. Information adverse to the applicant on any controverted issue may not be made a part of the hearing record unless (1) the information or a summary thereof has been made available to the applicant and (2) he either offers no objection to its presentation, or is afforded an opportunity to cross-examine the persons supplying the information either orally or in writing. The foregoing restrictions do not apply to information received and considered under 3., 4., 5., and 6., below.

3. Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be made a part of the record in the case subject to rebuttal without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities

in connection with assisting the Secretary of Defense, or the Agency Head concerned, to safeguard classified information within industry pursuant to Executive Order 10865.

4. Records compiled in the regular course of business or other physical evidence other than investigative reports, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided the Assistant Secretary of Defense (Administration), as designee of the Secretary of Defense, or when applicable, of the Agency Head concerned has (1) made a preliminary determination that such physical evidence appears to be material, and (2), determines that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security. Information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

5. A written or oral statement adverse to the applicant on a controverted issue may be received and considered without affording an opportunity to cross-examine the person making the statement only in the circumstances described in either of the following subparagraphs:

   a. The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

   b. The Assistant Secretary of Defense (Administration) as designee of the Secretary of Defense, or when applicable, of the Agency Head, has preliminarily determined, after considering the information

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furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security, and that the person who furnished the information cannot appear to testify (a), due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b), due to some other cause determined by the Secretary of Defense, or, when appropriate, by the Agency Head concerned, to be good and sufficient.

6. A written or oral statement relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant may be received and considered without affording the applicant an opportunity to cross-examine the person making the statement irrespective of whether the statement is adverse to the applicant or relates to a controverted issue.

7. Whenever physical evidence or statements are received and considered under 4. and 5., above, the applicant will be furnished with as comprehensive and detailed a summary of the information or physical evidence as the national security permits. Certificates evidencing the determinations required by these Sections will be entered into the hearing record. Appropriate consideration shall be accorded by officials charged with making determinations under this Directive to the fact that the applicant did not have an opportunity to cross-examine the person or persons who provided the information, or to inspect the physical evidence.

E. Determinations

1. Following the hearing, the Examiner will determine whether it is clearly consistent with the national interest to grant or continue the applicant's clearance at a specific level. He will prepare findings

of fact for or against the applicant with respect to each allegation in the Statement of Reasons and reasons in support of the said findings of fact. The Examiner's determination shall be based on grounds set out in the Statement of Reasons and upon information placed in the record in conformity with this Directive. Where the Examiner's determination is adverse to the applicant, the Examiner shall also determine whether any clearance then held by the applicant should be suspended or limited pending appeal under this Directive.

2. Where the Examiner's determination is adverse to the applicant, a copy thereof will be furnished to the applicant. Where the determination is favorable to the applicant, a copy thereof will be furnished to the Department Counsel. In the absence of timely appeal under F., below, this determination constitutes the final decision in the case. Provided, in those cases in which information was received and considered under D. 4. and 5., above, a copy of the determination, less any deletions required in the interests of national security, will be furnished:

   a. To applicant, if adverse to him, with notice that, in the absence of a timely appeal under F., below, the case record and the Examiner's determination will be forwarded to the Secretary of Defense or an Agency Head, as appropriate, for final determination;

   b. To Department Counsel, if favorable to applicant, with notice that, in the absence of timely appeal under F., below, the determination constitutes the final determination in the case.

F. Appeals

1. Within 10 days after receiving the Examiner's determination, the applicant or Department Counsel may appeal by filing a Notice of Appeal with the Appeal Board. When a Notice of Appeal is filed, a copy of the Examiner's determination will be furnished to the appellee.

2. Appeals may be made either in person or by filing a brief, and shall be based solely upon the case record. No further testimony or other evidence shall be received. A brief shall state with particularity the

specific issues involved in the appeal, cite the relevant portions of the record and set out the reasons why the determination should be reversed. Where an appeal is made in person, the appellant shall file with the Appeal Board, prior to the scheduled appeal hearing, a written statement identifying the issues to be considered before the Appeal Board. Appellant shall send a copy to the appellee who may file a statement in reply.

3. The Appeal Board may recommend to the Assistant Secretary of Defense (Administration), or his designee, that a case be returned (1) for further investigation, or (2) to the Examiner with instructions to take further testimony.

4. Appeal Board deliberations will be made in executive session and the Board's determination arrived at by majority vote. The Board will prepare a written determination setting forth whether it is clearly consistent with the national interest to grant or continue a clearance to a specific level. The determination will include findings for or against the applicant with respect to each allegation in the Statement of Reasons and a separate memorandum of reasons in support of the determination.

5. In those cases in which information was received and considered under D.4. and 5., above, and the Appeal Board's determination is adverse to the applicant, the case record, together with the determinations of the Examiner and the Appeal Board, will be referred to the Secretary of Defense or the appropriate Agency Head, who, following his personal review of the case, will make a final determination. In all other cases, the Appeal Board's determination will be announced as the final determination in the case.

6. If the final determination is adverse to the applicant, he will be furnished findings with respect to each allegation in the Statement of Reasons. The Appeal Board's memorandum of reasons will not be furnished to the applicant.

7. No provision of this Directive shall be construed as conferring a right upon an applicant to appeal from a final decision to the Secretary of Defense, to the Assistant Secretary of Defense (Administration) or to the Agency Head.

8. Nothing contained in this Directive shall be deemed to limit or affect the responsibility and powers of the Secretary of Defense or of an Agency Head to deny or revoke a clearance when the security of the nation so requires. This authority may be exercised only where he determines personally that the provisions of this Directive cannot be invoked consistently with the national security. Such determinations shall be conclusive.

IX. SUSPENSION ACTIONS IN SECURITY VIOLATION CASES

A. In any case alleging wilful, unauthorized use or release of classified information or documents, or wilful appropriation or retention of classified documents for personal use or for the use of others, or where the loss or compromise of classified documents or information is wilfully concealed, the Screening Board, irrespective of whether its determination under Section VIII. A., above, is to grant or continue a clearance, or issue a Statement of Reasons, shall make a separate finding whether the acts are established by a preponderance of the evidence. In each case where it so finds, it shall suspend an existing clearance for a period of one year, subject to the provisions of B., below, and shall set out in writing its reasons therefor.

B. Where within twenty (20) days after being notified of the Screening Board action, the applicant does not give notice of intent to contest the proposed suspension, it shall be ordered into effect. Where the applicant

contests the proposed suspension, the case shall be referred to an Examiner who shall make a final determination following a hearing which shall be governed by the provisions of this Directive to the extent applicable. A determination by the Examiner under this Section shall be final and no further appeal may be taken.

C. No action taken under this Section shall preclude other actions as provided in this Directive at any stage of the proceedings. Issues under this Section shall be heard in the same proceeding as other issues under this Directive, unless otherwise agreed by the parties.

D. The Assistant Secretary of Defense (Administration), or his designee, shall order suspensions under this Section which shall become effective immediately.

E. When the suspension has expired the applicant will be eligible for reinstatement of his clearance upon filing the necessary forms.

X. REIMBURSEMENT FOR LOSS OF EARNINGS

A. An applicant may be reimbursed for a loss of earnings resulting directly from the suspension, revocation, or denial of his clearance provided (1) a final determination thereafter is made that it is clearly consistent with the national interest to grant him a clearance for access to classified information at least equal to that which was suspended, revoked, or denied, and (2) it is found to be fair and equitable for the Department of Defense to reimburse the applicant for all or a part of the loss of earnings.

B. It shall be considered fair and equitable, except as hereinafter provided, to reimburse any applicant who has suffered loss of earnings as a result of suspension

revocation, or denial of clearance when that clearance is, in the course of the timely exhaustion of remedies by the applicant, granted or restored. A claim for reimbursement may be denied when:

1. The subsequent determination to grant the clearance depends upon material facts withheld by the applicant, or where circumstances have changed since the suspension, revocation, or denial and the grant or restoration of the clearance; or

2. The suspension, revocation, or denial follows the applicant's failure to comply with procedural requirements.

C. Claims for reimbursement in Department of Defense cases shall be initiated by a petition filed by the applicant with the Assistant Secretary of Defense (Administration). The petition shall contain a detailed statement why fairness and equity require reimbursement, including the basis for the assertion that the loss of earnings is attributable to the suspension, denial, or revocation of the clearance, and shall identify the alleged errors of fact or judgment involved.

D. Claims for reimbursement in Agency cases shall be initiated by a petition filed by the applicant with the Agency concerned. At the request of the Agency Head concerned, the Department of Defense under its procedures will review the petition and furnish that Agency with a recommendation with respect to the merits of the petition. However, the Department of Defense is not responsible for payment of such claims.

E. When a case has been reopened under Section XI., below, and thereupon a determination favorable to the applicant is made, a request for reimbursement may be considered only where (1) the applicant exhausted all of the administrative remedies available in the original proceeding, (2) the applicant made a full and complete

disclosure during the original proceeding, and (3) the determination to grant or restore the clearance is not based upon circumstances occurring after the final denial or revocation.

F. The amount of reimbursement shall not exceed the difference between the earnings of the applicant at the time of the suspension, revocation, or denial, whichever is earlier, and the interim net earnings. No reimbursement shall be allowed for any period of undue delay resulting from the applicant's acts or failure to act. Any payment shall be in full satisfaction of any further claim against the United States, the Department of Defense, and the Departments and Agencies referred to in Section IV. B., above, arising out of the suspension, revocation, or denial of a clearance. Any claim shall be forever barred unless it is filed within one year after the date such claim first accrues, or within one year of the final disposition of the case, whichever is later, Provided, a claim for reimbursement may be filed under this Section within one year from the effective date of this Directive where the applicant filed a claim under reference (b), but was denied solely on the ground that the clearance determination which resulted in the loss of earnings was not unjustified.

G. Approved claims against the Department of Defense shall be forwarded to the Department of the Army for payment from "Claims, Defense" Appropriation, in the same manner that Federal tort claims are currently processed under reference (d).

XI. PENDING AND REOPENED CASES

A. All cases pending before the Screening Board and the Field Boards 30 days from the date hereof shall proceed to a final determination under this Directive. All cases pending before the Central Board on that date, including those in which the applicant has requested a determination on the record, will be referred to an

Examiner for determination, notwithstanding a tentative determination has been announced or oral argument heard.

B. Any person whose clearance has been denied or revoked under this Program or any predecessor program, may have his eligibility for a clearance reconsidered upon a showing of newly discovered evidence or other good cause. The request for reconsideration shall set out fully the grounds therefor. The Assistant Secretary of Defense (Administration), or his designee, in his discretion, shall grant or deny such requests for reconsideration.

C. Where a clearance previously has been granted under this Program, and a Department component or Agency receives additional derogatory information which was not considered at the time the case was decided, it shall refer the information to the Deputy Director for Contract Administration Services, or to the Federal Bureau of Investigation, as appropriate, for appropriate action.

XII. EFFECTIVE DATE

Section VII. of this Directive is effective immediately. Other provisions are effective 30 days from the date hereof.

Cyrus Vance
Deputy Secretary of Defense

Enclosure
Appendix

5220.6 (Encl 1)
Dec 7, 66

EXECUTIVE ORDER 10865

SAFEGUARDING CLASSIFIED INFORMATION
WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their

respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

SECTION 2. An authorization for access to classified information may be granted by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SECTION 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SECTION 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SECTION 5. (a) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination

that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SECTION 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeronautics and Space Administration to subpoena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

SECTION 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

SECTION 8. Except as otherwise specified in the preceding provisions of this order, any authority vested in the head of a department by this order may be delegated to the

(1) Under Secretary of State or a Deputy Under Secretary of State, in the case of authority vested in the Secretary of State;

(2) Deputy Secretary of Defense or an Assistant Secretary of Defense, in the case of authority vested in the Secretary of Defense;

(3) General Manager of the Atomic Energy Commission, in the case of authority vested in the Commissioners of the Atomic Energy Commission;

(4) Deputy Administrator of the National Aeronautics and Space Administration, in the case of authority vested in the Administrator of the National Aeronautics and Space Administration;

(5) Deputy Administrator of the Federal Aviation Agency, in the case of authority vested in the Administrator of the Federal Aviation Agency; or

(6) Deputy Attorney General or an Assistant Attorney General, in the case of authority vested in the Attorney General.

SECTION 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
February 20, 1960

5220.6 (Encl 1)
Dec 7, 66

EXECUTIVE ORDER 10909

AMENDMENT OF EXECUTIVE ORDER NO. 10865,
SAFEGUARDING CLASSIFIED INFORMATION
WITHIN INDUSTRY

By virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, and as Commander in Chief of the armed forces of the United States, Executive Order No. 10865 of February 20, 1960 (25 F.R. 1583), is hereby amended as follows:

Section 1. Section 1(c) is amended to read as follows:

"(c) When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, the head of any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and in sections 4 and 8, includes the Attorney General. The term 'department' means the Department of State, the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Department of Justice."

Section 2. Section 6 is amended to read as follows:

"Sec. 6. The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section 1(b), or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided

by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amount payable under Standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

Sec. 3. Section 8 is amended by striking out the word "or" at the end of clause (5), by striking out the period at the end of clause (6) and inserting "; or" in place thereof, and by adding the following new clause at the end thereof:

"(7) the deputy of that department, or the principal assistant to the head of that department, as the case may be, in the case of authority vested in the head of a department or agency of the United States with which the Department of Defense makes an agreement under section 1(b)."

DWIGHT D. EISENHOWER

THE WHITE HOUSE

January 17, 1961

APPENDIX "A"

THE NATIONAL ARCHIVES
LITTERA SCRIPTA MANET
FEDERAL REGISTER
OF THE UNITED STATES
VOLUME 18 1934 NUMBER 2
Washington, Saturday, January 3, 1953

TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 10421

PROVIDING FOR THE PHYSICAL SECURITY OF FACILITIES IMPORTANT TO THE NATIONAL DEFENSE

By virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, it is hereby ordered as follows:

SECTION 1. As used in the following sections of this order:

(a) The word "facilities" means those Government-owned and privately-owned plants, mines, facilities (including buildings occupied in whole or in part by any Federal agency), materials, products, and processes, and those Government-provided and privately-provided services, which are of importance to defense mobilization, defense production, or the essential civilian economy and are located or provided in the continental United States or in the Territories or possessions of the United States: *Provided*, That the Chairman of the National Security Resources Board may, upon proper notice to affected Federal agencies, from time to time amend the foregoing definition of "facilities," with respect to any or all parts of this order, as he shall deem to be compatible with the purposes of this order.

(b) The term "physical security" means security against sabotage, espionage, and other hostile activity and other destructive acts and omissions, but excludes security attributable to operations of military defense or combat and excludes also activities with respect to the dispersal and post-attack rehabilitation of facilities.

(c) The word "Chairman" means the Chairman of the National Security Resources Board.

SEC. 2. With a view toward the maintenance of essential production and the security of the United States, to the extent permitted by law, and subject to the provisions of this order, Federal agencies shall develop and execute programs and measures for the physical security of facilities within the cognizance of such agencies, respectively.

SEC. 3. (a) In addition to carrying out the functions conferred upon him by law, the Chairman shall supervise and bring into harmonious action the programs and measures referred to in section 2 of this order.

(b) More particularly, the Chairman shall from time to time:

(1) Prescribe policies and programs governing the activities of Federal agencies with respect to the physical security of facilities, including the activities involved in carrying out section 4 (a) hereof (respecting security ratings).

(2) With the advice and assistance of appropriate Federal agencies, develop and promulgate standards of physical security to be applicable to facilities, which standards shall as far as practicable accommodate differences in degrees and types of physical security required, different categories of facilities, different security ratings, and such other considerations as may be pertinent.

(3) Assign facilities to Federal agencies, insofar as deemed practicable by the Chairman on the basis of the interests and general cognizance of agencies, for the performance by such agencies of the following functions, subject to the direction of the Chairman: (A) the furnishing of advice to the management or owner of a facility with respect to developing and administering the physical security program thereof; (B) in consultation with the management or owner of a facility and with other technically qualified persons, the development of physical security measures for such facility and, when necessary, the authorization of standards of physical security therefor which differ from the standards prescribed under section 3 (b) (2) hereof; (C) such supervision as may be appropriate of the application of physical security measures to assigned facilities; (D) the furthering, by other measures designated by the Chairman, of the physical security of assigned facilities; and (E) the appraisal of the adequacy

and efficiency of the physical security measures taken.

(4) Approve or revise security ratings established under section 4 (a) hereof and transmit the security ratings so approved or revised to agencies assigned facilities under section 3 (b) (3) hereof. The Chairman may make any approved or revised security rating available to Federal agencies other than the agency to which a facility concerned is assigned, for such uses related to the maintenance of production or the national security as the Chairman may approve.

(5) Review the physical security programs and measures of Federal agencies as to effectiveness and as to conformity with the policies and directives of the Chairman under this order.

(6) Obtain from Federal agencies reports, recommendations, and information deemed by the Chairman to be essential to the discharge of his responsibilities under this order.

(7) Consult with Federal agencies having responsibilities related to functions set forth in this order, for the purpose of furthering coordination of policies and activities; and develop, and report to the President concerning, programs which properly relate the physical security of facilities and other measures designed to maintain and restore essential productive capability.

(8) Make available, or cause to be made available, to Federal agencies such of the information developed in connection with carrying out section 4 (a) hereof as the Chairman deems to be needed by those agencies in connection with the physical security of facilities or other aspects of the maintenance of production.

(9) Keep the President informed as may be necessary concerning the matters encompassed by this order and furnish him such recommendations as may be appropriate.

(10) Consistent with law, establish such advisory bodies as the Chairman may deem necessary to assist him in carrying out his functions under this order.

SEC. 4. (a) The Secretary of Commerce shall from time to time establish and transmit to the Chairman security ratings of facilities, based on the relative importance thereof to defense mobilization, defense production, and essential civilian economy.

(b) In carrying out section 4 (a) hereof, the Secretary of Commerce shall consult with Federal agencies as may be appropriate.

(c) To the extent necessary for the performance of functions under section 4 (a) hereof, Federal agencies which have, or can best obtain, data on plant locations, plant capacities, production, service industries, technical processes, and production requirements, and other similar information shall make available to the Secretary of Commerce such data and information. In the event of any disagreement with respect to making data or information available under this section 4 (c), the Chairman shall resolve such disagreement and the decision of the Chairman shall be final.

(d) The Industry Evaluation Board is continued and shall, to such extent and in such manner as the Secretary of Commerce may direct, assist the Secretary in carrying out the functions of the Secretary under section 4 (a) hereof. The Secretary, with the approval of the Chairman, may from time to time alter the composition of the said Board. There is hereby terminated the now-existing Presidentially approved assignment of functions to the said Board.

SEC. 5. Each Federal procurement agency which obtains in connection with its procurement contracts agreements requiring contractors to provide physical security measures for their facilities shall provide in such agency for the review of such agreements. The purpose of such review shall be to assure conformity of the physical security measures required by the agreements with the standards prescribed under section 3 (b) (2) hereof.

SEC. 6. (a) The Facilities Protection Board is transferred to the jurisdiction of the Chairman. Existing arrangements concerning the physical location of and administrative support for the Board may be continued.

(b) The Facilities Protection Board shall hereafter consist of one representative of each of the following agencies, namely, the Departments of Defense, Commerce, Interior, and Labor, the Atomic Energy Commission, the Federal Civil Defense Administration, and such other agencies as the Chairman may from time to time designate. Each such representative shall be designated by the head of the agency he is to represent. Each person who is now a member of the Board may continue as a member without the necessity of redesignation by reason of this order. The Chairman of the National Security Resources Board shall from time to time designate from among the members of the Board a Chairman of the Facilities Protection Board.

(c) The Board shall assist and advise the Chairman in carrying out the functions vested in him by this order. There is hereby terminated the now-existing

Presidentially approved assignment of functions to the Board.

SEC. 7. (a) The programs and measures provided for in this order with respect to the physical security of facilities shall be supplementary to, and not in substitution for, similar or related activities carried on by state and local authorities and by private enterprise. This order shall not be deemed to place in the Federal Government the primary responsibility for the physical security of privately-owned facilities or of facilities owned by any state, any political subdivision of any state, or any intergovernmental body.

(b) This order shall not be deemed to govern activities with respect to the post-attack immediately essential emergency repair or restoration of damaged vital facilities (64 Stat. 1247; 50 U. S. C. App. 2252 (b)), except that the Federal Civil Defense Administration and the Chairman shall effect appropriate coordination of the said activities and functions carried out under this order.

(c) This order shall not extend to any facility of or under the cognizance of the Atomic Energy Commission, except those parts of any such facility which are not the responsibility of the said Commission.

(d) This order shall not extend to Federally-owned military posts, camps, stations, arsenals, or other comparable facilities under military command. The Chairman may exclude partly or wholly from the operation of this order any other facility under the cognizance of the Department of Defense, except that the Department shall advise and consult with the Chairman concerning the physical security of any facility so excluded. The provisions of this order shall not be deemed to apply to military defense or combat, except that the Chairman and the Secretary of Defense shall effect appropriate coordination of the functions carried out under this order and of operations of military defense or combat affecting facilities.

(e) Nothing in this order shall be deemed to confer on any Federal agency investigative functions exercised by any Federal agency represented in the Interdepartmental Intelligence Conference or to alter or modify any function of the said Conference.

(f) Nothing in this order shall be deemed to affect the responsibilities now assigned to the Interdepartmental Committee on Internal Security, except that there shall be governed by this order, (A) the Facilities Protection Board and the Industry Evaluation Board and their functions and supervision, (B) the prescription of standards of physical security of facilities, (C) the making of security ratings respecting facilities, and (D) the assignment of facilities to Federal agencies for the performance by them of physical security functions and the conduct by the said agencies of physical security functions respecting facilities assigned to them, respectively.

HARRY S. TRUMAN

THE WHITE HOUSE,
December 31, 1952.

[F. R. Doc. 52-13813; Filed, Dec. 31, 1952; 2:39 p. m.]

[*Federal Register*—vol. 18, no. 51, Mar. 17, 1953]

TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 10438

TRANSFERRING CERTAIN FUNCTIONS OF THE NATIONAL SECURITY RESOURCES BOARD AND OF THE CHAIRMAN THEREOF TO THE DIRECTOR OF DEFENSE MOBILIZATION

By virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. All of the functions vested in the National Security Resources Board and in the Chairman of such Board by the following-designated Executive orders are hereby transferred to the Director of Defense Mobilization, and the said Executive orders are amended accordingly.

(a) Executive Order No. 9781 of September 19, 1946, as amended by Executive Order No. 10360 of June 11, 1952 (17 F. R. 5337).

(b) Executive Order No. 10312 of December 10, 1951 (16 F. R. 12452).

(c) Executive Order No. 10346 of April 17, 1952 (17 F. R. 3477).

(d) Executive Order No. 10421 of December 31, 1952 (18 F. R. 57).

SEC. 2. So much of the records and personnel under the jurisdiction of the Chairman of the National Security Resources Board as such Chairman and the Director of Defense Mobilization shall jointly determine to relate primarily to the functions which are transferred to the Director of Defense Mobilization by section 1 of this order shall be transferred, consonant with law, to the Office of Defense Mobilization.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
March 13, 1953.

[F. R. Doc. 53-2405; Filed, Mar. 13, 1953; 9:52 p. m.]

EXECUTIVE ORDER No. 10501, AS AMENDED
NOVEMBER 5, 1953
SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Section 1. CLASSIFICATION CATEGORIES

Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) Top Secret: Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) Secret: Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

(c) Confidential: Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

Section 2. LIMITATION OF AUTHORITY TO CLASSIFY (NOTE 2, 4, 5)

The authority to classify defense information or material under this order shall be limited in the departments, agencies, and other units of the executive branch as hereinafter specified.

(a) In the following departments, agencies, and Governmental units having primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order may be exercised by the head of the department, agency, or Governmental unit concerned or by such responsible officers or employees as he, or his representative, may designate for that purpose. The delegation of such authority to classify shall be limited as severely as is consistent with the orderly and expeditious transaction of Government business.

The White House Office
President's Science Advisory Committee
Bureau of the Budget
Canal Zone Government
Council of Economic Advisors
Department of the Army
Department of the Navy
Department of the Air Force
Department of Commerce
Department of Defense
Department of Labor
Department of Justice
Department of the Treasury
Export-Import Bank of Washington
Federal Aviation Agency
Federal Communications Commission
Federal Radiation Council
General Services Administration
Interstate Commerce Commission
National Aeronautics and Space Administration
National Aeronautics and Space Council
National Security Council
Office of Emergency Planning
Office of Science and Technology
Peace Corps
President's Foreign Intelligence Advisory Board
The Special Representative for Trade Negotiations
United States Arms Control and Disarmament Agency
United States Civil Service Commission
United States Information Agency
Agency for International Development
Atomic Energy Commission
Central Intelligence Agency
Department of State

(b) In the following departments, agencies, and Governmental units, having partial but not primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order shall be exercised only by the head of the department, agency, or Governmental unit without delegation:

Civil Aeronautics Board
Department of Agriculture
Department of Health, Education and Welfare
Department of the Interior
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Post Office Department
Renegotiation Board
Small Business Administration
Tennessee Valley Authority
Panama Canal Company

(c) Any agency or unit of the executive branch not named herein, and any such agency or unit which may be established hereafter shall be deemed not to have authority for original classification of information or material under this order, except as such authority may be specifically conferred upon any such agency or unit hereafter.

Section 3. CLASSIFICATION

Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) Documents in General: Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) Physically Connected Documents: The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) Multiple Classification: A document, product, or substance shall bear a classification at least as high as that of its highest

classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) Transmittal Letters: A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

(e) Information Originated by a Foreign Government or Organization: Defense information of a classified nature furnished to the United States by a foreign government or international organization shall be assigned a classification which will assure a degree of protection equivalent to or greater than that required by the government or international organization which furnished the information.

Section 4. DECLASSIFICATION, DOWNGRADING, OR UPGRADING (Note 1, 3)

When classified information or material no longer requires its present level of protection in the defense interest, it shall be downgraded or declassified in order to preserve the effectiveness and integrity of the classification system and to eliminate classifications of information or material which no longer require classification protection. Heads of departments or agencies originating classified information or material shall designate persons to be responsible for continuing review of such classified information or material on a document-by-document category, project, program, or other systematic basis, for the purpose of declassifying or downgrading whenever national defense considerations permit, and for receiving requests for such review from all sources. However, Restricted Data and material formerly designated as Restricted Data shall be handled only in accordance with subparagraph 4 (a) (1) below and section 13 of this order. The following special rules shall be observed with respect to changes of classification of defense information or material, including information or material heretofore classified:

(a) Automatic Changes. In order to insure uniform procedures for automatic changes, heads of departments and agencies having authority for original classification of information or material, as set forth in section 2, shall categorize such classified information or material into the following groups:

(1) Group 1. Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information, or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

(2) Group 2. Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

(3) Group 3. Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

(4) Group 4. Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

To the fullest extent practicable, the classifying authority shall indicate on the information or material at the time of original classification if it can be downgraded or declassified at an earlier date, or if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. The heads, or their designees, of departments and agencies in possession of defense information or material classified pursuant to this order, but not bearing markings for automatic downgrading or declassification, are hereby authorized to mark or designate for automatic downgrading or declassification such information or material in accordance with the rules or regulations established by the department or agency that originally classified such information or material.

(b) Non-Automatic Changes: The persons designated to receive requests for review of classified material may downgrade or declassify such material when circumstances no longer warrant its retention in its original classification provided the consent of the appropriate classifying authority has been obtained. The downgrading or declassification of extracts from or paraphrases of classified documents shall also require the consent of the appropriate classifying authority unless the agency making such extracts knows positively that they warrant a classification lower than that of the document from which extracted, or that they are not classified.

(c) Material Officially Transferred: In the case of material transferred by or pursuant to statute or Executive order from one department or agency to another for the latter's use and as part of its official files or property, as distinguished from transfers merely for purposes of storage, the receiving department or agency shall be deemed to be the classifying authority for all purposes under this order, including declassifiction and downgrading.

(d) Material Not Officially Transferred: When any department or agency has had in its possession any classified material which has become five years old, and it appears (1) that such material originated in an agency which has since become defunct and whose files and other property have not been officially transferred to another department or agency within the meaning of subsection (c), above, or (2) that it is impossible for the possessing department or agency to identify the originating agency, and (3) a review of the material indicates that it should be downgraded or declassified, the said possessing department or agency shall have power to declassify or downgrade such material. If it appears probable that another department or agency may have a substantial interest in whether the classification of any particular information should be maintained, the possessing department or agency shall not exercise the power conferred upon it by this subsection, except with the consent of the other department or agency, until thirty days after it has notified such other department or agency of the nature of the material and of its intention to declassify or downgrade the same. During such thirty-day period the other department or agency may, if it so desires, express its objections to declassifying or downgrading the particular material, but the power to make the ultimate decision shall reside in the possessing department or agency.

(e) Information or Material Transmitted by Electrical Means: The downgrading or declassification of classified information or material transmitted by electrical means shall be accomplished in accordance with the procedures described above unless specifically prohibited by the originating department or agency. Unclassified information or material which is transmitted in encrypted form shall be safeguarded and handled in accordance with the regulations of the originating department or agency.

(f) Downgrading: If the recipient of classified material believes that it has been classified too highly, he may make a request to the reviewing official who may downgrade or declassify the material after obtaining the consent of the appropriate classifying authority.

(g) Upgrading: If the recipient of unclassified information or material believes that it should be classified, or if the recipient of classified information or material believes that its classification is not sufficiently protective, it shall be safeguarded in accordance with the classification deemed appropriate and a request made to the reviewing official, who may classify the information or material or upgrade the classification after obtaining the consent of the appropriate classifying authority. The date of this action shall constitute a new date of origin insofar as the downgrading or declassification schedule (paragraph (a) above) is concerned.

(h) Departments and Agencies Which Do Not have Authority for Original Classification: The provisions of this section relating to the declassification of defense information or material shall apply to departments or agencies which do not, under the terms of this order, have authority for original classification of information or material, but which have formerly classified information or material pursuant to Executive Order No. 10290 of September 24, 1951.

(i) Notification of Change in Classification: In all cases in which action is taken by the reviewing official to downgrade or declassify earlier than called for by the automatic downgrading-declassification stamp, the reviewing official shall promptly notify all addressees to whom the information or material was originally transmitted. Recipients of original information or material, upon receipt of notification of change in classification, shall notify addressees to whom they have transmitted the classified information or material.

Section 5. MARKING OF CLASSIFIED MATERIAL (Note 3)

After a determination of the proper defense classification to be assigned has been made in accordance with the provisions of this order, the classified material shall be marked as follows:

(a) Downgrading-Declassification Markings: At the time of origination, all classified information or material shall be marked to indicate the downgrading-declassification schedule to be followed in accordance with paragraph (a) of section 4 of this order.

(b) Bound Documents: The assigned defense classification on bound documents, such as books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped on the outside of the front cover, on the title page, on the first page, on the back page and on the outside of the back cover. In each case the markings shall be applied to the top and bottom of the page or cover.

(c) Unbound Documents: The assigned defense classification on unbound documents, such as letters, memoranda, reports, telegrams, and other similar documents, the pages of which are not permanently and securely fastened together, shall be conspicuously marked or stamped at the top and bottom of each page, in such manner that the marking will be clearly visible when the pages are clipped or stapled together.

(d) Charts, Maps, and Drawings: Classified charts, maps, and drawings shall carry the defense classification marking under the legend, title block, or scale in such manner that it will be reproduced on all copies made therefrom. Such classification shall also be marked at the top and bottom in each instance.

(e) Photographs, Films and Recordings: Classified photographs, films and recordings, and their containers, shall be conspicuously and appropriately marked with the assigned defense classification.

(f) Products or Substances: The assigned defense classification shall be conspicuously marked on classified products or substances, if possible, and on their containers, if possible, or, if the article or container cannot be marked, written notification of such classification shall be furnished to recipients of such products or substances.

(g) Reproductions: All copies of reproductions of classified material shall be appropriately marked or stamped in the same manner as the original thereof.

(h) Unclassified Material: Normally, unclassified material shall not be marked or stamped Unclassified unless it is essential to covey to a recipient of such material that it has been examined specifically with a view to imposing a defense classification and has been determined not to require such classification.

(i) Change or Removal of Classification: Whenever classified material is declassified, downgraded, or upgraded, the material shall be marked or stamped in a prominent place to reflect the change in classification, the authority for the action, the date of action, and the identity of the person or unit taking the action. In addition, the old classification marking shall be cancelled and the new classification (if any) substituted therefor. Automatic change in classification shall be indicated by the appropriate classifying authority through marking or stamping in a prominent place to reflect information specified in subsection 4 (a) hereof.

(j) Material Furnished Persons not in the Executive Branch of the Government: When classified material affecting the national defense is furnished authorized persons, in or out of Federal service other than those in the executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

> "This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law."

Use of alternative marking concerning "Restricted Data" as defined by the Atomic Energy Act is authorized when appropriate.

Section 6. CUSTODY AND SAFEKEEPING (Note 3)

The possession or use of classified defense information or material shall be limited to locations where facilities for secure storage or protection thereof are available by means of which unauthorized persons are prevented from gaining access thereto. Whenever such information or material is not under the personal supervision of its custodian, whether during or outside of working hours, the following means shall be taken to protect it:

(a) Storage of Top Secret Information and Material: As a minimum, Top Secret defense information and material shall be stored in a safe or safe-type steel file container having a three-position dial-type combination lock, and being of such weight, size, construction, or installation as to minimize the possibility of unauthorized access to, or the physical theft of, such information and material. The head of a department or agency may approve other storage facilities which afford equal protection, such as an alarmed area, a vault, a vault-type room, or an area under continuous surveillance.

(b) Storage of Secret and Confidential Information and Material: As a minimum, Secret and Confidential defense information and material may be stored in a manner authorized for Top Secret information and material, or in steel file cabinets equipped with steel lockbar and a changeable three-combination dial-type padlock or in other storage facilities which afford equal protection and which are authorized by the head of the department or agency.

(c) Storage or Protection Equipment: Whenever new security storage equipment is procured, it should, to the maximum extent practicable, be of the type designated as security filing cabinets on the Federal Supply Schedule of the General Services Administration.

(d) Other Classified Material: Heads of departments and agencies shall prescribe such protective facilities as may be necessary in their departments or agencies for material originating under statutory provisions requiring protection of certain information.

(e) Changes of Lock Combinations: Combinations on locks of safekeeping equipment shall be changed, only by persons having appropriate security clearance whenever such equipment is placed in use after procurement from the manufacturer or other sources, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, or whenever the combination has been subjected to compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified defense material authorized for storage in the safekeeping equipment concerned.

(f) Custodian's Responsibilities: Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in presence of unauthorized persons.

(g) Telephone Conversations: Defense information classified in the three categories under the provisions of this order shall not be revealed in telephone conversations, except as may be authorized under section 8 hereof with respect to the transmission of Secret and Confidential material over certain military communications circuits.

(h) Loss or Subjection to Compromise: Any person in the executive branch who has knowledge of the loss or possible subjection to compromise of classified defense information shall promptly report the circumstances to a designated official of his agency, and the latter shall take appropriate action forthwith, including advice to the originating department or agency.

Section 7. ACCOUNTABILITY AND DISSEMINATION

Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) Accountability Procedures: Heads of departments and agencies shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) Dissemination Outside the Executive Branch: Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which

dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

(c) Information Originating in Another Department or Agency: Except as otherwise provided by section 102 of the National Security Act of July 26, 1947, c. 343, 61 Stat. 498, as amended, 50 U.S.C. sec. 403, classified defense information originating in another department or agency shall not be disseminated outside the receiving department or agency without the consent of the originating department or agency. Documents and material containing defense information which are classified Top Secret or Secret shall not be reproduced without the consent of the originating department or agency.

Section 8. TRANSMISSION (Note 1, 3)

For transmission outside of a department or agency, classified defense material of the three categories originated under the provisions of this order shall be prepared and transmitted as follows:

(a) Preparation for Transmission: Such material shall be enclosed in opaque inner and outer covers. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification of its contents. A receipt form shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt form shall identify the addressor, addressee, and the document, but shall contain no classified information. It shall be signed by the proper recipient and returned to the sender.

(b) Transmitting Top Secret Material: The transmission of Top Secret material shall be effected preferably by direct contact of officials concerned, or, alternatively, by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, or by electric means in encrypted form; or in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are currently approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating agency.

(c) Transmitting Secret Information and Material: Secret information and material shall be transmitted within and between the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for Top Secret information and material, by authorized courier, by United States registered mail, or by the use of protective services provided by commercial carriers, air or surface, under such conditions as may be prescribed by the head of the department or agency concerned. Secret

information and material may be transmitted outside those areas by one of the means established for Top Secret information and material, by commanders or masters of vessels of United States registry, or by the United States registered mail through Army, Navy, Air Force, or United States civil postal facilities; provided that the information or material does not at any time pass out of United States Government control and does not pass through a foreign postal system. For the purposes of this section registered mail in the custody of a transporting agency of the United States Post Office is considered within United States Government control unless the transporting agent is foreign controlled or operated. Secret information and material may, however, be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous States, the District of Columbia, Alaska, and Canada by United States and Canadian registered mail with registered mail receipt. Secret information and material may also be transmitted over communications circuits in accordance with regulations promulgated for such purpose by the Secretary of Defense.

(d) Transmitting Confidential Information and Material: Confidential information and material shall be transmitted within the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first-class mail. Outside those areas Confidential information and material shall be transmitted in the same manner as authorized for higher classifications."

(e) Within an Agency: Preparation of classified defense material for transmission, and transmission of it, within a department or agency shall be governed by regulations, issued by the head of the department or agency, insuring a degree of security equivalent to that outlined above for transmission outside a department or agency.

Section 9. DISPOSAL AND DESTRUCTION

Documentary record material made or received by a department or agency in connection with transaction of public business and preserved as evidence of the organization, functions, policies, operations, decisions, procedures or other activities of any department or agency of the Government, or because of the informational value of the data contained therein, may be destroyed only in accordance with the act of July 7, 1943, c. 192, 57 Stat. 380, as amended, 44 U.S.C. 366-380. Non-record classified material, consisting of extra copies and duplicates including shorthand notes, preliminary drafts, used carbon paper, and other material of similar temporary nature, may be destroyed, under procedures established by the head of the department or agency which meet the following requirements, as soon as it has served its purpose:

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(a) Methods of Destruction: Classified defense material shall be destroyed by burning in the presence of an appropriate official or by other methods authorized by the head of an agency provided the resulting destruction is equally complete.

(b) Records of Destruction: Appropriate accountability records maintained in the department or agency shall reflect the destruction of classified defense material.

Section 10. ORIENTATION AND INSPECTION

To promote the basic purposes of this order, heads of those departments and agencies originating or handling classified defense information shall designate experienced persons to coordinate and supervise the activities applicable to their departments or agencies under this order. Persons so designated shall maintain active training and orientation programs for employees concerned with classified defense information to impress each such employee with his individual responsibility for exercising vigilance and care in complying with the provisions of this order. Such persons shall be authorized on behalf of the heads of the departments and agencies to establish adequate and active inspection programs to the end that the provisions of this order are administered effectively.

Section 11. INTERPRETATION OF REGULATIONS BY THE ATTORNEY GENERAL

The Attorney General, upon request of the head of a department or agency or his duly designated representative, shall personally or through authorized representatives of the Department of Justice render an interpretation of these regulations in connection with any problems arising out of their administration.

Section 12. STATUTORY REQUIREMENTS

Nothing in this order shall be construed to authorize the dissemination, handling or transmission of classified information contrary to the provisions of any statute.

Section 13. RESTRICTED DATA, MATERIAL FORMERLY DESIGNATED AS 'RESTRICTED DATA,' COMMUNICATIONS INTELLIGENCE AND CRYPTOGRAPHY: (Note 3)

(a) Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. 'Restricted Data,' and material formerly designated as "Restricted Data," shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

(b) Nothing in this order shall prohibit any special requirements that the originating agency or other appropriate authority may impose as to communications intelligence, cryptography, and matters related thereto.

Section 14. COMBAT OPERATIONS

The provisions of this order with regard to dissemination, transmission, or safekeeping of classified defense information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

Section 15. EXCEPTIONAL CASES (Note 1)

When, in an exceptional case, a person or agency not authorized to classify defense information originates information which is believed to require classification, such person or agency shall protect that information in the manner prescribed by this order for that category of classified defense information into which it is believed to fall, and shall transmit the information forthwith, under appropriate safeguards, to the department, agency, or person having both the authority to classify information and a direct official interest in the information (preferably, that department, agency, or person to which the information would be transmitted in the ordinary course of business), with a request that such department, agency, or person classify the information.

"Historical Research. As an exception to the standard of access prescribed in the first sentence of section 7, but subject to all other provisions of this order, the head of an agency may permit persons outside the executive branch performing functions in connection with historical research projects to have access to classified defense information originated within his agency if he determines that: (a) access to the information will be clearly consistent with the interests of national defense, and (b) the person to be granted access is trustworthy: Provided, that the head of the agency shall take appropriate steps to assure that classified information is not published or otherwise compromised."

Section 16. REVIEW TO INSURE THAT INFORMATION IS NOT IMPROPERLY WITHHELD HEREUNDER

The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from non-Governmental sources relating to the operation of this order.

Section 17. REVIEW TO INSURE SAFEGUARDING OF CLASSIFIED DEFENSE INFORMATION

The National Security Council shall conduct a continuing review of the implementation of this order to insure that classified defense information is properly safeguarded, in conformity herewith.

Section 18. REVIEW WITHIN DEPARTMENTS AND AGENCIES

The head of each department and agency shall designate a member or members of his staff who shall conduct a continuing review of the implementation of this order within the department or agency concerned to insure that no information is withheld hereunder which the people of the United States have a right to know, and to insure that classified defense information is properly safeguarded in conformity herewith.

Section 19. UNAUTHORIZED DISCLOSURE BY GOVERNMENT PERSONNEL (Note 3)

The head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order, and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case.

Section 20. REVOCATION OF EXECUTIVE ORDER NO. 10290 (Note 3)

Executive Order No. 10290 of September 24, 1951 is revoked as of the effective date of this order.

Section 21. EFFECTIVE DATE (Note 3)

This order shall become effective on December 15, 1953.

DWIGHT D. EISENHOWER

THE WHITE HOUSE

November 5, 1953.

NOTES:
1. As Amended by Executive Order 10816 dated May 7, 1959
2. As Amended by Executive Order 10901 dated January 9, 1961
3. As Amended by Executive Order 10964 dated September 20, 1961
4. As Amended by Executive Order 10985 dated January 12, 1962
5. As Amended by Executive Order 11097 dated February 28, 1963

THE NATIONAL ARCHIVES
LITTERA SCRIPTA MANET
FEDERAL REGISTER
1934
OF THE UNITED STATES
VOLUME 23 NUMBER 130
Washington, Thursday, July 3, 1958

TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 10773

DELEGATING AND TRANSFERRING CERTAIN FUNCTIONS AND AFFAIRS TO THE OFFICE OF DEFENSE AND CIVILIAN MOBILIZATION

By virtue of the authority vested in me as President of the United States, including authority vested in me by the provisions of Reorganization Plan No. 1 of 1958 and including also authority vested in me by provisions of law cited in the preambles of, or relied upon in connection with the issuance of, orders amended by this order, it is ordered as follows:

SECTION 1. The "Office of Defense and Civilian Mobilization" and the "Director of the Office of Defense and Civilian Mobilization", referred to in this order, are the Office of that name and the officer with that title, respectively, provided for in Reorganization Plan No. 1 of 1958.

SEC. 2. (a) There are hereby delegated to the Director of the Office of Defense and Civilian Mobilization, with power of redelegation by him, all functions transferred to the President by the provisions of Reorganization Plan No. 1 of 1958.

(b) Subject to the provisions of section 7 of this order, all functions of the President of the United States heretofore delegated or assigned to the Director of the Office of Defense Mobilization, the Office of Defense Mobilization, the Federal Civil Defense Administrator (or the Administrator of the Federal Civil Defense Administration), or the Federal Civil Defense Administration are, to the extent that those delegations or assignments were in effect June 30, 1958, redelegated or reassigned, as the case may be, to the Director of the Office of Defense and Civilian Mobilization.

SEC. 3. Except in instances wherein the provisions concerned are for any reason inapplicable as of the effective date of Reorganization Plan No. 1 of 1958:

(a) Each reference in any prior Executive order to the Director of the Office of Defense Mobilization and each reference in any prior Executive order to the Federal Civil Defense Administrator (or to the Administrator of the Federal Civil Defense Administration) is hereby amended to refer to the Director of the Office of Defense and Civilian Mobilization.

(b) Each reference in any prior Executive order to the Office of Defense Mobilization and each reference in any prior Executive order to the Federal Civil Defense Administration is hereby amended to refer to the Office of Defense and Civilian Mobilization.

SEC. 4. Without limiting the application of section 3 of this order, the amendments made thereby shall apply, subject to the provisions of section 3 of this order:

(a) To references to the Federal Civil Defense Administrator (or to the Administrator of the Federal Civil Defense Administration) and to references to the Federal Civil Defense Administration in the following-designated Executive orders, including any Executive orders amendatory thereof or supplementary thereto:

(1) Executive Order No. 10242 of May 8, 1951.

(2) Executive Order No. 10260 of June 27, 1951.

(3) Executive Order No. 10346 of April 17, 1952.

(4) Executive Order No. 10421 of December 31, 1952.

(5) Executive Order No. 10427 of January 16, 1953.

(6) Executive Order No. 10529 of April 22, 1954.

(7) Executive Order No. 10737 of October 29, 1957.

(b) To references to the Director of the Office of Defense Mobilization and to references to the Office of Defense Mobilization in the following-designated Executive orders, including any Executive order amendatory thereof or supplementary thereto:

(1) Executive Order No. 10219 of

February 28, 1951.

(2) Executive Order No. 10296 of October 2, 1951.

(3) Executive Order No. 10312 of December 10, 1951.

(4) Executive Order No. 10346 of April 17, 1952.

(5) Executive Order No. 10421 of December 31, 1952.

(6) Executive Order No. 10460 of June 16, 1953.

(7) Executive Order No. 10480 of August 14, 1953, (except section 102).

(8) Executive Order No. 10494 of October 14, 1953.

(9) Executive Order No. 10524 of March 31, 1954.

(10) Executive Order No. 10539 of June 22, 1954.

(11) Executive Order No. 10560 of September 9, 1954.

(12) Executive Order No. 10590 of January 18, 1955.

(13) Executive Order No. 10601 of March 21, 1955.

(14) Executive Order No. 10634 of August 25, 1955.

(15) Executive Order No. 10638 of October 10, 1955.

(16) Executive Order No. 10655 of January 28, 1956.

(17) Executive Order No. 10660 of February 15, 1956.

(18) Executive Order No. 10700 of February 25, 1957.

(19) Executive Order No. 10705 of April 17, 1957.

SEC. 5. Each reference in Executive Order No. 10737 of October 29, 1957, to a Regional Administrator of the Federal Civil Defense Administration is hereby amended to refer to a Regional Director of the Office of Defense and Civilian Mobilization.

SEC. 6. (a) There is hereby established in the Office of Defense and Civilian Mobilization the Defense and Civilian Mobilization Board. The Board shall be composed of the Director of the Office of Defense and Civilian Mobilization, who shall be the chairman of the Board, and of the heads of such executive departments and agencies of the Government as may be designated, with their consent, from time to time by the Director.

(b) The Director of the Office of Defense and Civilian Mobilization may from time to time establish subsidiary units of the Board and assign suitable names thereto. The Director and the heads of any executive departments and agencies may be designated, with their consent, as members of such units. The Director shall be the chairman of any subsidiary unit of which he is a member and he shall designate the chairman of any other subsidiary unit from among the members thereof.

(c) The Board established by this section, and each subsidiary unit thereof established under this section, shall advise the Director of the Office of Defense and Civilian Mobilization with respect to matters relating to his responsibilities as he shall request.

SEC. 7. The following are hereby revoked:

(1) Executive Order No. 10224 of March 15, 1951.

(2) Executive Order No. 10276 of July 31, 1951.

(3) Executive Order No. 10293 of September 27, 1951.

(4) Executive Order No. 10350 of May 14, 1952.

(5) Executive Order No. 10475 of July 31, 1953.

(6) Section 102 of Executive Order No. 10480 of August 14, 1953.

(7) Executive Order No. 10611 of May 11, 1955.

SEC. 8. This order shall not operate to terminate or impair any regulation, ruling, order, directive, certificate, determination, authorization, contract, agreement, or other action, issued, undertaken, or entered into with respect to any function affected by the provisions of sections 2, 3, or 4 of this order; nor shall this order affect the validity or force of anything heretofore done in connection with any such function. Any of the instruments referred to in this section may be hereafter amended, modified, or revoked, by appropriate authority.

SEC. 9. The Director of the Office of Defense and Civilian Mobilization is hereby authorized to issue such regulations as he may deem necessary or desirable to carry out the purposes of this order.

SEC. 10. The provisions of this order shall be effective as of July 1, 1958, the effective date of Reorganization Plan No. 1 of 1958.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
July 1, 1958.

[F. R. Doc. 58-5159; Filed, July 1, 1958; 5:02 p. m.]

Tuesday, October 2, 1962 FEDERAL REGISTER 9683

27 FR 191, 2 Oct 62

Executive Order 11051

PRESCRIBING RESPONSIBILITIES OF THE OFFICE OF EMERGENCY PLANNING IN THE EXECUTIVE OFFICE OF THE PRESIDENT

WHEREAS national preparedness must be achieved and maintained to support such varying degrees of mobilization as may be required to deal with increases in international tension, with limited war, or with general war including attack upon the United States; and

WHEREAS the national security and our continuing economic growth and prosperity are interdependent, appropriate attention must be directed to effective coordination of emergency preparedness measures with national economic policies and objectives; and

WHEREAS mobilization readiness and civil defense activities can be accomplished most effectively and efficiently through the performance by departments and agencies of the Government of those emergency preparedness functions related to their established roles and capabilities; and

WHEREAS responsibility for emergency preparedness involves virtually every agency of the Federal Government, and there is need to provide a central point of leadership and coordination in the Executive Office of the President:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, including the authorities contained in the National Security Act of 1947, the Defense Production Act of 1950 (50 U.S.C. App. 2061 et seq.), the Federal Civil Defense Act of 1950 (50 U.S.C. App. 2251 et seq.), and other authorities of law vested in me pursuant to Reorganization Plan No. 1 of 1958 (72 Stat. 1799), and also including the authority vested in me by the provisions of Section 301 of title 3 of the United States Code, it is hereby ordered as follows:

PART I. SCOPE

SECTION 101. *Resumé of responsibilities.* The Director of the Office of Emergency Planning (hereinafter referred to as the Director) shall:

(a) Advise and assist the President in the coordination of and in the determination of policy for the emergency plans and preparedness assignments of the Federal departments and agencies (hereinafter referred to as Federal agencies) designed to make possible at Federal, State and local levels the mobilization of the human, natural and industrial resources of the nation to meet all conditions of national emergency, including attack on the United States.

(b) Under the direction of the President, be responsible for the preparation of nonmilitary plans and preparedness programs with respect to organization and functioning of the Federal Government under emergency conditions and with respect to specific areas of Federal activity necessary in time of war which are neither performed in the normal operations of the regular departments and agencies nor assigned thereto by or under the authority of the President.

(c) Perform such other functions as are vested in him by law or are by this order, or by orders referred to in this order, delegated or otherwise assigned to him.

(d) Perform such additional functions as the President may from time to time direct.

PART II. GENERAL COORDINATING RESPONSIBILITIES

SEC. 201. *General.* (a) The Director shall advise and assist the President in (1) the development of planning assumptions and broad emergency preparedness objectives with respect to various conditions of national emergency, (2) the development of policies and procedures to determine the relationship between available supplies of the nation's resources and the requirements of military, foreign, and essential civilian programs, including those of civil defense, (3) the development of policies, programs, and control systems designed to deal with supply deficiencies and to meet effectively the most urgent requirements for those resources in the interests of national defense,

and (4) coordinating the governmental programs designed to achieve these ends.

(b) The Director shall advise and assist the President with respect to resolving any issues, related to emergency preparedness responsibilities of Federal agencies, which arise between two or more such agencies.

SEC. 202. *Resources and Requirements.* The Director shall provide policy guidance to the heads of Federal agencies having resource mobilization or claimancy responsibilities to assist them in (1) the development and submission of estimated military and foreign as well as industrial and consumer requirements, (2) the development of resource supply estimates; and (3) the periodic evaluation of requirements estimates in relation to estimates of availability of resources from all sources.

SEC. 203. *Central program determination.* The Director shall develop an overall emergency system for reaching central program decisions for the utilization of resources on the basis that he will have the responsibility for making such central decisions in the initial period of an emergency. This system shall include uniform criteria and procedures for:

(a) The development by each Federal agency of the amounts and types of resources which it must claim in order to meet the requirements of its planned programs;

(b) The central consideration of the supply-requirements evaluations of planned programs;

(c) The central determination of major resource utilization programs under varied conditions of national emergency on a relative urgency basis and central direction for the adjustment of agency programs consistent with such determinations; and

(d) The decentralization of controls if required by emergency conditions.

SEC. 204. *Control systems.* The Director shall develop policies and procedures for the coordinated application by Federal agencies, in time of emergency, of priorities, allocations, and other resource control and distribution systems (including a system for the rationing of consumer goods) for the conduct of approved major programs.

SEC. 205. *Research.* The Director shall develop, maintain, and conduct a central research planning program for emergency preparedness purposes. The Director shall maintain, with the participation and support of Federal agencies concerned, a national resources evaluation capability for predicting and monitoring the status of resources under all degrees of emergency, for identifying resource deficiencies and feasible production programs and for supplying resource evaluations at national and subordinate levels to support mobilization base planning, continuity of government, resource management and economic recovery.

SEC. 206. *Dispersal and protection of facilities.* (a) The Director, after consultation with the appropriate Federal agencies, shall advise the President concerning the strategic relocation of industries, services, government and economic activities, the operations of which are essential to the nation's security. He shall coordinate the efforts of Federal agencies with respect to the application of the principle of geographic dispersal of certain industrial facilities, both government- and privately-owned, in the interest of national defense.

(b) The Director, under authority of, and in accordance with the provisions of, Executive Order No. 10421 of December 31, 1952, shall perform functions in respect of the physical security of facilities important to the national defense.

(c) In addition, the Director shall review all measures being taken by the Federal agencies with respect to the physical security and protection of facilities important to defense mobilization, defense production, civil defense or the essential civilian economy, including those under the provisions of emergency preparedness assignments to such

agencies and shall recommend to the President such actions as are necessary to strengthen such measures.

SEC. 207. *Civil defense.* (a) Under authority of the provisions of Section 2 of Executive Order No. 10952 of July 20, 1961, and as there prescribed, the Director shall advise and assist the President, and shall perform other functions, in respect of civil defense.

(b) Under authority of, and in accordance with the provisions of, Executive Order No. 10958 of August 14, 1961, the Director shall advise and assist the President with respect to the stockpiling of food and medical supplies.

(c) The Director shall advise and assist the President with respect to the need for stockpiling various items essential to the survival of the population, additional to food and medical supplies, and with respect to programs for the acquisition, storage, and maintenance of such stockpiles.

SEC. 208. *Federal-State relations.* (a) The Director shall represent the President in working with State Governors to stimulate vigorous State and local participation in emergency preparedness measures.

(b) He shall provide advice and guidance to the States with regard to preparations for the continuity of State and local civilian political authority in the event of nuclear attack on the United States which shall include, but not be limited to, programs for maintaining lines of succession to office, safekeeping of essential records, provision for alternate sites of government, the protection and effective use of government resources, personnel, and facilities, and interstate compacts and reciprocal legislation relating to emergency preparedness.

(c) He shall assist the President in achieving a coordinated working relationship between the various elements of State governments and the Federal agencies to which specific emergency preparedness functions have been assigned pursuant to statute or Executive order.

(d) The civil defense activities involved in the functions prescribed by the foregoing provisions of this section shall be carried out in accordance with the provisions of Section 2 of Executive Order No. 10952 of July 20, 1961.

SEC. 209. *Review and evaluation.* The Director shall from time to time furnish the President overall reports and recommendations concerning the emergency preparedness programs, including the state of preparedness of Federal, State, and local governments to carry out their emergency functions.

PART III. SPECIAL EMERGENCY PLANNING RESPONSIBILITIES

SEC. 301. *General.* Under the direction of the President, the Director shall have primary responsibility (1) for planning assumptions and broad nonmilitary emergency preparedness objectives, (2) for planning the nonmilitary organization and functioning of the Federal Government in time of national emergency, (3) for developing, in association with interested agencies, the emergency planning, including making recommendations to the President as to the appropriate roles of Federal agencies, in currently unassigned matters, such as, but not necessarily limited to, economic stabilization, economic warfare, emergency information, and wartime censorship, (4) for planning for the emergency mobilization of telecommunications resources, and (5) for the development of nonmilitary policies and programs for use in the event of enemy attack on the United States designed to restore the national defense potential of the nation.

SEC. 302. *Emergency organization.* The Director, in consultation with the Director of the Bureau of the Budget, shall plan for the organization and functioning of the Federal Government in an emergency, including provisions for the central direction of all emergency mobilization activities and the creation of such emergency agencies as may be required for the conduct of emergency activities including those within the normal jurisdiction of existing agencies. Plans shall provide for maximum practicable reliance to be placed on existing Federal agencies with competence in emergency operations and, as

best may be, shall be harmonious with related operations of the Government as a whole.

SEC. 303. *Emergency authorities.* The Director shall provide for the prompt exercise of Federal emergency authority through the advance preparation of such proposed legislation, Executive orders, rules, regulations, and directives as would be necessary to put into effect operating programs appropriate to the emergency situation.

SEC. 304. *Continuity of Federal Government.* The Director shall develop policies and plans to assure the continuity of essential Federal Government activities through programs to provide for lines of succession to office, safekeeping of essential records, alternate sites for Government operations, and the protection and effective use of Government resources, personnel, and facilities.

SEC. 305. *Executive Reserve.* The Director, under authority of, and in accordance with the provisions of, Executive Order No. 10660 of February 15, 1956, shall develop policies and plans for the provision of an Executive Reserve of personnel capable of filling executive positions in the Government in time of emergency.

SEC. 306. *Emergency telecommunications.* The Director shall be responsible for (1) planning for the mobilization of the nation's telecommunications resources in time of national emergency, and (2) carrying out, under the authority of, and in accordance with the provisions of, Executive Order No. 10705 of April 17, 1957, the functions thereby delegated or otherwise assigned to him.

SEC. 307. *Post-attack recovery.* Under the direction of the President, the Director, with the cooperation and assistance of the Federal agencies, shall develop policies, plans, and programs designed to provide for the rapid restoration after an attack on the United States of a national capability to support a strong national defense effort.

PART IV. CURRENT MANAGEMENT RESPONSIBILITIES

SEC. 401. *Defense production.* Under the authority of, and in accordance with the provisions of, Executive Order No. 10480 of August 14, 1953, the Director shall perform the functions thereby delegated or otherwise assigned to him.

SEC. 402. *Strategic and critical materials stockpiling.* (a) There are hereby delegated to the Director all those functions under the Strategic and Critical Materials Stockpiling Act (50 U.S.C. 98 et seq.), under Section 4(h) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b(h)), and under Section 204(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 485(f)), which were transferred to the President by the provisions of Reorganization Plan No. 1 of 1958 (72 Stat. 1799).

(b) The Director, under the provisions of the said Strategic and Critical Materials Stockpiling Act, shall determine which materials are strategic and critical and the quality and quantity of such materials which shall be stockpiled, and shall direct the General Services Administration in the purchase, storage, refinement, rotation, and disposal of materials.

(c) The Director is hereby designated as an agency under and for the purposes of the provisions of clause (b) of Section 5 of the Strategic and Critical Materials Stockpiling Act (50 U.S.C. 98d (clause (b))); and, accordingly, in the event of enemy attack upon the United States the Director is authorized and directed to order the release by the Administrator of General Services of such materials from stockpiles established under the said Act, in such quantities, for such uses, and on such terms and conditions, as the Director determines to be necessary in the interests of the national defense.

SEC. 403. *Supplemental stockpile.* The Director, under authority of the provisions of Section 4(d)(2) of Executive Order No. 10900 of January 6, 1961, shall determine from time to time the materials to be contracted for or purchased for a supplemental stockpile with foreign currencies pursuant to the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1704(b)).

SEC. 404. *Imports threatening the national security.* (a) The Director, under the authority of, and in accordance with the provisions of, Section 2 of the Act of July 1, 1954 (68 Stat. 360; 19 U.S.C. 1352a), shall make appropriate investigations of the effects of imports on the national security and shall advise the President of any case in which the Director is of the opinion that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

(b) The Director, under authority of, and in accordance with the provisions of, Section 3(d) of Executive Order No. 10582 of December 17, 1954, shall furnish advice to procuring agencies with respect to the rejection of bids or offers to furnish materials of foreign origin on the ground that such rejection is necessary to protect essential national security interests.

SEC. 405. *Disaster relief.* The Director, under authority of, and in accordance with the provisions of, Executive Order No. 10427 of January 16, 1953, and Executive Order No. 10737 of October 29, 1957, shall exercise authority under the Act of September 30, 1950, entitled "An Act to authorize Federal assistance to States and local governments in major disasters, and for other purposes" (42 U.S.C. 1855 et seq.).

SEC. 406. *Telecommunications.* Under authority of, and in accordance with the provisions of, Executive Order No. 10995 of February 16, 1962, the Director shall perform functions in respect of telecommunications.

PART V. GENERAL PROVISIONS

SEC. 501. *Rules and regulations.* In carrying out his responsibilities under this order, the Director is authorized to issue such rules and regulations, and directives, consonant with law and Executive order, as he deems necessary and appropriate to the functions involved.

SEC. 502. *Boards and committees.* The Director is hereby authorized to establish in headquarters and in the field such boards and committees as he deems necessary to advise him in the conduct of activities outlined herein.

SEC. 503. *Certain additional authorities.* (a) There are hereby delegated to the Director all those now-existing functions under the National Security Act of 1947 which were transferred to the President by the provisions of Reorganization Plan No. 1 of 1958 (72 Stat. 1799).

(b) In performing the functions under the Federal Civil Defense Act of 1950 assigned to him, and subject to applicable provisions of Executive orders, the Director is authorized to exercise the authority conferred by Title IV of that Act. The foregoing provision of this subsection shall not be deemed to derogate from any authority under Title IV heretofore available to the Secretary of Defense.

SEC. 504. *Reports.* The Director is authorized to require from Federal agencies such statistical data and progress reports at such intervals as he deems necessary to discharge his responsibilities under this order.

SEC. 505. *Prior actions.* All orders, regulations, rulings, certificates, directives, and other actions relating to any function affected by this order shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority, and nothing in this order shall affect the validity or force of anything done under previous delegations or other assignments of the functions affected by this order.

SEC. 506. *Executive Order 11030.* Nothing in this order or in any order amended by this order shall derogate from the provisions of Executive Order No. 11030 of June 19, 1962.

SEC. 507. *References to orders and Acts.* Except as may for any reason be inappropriate, references in this order to any other Executive order or to any Act, and references in this order or in any other Executive order to this order, shall be deemed to include references thereto, respectively, as amended from time to time.

PART VI. PRIOR EXECUTIVE ORDERS AND PROCLAMATIONS

SEC. 601. *General amendments.* Each reference to the Office of Civil and Defense Mobilization or to the Director of the Office of Civil and Defense Mobilization in the following is hereby amended to refer to the Office of Emergency Planning and the Director of the Office of Emergency Planning, respectively:

(1) Executive Order No. 10296 of October 2, 1951
(2) Executive Order No. 10312 of December 10, 1951
(3) Executive Order No. 10346 of April 17, 1952 (penultimate sentence of Section 2, only)
(4) Executive Order No. 10421 of December 31, 1952
(5) Executive Order No. 10427 of January 16, 1953
(6) Executive Order No. 10480 of August 14, 1953
(7) Executive Order No. 10494 of October 14, 1953
(8) Executive Order No. 10601 of March 21, 1955
(9) Executive Order No. 10634 of August 25, 1955
(10) Executive Order No. 10660 of February 15, 1956
(11) Executive Order No. 10705 of April 17, 1957
(12) Executive Order No. 10737 of October 29, 1957
(13) Executive Order No. 10900 of January 5, 1961
(14) Executive Order No. 10952 of July 20, 1961
(15) Executive Order No. 10958 of August 14, 1961
(16) Proclamation No. 3279 of March 10, 1959

SEC. 602. *Executive Order 10242.* Executive Order No. 10242 of May 8, 1951, is hereby amended:

(1) By deleting from subsection 101(a) thereof the following: "upon the Director of the Office of Civil and Defense Mobilization, hereinafter referred to as the Director,".

(2) By deleting from Sections 101(c), 101(d), 102, 103, 104, 106 (preamble), 201, and 301 the following: "upon the Director of the Office of Civil and Defense Mobilization".

(3) By substituting for the words "the Director of the Office of Civil and Defense Mobilization", at each place where they occur in the order and are not deleted or otherwise amended by this order, the following: "the delegate of the President".

(4) By substituting for the words "shall not be delegated" in subsection 101(d) the following: "shall not be redelegated by the delegate of the President".

(5) By adding after Section 106 new Sections 107, 108, and 109, reading as follows:

"SEC. 107. The words 'the delegate of the President' as used in this order:

"(1) In respect of functions under the Act delegated or otherwise assigned to the Secretary of Defense, mean the Secretary of Defense.

"(2) In respect of functions delegated or otherwise assigned to the Director of the Office of Emergency Planning, mean the Director of the Office of Emergency Planning.

"SEC. 108. The authority conferred by Section 401(a) of the Act to employ part-time or temporary advisory personnel deemed necessary in carrying out the provisions of the Act, and delegated by the provisions of Section 101(a) of this order, shall be available as follows: (1) To the Secretary of Defense in respect of not to exceed eighty personnel (including not to exceed twenty subjects of the United Kingdom and Canada), and (2) to the Director of the Office of Emergency Planning in respect of not to exceed twenty personnel (including not to exceed five subjects of the United Kingdom and Canada).

"SEC. 109. The relevant provisions of this Part shall be subject to the provisions of the Memorandum of the President, pertaining to conflicts of interest, dated February 9, 1962 (27 F.R. 1341ff.)."

(c) By amending Section 401 to read as follows:

"SEC. 401. The approval of the President is hereby given for the employment of retired personnel of the armed services, pursuant to the provisions of subsection 401(a) of the Act as follows: (1) By the Secretary of Defense, not to exceed twenty persons, and (2) by the Director of the Office of Emergency Planning, not to exceed five persons."

SEC. 603. *Other orders.* (a) Executive Order No. 10260 of June 27, 1951, is hereby amended by striking from Section 1 thereof the following: "Office of Civil and Defense Mobilization, the".

(b) Executive Order No. 10346 of April 17, 1952, is hereby amended by substituting for the reference therein to the Director of the Office of Civil and Defense Mobilization, and for each reference therein to the Office and Defense Mobilization except that in the penultimate sentence of Section 2, the following: "the Office of Emergency Planning or the Department of Defense or both, as may be determined under the provisions of appropriate Executive orders".

(c) Executive Order No. 10421 of December 31, 1952, is hereby amended by inserting before the period at the end of Section 3(b)(9) thereof a comma and the following: "including recommendations as to actions necessary to strengthen the program provided for in this order".

(d) Executive Order No. 10529 of April 22, 1954, is hereby amended by substituting for each reference therein to the Director of the Office of Civil and Defense Mobilization the following: "the Director of the Office of Emergency Planning or the Secretary of Defense or both as may be determined under appropriate Executive orders".

(e) Executive Order No. 10582 of December 17, 1954, is hereby amended by striking from Section 3(d) thereof the words "from any officer of the Government designated by the President to furnish such advice" and by inserting in lieu of the stricken words the following: "from the Director of the Office of Emergency Planning. In providing this advice the Director shall be governed by the principle that exceptions under this section shall be made only upon a clear showing that the payment of a greater differential than the procedures of this section generally prescribe is justified by consideration of national security".

(f) Executive Order No. 10789 of November 14, 1958, is hereby amended by striking from Section 21 thereof the words "Office of Civil and Defense Mobilization".

SEC. 604. *Superseded orders.* To the extent that the following have not heretofore been made or become inapplicable, they are hereby superseded and revoked:

(1) Executive Order No. 9981 of July 26, 1948
(2) Executive Order No. 10219 of February 28, 1951
(3) Executive Order No. 10269 of July 6, 1951
(4) Executive Order No. 10438 of March 13, 1953
(5) Executive Order No. 10461 of June 17, 1953
(6) Executive Order No. 10524 of March 31, 1954
(7) Executive Order No. 10539 of June 22, 1954 (without prejudice to final liquidation of any affairs thereunder)
(8) Executive Order No. 10638 of October 10, 1955
(9) Executive Order No. 10773 of July 1, 1958
(10) Executive Order No. 10782 of September 6, 1958
(11) Executive Order No. 10902 of January 9, 1961

JOHN F. KENNEDY

THE WHITE HOUSE,
September 27, 1962.

[F.R. Doc. 62-9860; Filed, Sept. 28, 1962; 1:27 p.m.]

SECURITY OF VESSELS

AND

WATERFRONT FACILITIES

(Title 33, C. F. R., Parts 3, 6, 121, 122, 124, 125, and 126)

CG-239

MARCH 1, 1967

UNITED STATES COAST GUARD

TREASURY DEPARTMENT

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FOREWORD

This pamphlet entitled "Security of Vessels and Waterfront Facilities," CG-239, relates to the safeguarding of vessels, harbors, ports, and waterfront facilities of the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States exclusive of the Canal Zone. The regulations are issued pursuant to Executive Order 10173, as amended by Executive Orders 10277 and 10352, and carry out the requirements of Section 1, Title II of the Act of June 15, 1917, as amended (40 Stat. 220, 50 U.S.C. 191).

The regulations in this pamphlet are copied from Chapter I of Title 33—Navigation and Navigable Waters of the Code of Federal Regulations and include material published in Subchapter A—General, Subchapter K—Security of Vessels, and Subchapter L—Security of Waterfront Facilities, which have been published in various issues of the Federal Register prior to March 1, 1967. This pamphlet replaces the prior edition of July 1, 1964, and contains requirements currently in effect. For the convenience of all concerned, the appendix contains a current listing of the descriptions and addresses of the Captains of the Port and Coast Guard districts, as well as appropriate excerpts of law from the United States Code.

General authority over and responsibility for the administration and enforcement of the laws and regulations relating to security of vessels and waterfront facilities in the several Coast Guard districts are vested in and imposed upon the Coast Guard District Commanders in charge of such districts. The Captains of the Port have been designated for the purpose of giving immediate direction to Coast Guard enforcement activities within the general proximity of the port in which he is situated under the general supervision of a Coast Guard District Commander.

The masters, owners, operators, and agents of vessels or other waterfront facilities have the primary responsibility for the protection and security of such vessels or waterfront facilities. Masters, shipowners, operators, and agents, vessels' operating forces, and other persons affected by the requirements for security of vessels and waterfront facilities should familiarize themselves with the requirements contained in this publication. To this end, Coast Guard personnel concerned with the administration and enforcement of these laws, namely the Coast Guard District Commander and the Captain of the Port who have jurisdiction over Coast Guard enforcement activities in the general area of the port in which he is situated, will extend upon request every possible assistance.

W. J. SMITH,
Admiral, U.S. Coast Guard,
Commandant.

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CONTROL SHEET FOR CHANGES

Federal Register date	Section No.	Subject

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Federal Register date	Section No.	Subject

CONTENTS

[1] The regulations in this pamphlet are copied from Title 1, Chapter 1, Code of Federal Regulations of the United States of America, as amended.

THE TERMINOLOGY FOR NUMBERING

This is an explanation of the numbering system used in Coast Guard pamphlets containing regulations and is the same as that used in the Code of Federal Regulations.

The regulations are divided into chapters, subchapters, parts, subparts, sections, paragraphs, subparagraphs, and subdivisions. The chapters are numbered with a Roman numeral and the subchapters are given alphabetical designations. The terminology for numbering may be described as follows:

Terminology	*Example*
Part	6
Subpart	6.01
Section	6.01–1
Paragraph	6.01–1(a)
Subparagraph	6.01–1(a)(1)
Subdivision	6.01–1(a)(1)(i)

EXECUTIVE ORDER 10173 AS AMENDED BY EXECUTIVE ORDERS 10277, 10352, AND 11249

REGULATIONS RELATING TO THE SAFEGUARDING OF VESSELS, HARBORS, PORTS, AND WATERFRONT FACILITIES OF THE UNITED STATES

By virtue of the authority vested in me by Public Law 679, 81st Congress, 2d Session, approved August 9, 1950, which amended section 1, Title II of the act of June 15, 1917, 40 Stat. 220 (50 U.S.C. 191), and as President of the United States, I hereby find that the security of the United States is endangered by reason of subversive activity, and I hereby prescribe the following regulations relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront facilities in the United States, and all territory and water, continental or insular, subject to the jurisdiction of the United States, exclusive of the Canal Zone, and the said regulations shall constitute Part 6, Subchapter A, Chapter I, Title 33 of the Code of Federal Regulations; and all agencies and authorities of the Government of the United States shall, and all state and local authorities and all persons are urged to support, conform to, and assist in the enforcement of these regulations and all supplemental regulations issued pursuant thereto.

SUBCHAPTER A—GENERAL

PART 6—PROTECTION AND SECURITY OF VESSELS, HARBORS, AND WATERFRONT FACILITIES

Subpart 6.01—Definitions

Sec.
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6.01–2 District Commander.
6.01–3 Captain of the Port.
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Sec.
6.19–1 Primary responsibility.

AUTHORITY: §§ 6.01–1 to 6.19–1, inclusive, issued under the act of June 15, 1917, 40 Stat. 220, 50 U.S.C. 191, as amended by Pub. Law 679, 81st Cong., 2d Session, approved August 9, 1950.

SOURCE: §§ 6.01–1 to 6.18–1 contained in E.O. 10173 dated October 18, 1950, and published in Federal Register October 20, 1950, 15 F.R. 7005, 7007, 7008. §§ 6.04–1(a), 6.10–1, and 6.10–7 were amended and §§ 6.14–1, 6.14–2, and 6.19–1 were added by E.O. 10277, dated August 1, 1951, and published in Federal Register August 2, 1951, 16 F.R. 7537, 7538. § 6.10–1 was further amended by E.O. 10352 dated May 19, 1952, and published in Federal Register May 21, 1952, 17 F.R. 4607. §§ 6.01–3, 6.01–4, 6.04–5, and 6.04–7 were amended and §§ 6.01–5 and 6.04–6 were added by E.O. 11249 dated October 10, 1965, 30 F.R. 13001, 13002.

SUBPART 6.01—DEFINITIONS

6.01–1 Commandant. "Commandant" as used in this part, means the Commandant of the United States Coast Guard.

6.01–2 District Commander. "District Commander" as used in this part, means the officer of the Coast Guard designated by the Commandant to command a Coast Guard District.

6.01–3 Captain of the Port. "Captain of the Port" as used in this part, means the officer of the Coast Guard, under the command of a District Commander, so designated by the Commandant for the purpose of giving immediate direction to Coast Guard law enforcement activities within his assigned area. In addition, the District Commander shall be Captain of the Port with respect to remaining areas in his District not assigned to officers designated by the Commandant as Captain of the Port.

6.01–4 Waterfront facility. "Waterfront facility" as used in this part, means all piers, wharves, docks, and similar structures to which vessels may be secured; areas of land, water, or land and water under and in immediate proximity to them; buildings on such structures or contiguous to them and equipment and materials on such structures or in such buildings.

6.01–5 Security zone. "Security zone" as used in this part, means all areas of land, water, or land and water, which are so designated by the Captain of the Port for such time as he deems necessary to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States.

SUBPART 6.04—GENERAL PROVISIONS

6.04–1 Enforcement. (a) The rules and regulations in this part shall be enforced by the Captain of the Port under the supervision and general direction of the District Commander and the Commandant, and all authority and power vested in the Captain of the Port by the regulations in this part shall be deemed vested in and may be exercised by the District Commander and the Commandant.

(b) The rules and regulations in this part may be enforced by any other officer of the Coast Guard designated by the Commandant or the District Commander.

6.04–5 Preventing access of persons, articles or things to vessels, or waterfront facilities. The Captain of the Port may prevent any person, article, or thing from boarding or being taken or placed on board any vessel or entering or being taken into or upon or placed in or upon any waterfront facility whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury or to prevent damage or injury to any vessel, or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

6.04–6 Establishing security zones; prohibitions with respect thereto. The Captain of a Port may establish security zones subject to the terms and conditions specified in Section 6.01–5. No person or vessel shall enter a security zone without the permission of the Captain of the Port. No person shall board or take or place any article or thing on board any vessel in a security zone without the permission of the Captain of the Port. No person shall take or place any article or thing upon any waterfront facility in any such zone without such permission.

6.04–7. Visitation, search, and removal. The Captain of the Port may cause to be inspected and searched at any time any vessel, waterfront facility, or security zone, or any person, article, or thing thereon or therein, within the jurisdiction of the United States, may place guards upon any such vessel, waterfront facility, or security zone and may remove therefrom any and all persons, articles, or things not specifically authorized by him to go or remain thereon or therein.

6.04–8. Possession and control of vessels. The Captain of the Port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under his jurisdiction, whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

6.04–11 Assistance of other agencies. The Captain of the Port may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part.

SUBPART 6.10—IDENTIFICATION AND EXCLUSION OF PERSONS FROM VESSELS AND WATERFRONT FACILITIES

6.10–1 Issuance of documents and employment of persons aboard vessels. No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States: *Provided*, That the Commandant may designate categories of merchant vessels to which the foregoing shall not apply.

6.10–3 Special validation of merchant marine documents. The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents. The form of such documents, the conditions, and the manner of their issuance shall be as prescribed by the Commandant. The Commandant shall revoke and require the surrender of a specially validated document when he is no longer satisfied that the holder is entitled thereto.

6.10–5 Access to vessels and waterfront facilities. Any person on board any vessel or any person seeking access to any vessel or any waterfront facility within the jurisdiction of the United States may be required to carry identification credentials issued by or otherwise satisfactory to the

Commandant. The Commandant may define and designate those categories of vessels and areas of the waterfront wherein such credentials are required.

6.10–7 Identification credentials. The identification credential to be issued by the Commandant shall be known as the Coast Guard Port Security Card, and the form of such credential, and the conditions and the manner of its issuance shall be as prescribed by the Commandant after consultation with the Secretary of Labor. The Commandant shall not issue a Coast Guard Port Security Card unless he is satisfied that the character and habits of life of the applicant therefor are such as to authorize the belief that the presence of such individual on board a vessel or within a waterfront facility would not be inimical to the security of the United States. The Commandant shall revoke and require the surrender of a Coast Guard Port Security Card when he is no longer satisfied that the holder is entitled thereto. The Commandant may recognize for the same purpose such other credentials as he may designate in lieu of the Coast Guard Port Security Card.

6.10–9 Appeals. Persons who are refused employment or who are refused the issuance of documents or who are required to surrender such documents, under this subpart, shall have the right of appeal, and the Commandant shall appoint Boards for acting on such appeals. Each such Board shall, so far as practicable, be composed of one Coast Guard officer, one member drawn from management, and one member drawn from labor. The members drawn from management and labor shall, upon suitable security clearance, be nominated by the Secretary of Labor. Such members shall be deemed to be employees of the United States and shall be entitled to compensation under the provisions of section 15 of the act of August 2, 1946 (5 U.S.C. 55a) while performing duties incident to such employment. The Board shall consider each appeal brought before it and, in recommending final action to the Commandant, shall insure the appellant all fairness consistent with the safeguarding of the national security.

SUBPART 6.12—SUPERVISION AND CONTROL OF EXPLOSIVES OR OTHER DANGEROUS CARGO

6.12–1 General supervision and control. The Captain of the Port may supervise and control the transportation, handling, loading, discharging, stowage, or storage of explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations entitled "Explosives or Other Dangerous Articles on Board Vessels" (46 CFR Part 146) and the regulations governing tank vessels (46 CFR Parts 30 to 39, inclusive).

6.12–3 Approval of facility for dangerous cargo. The Commandant may designate waterfront facilities for the handling and storage of, and for vessel loading and discharging, explosives, inflammable or combustible liquids in bulk, or other dangerous articles or cargo covered by the regulations referred to in section 6.12–1, and may require the owners, operators, masters, and others concerned to secure permits for such handling, storage, loading, and unloading from the Captain of the Port, conditioned upon the fulfillment of such requirements for the safeguarding of such waterfront facilities and vessels as the Commandant may prescribe.

SUBPART 6.14—SECURITY OF WATERFRONT FACILITIES AND VESSELS IN PORT

6.14–1 Safety measures. The Commandant, in order to achieve the purposes of this Part, may prescribe such conditions and restrictions relating to the safety of waterfront facilities and vessels in port as he finds to be necessary under existing circumstances. Such conditions and restrictions may extend, but shall not be limited to, the inspection, operation, maintenance, guarding, and manning of, and fire-prevention measures for, such vessels and waterfront facilities.

6.14–2 Condition of waterfront facility a danger to vessel. Whenever the Captain of the Port finds that the mooring of any vessel to a wharf, dock, pier, or other waterfront structure would endanger such vessel, or any other vessel, or the harbor or any facility therein by reason of conditions existing on or about such wharf, dock, pier, or other waterfront structure, including, but not limited to, inadequate guard service, insufficient lighting, fire hazards, inadequate fire protection, unsafe machinery, internal disturbance, or unsatisfactory operation, the Captain of the Port may prevent the mooring of any vessel to such wharf, dock, pier, or other waterfront structure until the unsatisfactory condition or conditions so found are corrected, and he may, for the same reasons, after any vessel has been moored, compel the shifting of such vessel from any such wharf, dock, pier, or other waterfront structure.

SUBPART 6.16—SABOTAGE AND SUBVERSIVE ACTIVITY

6.16–1 Reporting of sabotage and subversive activity. Evidence of sabotage or subversive activity involving or endangering any vessel, harbor, port, or waterfront facility shall be reported immediately to the Federal Bureau of Investigation and to the Captain of the Port, or to their respective representatives.

6.16–3 Precautions against sabotage. The master, owner, agent, or operator of a vessel or

waterfront facility shall take all necessary precautions to protect the vessel, waterfront facility, and cargo from sabotage.

SUBPART 6.18—PENALTIES

6.18–1 Violations. Section 2, Title II of the act of June 15, 1917, as amended, 50 U.S.C. 192, provides as follows:

If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

(a) If any other person knowingly fails to comply with any regulation or rule issued or order given under the provisions of this title, or knowingly obstructs or interferes with the exercise of any power conferred by this title, he shall be punished by imprisonment for not more than ten years and may, at the discretion of the court, be fined not more than $10,000.

SUBPART 6.19—RESPONSIBILITY FOR SECURITY OF VESSELS AND WATERFRONT FACILITIES

6.19–1 Primary responsibility. Nothing contained in this part shall be construed as relieving the masters, owners, operators, and agents of vessels or other waterfront facilities from their primary responsibility for the protection and security of such vessels or waterfront facilities.

HARRY S. TRUMAN

THE WHITE HOUSE.

SUBCHAPTER K—SECURITY OF VESSELS

PART 121—SPECIAL VALIDATION ENDORSEMENT FOR EMERGENCY SERVICE FOR MERCHANT MARINE PERSONNEL

Sec.

AUTHORITY: §§ 121.01 to 121.29 issued under sec. 1, 40 Stat. 220, as amended; 50 U.S.C. 191; E.O. 10173, 15 F.R. 7005, 3 CFR, 1950 Supp., E.O. 10277, 16 F.R. 7537, 3 CFR, 1951 Supp., E.O. 10352, 17 F.R. 4007, 3 CFR, 1952 Supp. Interpret or apply; R.S. 4517, as amended, 4518, as amended, sec. 19, 23 Stat. 58, as amended, sec. 2, 22 Stat. 118, as amended, sec. 7, 49 Stat. 1936, as amended; 46 U.S.C. 570, 571, 572, 2, 689.

SOURCE: §§ 121.01 to 121.29 contained in CGFR 56-12 F.R. 2814, May 1, 1956, except as otherwise noted.

121.01 Requirements for special validation endorsement. (a) Except as otherwise provided in this section no person shall be employed on a merchant vessel of the United States of 100 gross tons or over unless he is in possession of a Merchant Mariner's document bearing a special validation endorsement for emergency service.

(b) The vessels described in paragraph (a) of this section include those at anchor or made fast to a dock, but not those laid up or dismantled or out of commission.

(c) By "employed" and "employment" is meant the engagement of any person to fill any licensed or certificated berth on board ship whether or not under articles and includes those engaged for standby, relief, or other capacities.

(d) The following terms and conditions shall apply with respect to the employment of any person as a replacement or addition in the crew of any vessel described in paragraph (a) of this section at foreign ports when persons in possession of documents bearing a special validation endorsement for emergency service are not available as established to the satisfaction of the United States consular representative of the area:

(1) A person in possession of a United States seaman's document not bearing a special validation endorsement for emergency service may be employed only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(2) A person who is a United States citizen and who is not in possession of a United States seaman's document may be employed if no person specified in subparagraph (1) of this paragraph is available as established to the satisfaction of the United States consular representative for the area, and then only after approval of the Commandant is obtained by the United States consular representative for the area or by the master of the vessel.

(3) A person who is not a citizen of the United States and who is not in possession of a United States seaman's document may be employed only if no person as specified in subparagraphs (1) and (2) of this paragraph is available as established to the satisfaction of the United States consular representative for the area and then only after the following terms and conditions are met:

(i) No such person shall be employed unless he presents evidence of temporary clearance from the United States consular representative for the area;

(ii) In no case shall the number of such persons employed on any one vessel exceed ten (10) percent of the total complement of the vessel, unless it is established to the satisfaction of the United States consular representative for the area that it is necessary to exceed this percentage to avoid delay to the sailing of the vessel or that the employment of persons with special qualifications as additional crewmembers is necessary in the vessel's operations; and

(iii) No such person shall be employed to fill the berth of a licensed officer or registered staff officer, except that if no radio officer is available as established to the satisfaction of the United States consular representative for the area, a person may be employed as radio operator in accordance with the provisions of Article 24, section 2, of the International Telecommunications Convention (Atlantic City, 1947), which reads as follows:

2. (1) In the case of complete unavailability of the operator in the course of a sea passage, a flight or a journey, the master or the person responsible for the station may authorize, solely as a temporary measure, an operator holding a certificate issued by the government of another country member of the Union [Footnote: The term "Union" means those countries which are parties to the International Telecommunications Convention] to perform the radio communication service.

(2) When it is necessary to employ as a temporary operator a person without a certificate or an operator not holding an adequate certificate, his performance as such must be limited solely to signals of distress, urgency and

safety, messages, relating thereto, messages relating directly to the safety of life, urgent messages relating to movement of the ship and essential messages relating to the navigation and safe movement of the aircraft. Persons employed in these cases are bound by the provisions of 508 regarding the secrecy of correspondence.

(3) In all cases, such temporary operators must be replaced as soon as possible by operators holding the certificate prescribed in Sec. 1 of this article.

121.03 Standards. Information concerning an applicant for special validation endorsement for emergency service, or a holder of such endorsement, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

121.05 Applications. (a) Any person legally holding a current valid license or certificate, or an applicant for such a document, may make application at any Coast Guard Marine Inspection Office for a special validation endorsement for emergency service.

(b) Each Marine Inspection Office shall forward promptly to the Commandant each application for a special validation endorsement received by it.

(c) (1) Application for special validation endorsement shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in Section 121.03, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(2) If an applicant fails or refuses to furnish the required information or fails or refuses to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him.

(d) (1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in Section 121.03 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(e) Upon receipt, the application and such further information as the Commandant may have required shall be referred, except in those instances where action on an application is held in abeyance pursuant to paragraphs (c)(2) or (d)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division, and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.

(CGFR 59-63, 25 F.R. 1588, Feb. 24, 1960)

121.07 Approval of applicant by Commandant. (a) If the Commandant is satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will direct that a special validation endorsement be entered on the applicant's Merchant Mariner's Document.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in Section 121.11.

121.09 Holders of special validation endorsement. (a) Whenever the Commandant is not satisfied that the character and habits of life of a holder of a document bearing a special validation endorsement are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he will request the holder to furnish under

oath in writing such information as he deems pertinent to the standards set forth in Section 121.03 and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in Paragraph 121.11(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in Paragraph 121.05(e) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall notify the holder in writing as provided for in Section 121.11.

(CGFR 59-63, 25 F.R. 1589, Feb. 24, 1960)

121.11 Notice by Commandant. (a) The notice provided for in Sections 121.07 and 121.09 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in Paragraph 121.05 (e) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant's or holder's character and habits of life are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

121.13 Hearing Boards. The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

121.15 Notice by Hearing Board. Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing.

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witnesses appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or by counsel or representative, the Hearing Board will proceed without further notice to him.

121.17 Challenges. Within five days after receipt of the notice described in Section 121.15 the applicant or holder may request disqualification of any member of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge

takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right of challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

121.19 Hearing procedure. (a) Hearing shall be conducted in an orderly manner and in a serious, business-like atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, together with such other information as may have been developed through investigations and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

121.21 Action by Commandant. (a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant for special validation endorsement, notify him of the Commandant's refusal to enter such endorsement;

(2) In the case of an applicant for a Merchant Mariner's Document, notify him of the Commandant's refusal to issue such document; or

(3) In the case of a holder, revoke and require the surrender of his special validation endorsement.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which, to appeal under this part.

121.23 Appeals. (a) The Commandant shall establish at Coast Guard Headquarters, Washington, D. C., an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in Section 121.15 and the privilege of challenge may be exercised through the same procedure as that specified in Section 121.17.

(c) Appeal Board proceedings shall be conducted in the same manner as that specified in Section 121.19.

121.25 Action by Commandant after appeal. (a) If, upon receipt of the Appeal Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a special validation endorsement be entered on his Merchant Mariner's Document, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Appeal Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States would not be inimical to the security of the United States, the Commandant shall notify the applicant or holder that his appeal is denied.

121.27 Outstanding endorsements and applications. (a) All special validation endorsements for emergency service entered upon Merchant Mariner's Documents will be accepted as valid until canceled, revoked, or suspended by proper authority.

(b) A person who has filed an application for a Merchant Mariner's Document bearing a special validation endorsement for emergency service and who has not received such an endorsement prior to May 1, 1956, shall submit a new application in accordance with the requirements of this part.

121.29 Applications previously denied. A person who has been denied a Merchant Mariner's Document bearing a special validation endorsement for emergency service, before May 1, 1956, may file a new application for such an endorsement in accordance with the requirements of this part.

PART 122—SAFETY MEASURES

Sec.

AUTHORITY: §§ 122.01 and 122.10 issued under sec. 1, 40 Stat. 220, as amended; 50 U. S. C. 191; E. O. 10173, 15 F. R. 7005, 3 CFR, 1950 Supp., as amended by E. O. 10277, 16 F. R. 7537, 3 CFR, 1951 Supp., E. O. 10352, 17 F. R. 4607, 3 CFR, 1952 Supp.
SOURCE: §§ 122.01 and 122.10 contained in CGFR 52-11, 17 F. R. 2183, Mar. 13, 1952.

122.01 General. The regulations in this part require additional safety precautions for vessels in accordance with Section 6.14–1 of this chapter.

122.10 Atomic attack instructions for merchant vessels in port. A placard (Form CG 3256) containing atomic attack instructions for merchant vessels in port has been prepared for the information and assistance of persons on board merchant vessels. When given to the master of a vessel by the Coast Guard, the placards (Form CG 3256) shall be posted in conspicuous places in the pilothouse, engineroom, and in the seamen's, firemen's, and steward's departments of the vessel.

PART 124—CONTROL OVER MOVEMENT OF VESSELS

Sec.

AUTHORITY: §§ 124.01 and 124.10 issued under sec. 1, 40 Stat. 220 as amended; 50 U.S.C. 191; E.O. 10173, Oct. 18, 1950, 15 F.R. 7005, 3 CFR, 1950 Supp. E.O. 10277, Aug. 1, 1951, 16 F.R. 7537, 3 CFR, 1951 Supp., E.O. 10352, May 19, 1952, 17 F.R. 4607, 3 CFR, 1952 Supp.

SOURCE: §§ 124.01 to 124.10 contained in CGFR 55–6, 20 F.R. 1532, Mar. 12, 1955, except as otherwise noted.

124.01 General. The regulations in this part implement the general enforcement provisions in Executive Order 10173, as amended, and designated Sections 6.04–1 to 6.04–11 of this chapter.

124.10 Advance notice of vessel's time of arrival to Captain of the Port. (a) The master or agents of every registered vessel of the United States, and every foreign vessel arriving at a United States port or place from a port or place outside the United States, or any such vessel destined from one port or place in the United States to another port or place in the United States, shall give at least 24 hours' advance notice of arrival to the Captain of the Port at every port or place where the vessel is to arrive, except as follows:

(1) Registered United States pleasure vessels and registered United States fishing vessels are not required to submit advance notice of arrival report.

(2) When the port of arrival is not located within the geographical area assigned to a particular Captain of the Port, this advance notice of time of arrival shall be made to the Commander of the Coast Guard District in which such port or place is located.

(3) When the arrival is a direct result of the operation of "force majeure," and it is not possible to give at least 24 hours' advance notice of time of arrival, then advance notice as early as practicable shall be furnished.

(4) When the vessel, while in United States waters, does not navigate any portion of the high sea, i.e., does not navigate beyond the low water mark along the coasts or beyond the waters contained within the headlands of the United States.

(5) When a vessel is engaged upon a scheduled route if a copy of the schedule is filed with the Captain of the Port for each port of call named in the schedule and the times of arrival at each such port are adhered to.

(6) When the master of a merchant vessel (except on a coastwise voyage of 24 hours or less) reports in accordance with the U.S. Coast Guard's voluntary Automated Merchant Vessel Report (AMVER) System, he shall be considered to be in constructive compliance with the requirements of paragraph (a) of this section and no additional advance notice of vessel's arrival reports to the Captain of the Port is required. The master or agent of a vessel on coastwise voyages of 24 hours or less shall report the advance notice of vessel's arrival to the Captain of the Port at next port of call prior to or upon departure from port.

(7) For that vessel which is engaged in operations in and out of the same port to sea and return without entering any other port, or on coastwise voyages between ports in the same Coast Guard District, or on voyages between ports in the First, Ninth, Thirteenth, or Seventeenth Coast Guard Districts and adjacent Canadian ports, or between ports of the Commonwealth of Puerto Rico and ports in the Lesser Antilles, or between ports in the Lesser Antilles, or between ports on the east coast of Florida and the Bahama Islands, the Coast Guard District Commander having jurisdiction may, when no reason exists which renders such action prejudicial to the rights and interests of the United States, prescribe conditions under which such vessels may be considered by the Captains of the Port as being in constructive compliance with the requirements of this section.

(8) A westbound vessel which is to proceed to or through United States waters of the St. Lawrence River and/or the Great Lakes shall be subject to compliance with paragraph (b) of this section.

(b) The master or agent of every vessel other than vessels of United States or Canadian nationality engaged in the coastal trade of their respective countries or in trade between their two countries without calling at any other country en route, when proceeding westbound to United States waters of the St. Lawrence River and/or the Great Lakes shall:

(1) At least 24 hours in advance of the vessel's arrival at the Snell Lock, Massena, New York, advise the Commander, Ninth Coast Guard District, Cleveland, Ohio, of estimated time of arrival of such vessel at the Snell Lock.

(2) In addition, at least 24 hours in advance of the vessel's arrival at the first United States port-of-call, advise the Commander, Ninth Coast Guard District, Cleveland, Ohio, of the estimated time of arrival at that port.

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(4) A master of a vessel who reports in accordance with the U.S. Coast Guard's voluntary Automated Merchant Vessel Report (AMVER) System and who includes in this report an estimated time of arrival at the Snell Lock, Massena, New York, shall be considered to be in constructive compliance with the requirements of subparagraph (1) of this paragraph and no additional advance notice of vessel's arrival at the Snell Lock is required. Likewise a master of such vessel who indicates in this report the name of the first intended United States port of call and estimated time of arrival at that port shall be considered in constructive compliance with subparagraph (2) of this paragraph and no additional advance notice of arrival is required.

(56-54, 21 F.R. 9565, Dec. 4, 1956)

NOTE: For the information of those affected by requirements in 33 CFR Part 124 to file advance notice of time of arrival with the local Captain of the Port or the Coast Guard District Commander, the addresses and descriptions of Coast Guard Districts, as well as Captain of the Port Offices and port areas are included in the appendix. (See pages 46 through 55.)

(5) A master or agent of a vessel who files a copy of the scheduled route with the Commander, Ninth Coast Guard District, Cleveland, Ohio, at least 24 hours prior to arrival at Snell Lock, and who includes in the schedule the estimated time of arrival at the Snell Lock, Massena, N.Y., shall be considered to be in constructive compliance with requirements of subparagraph (1) of this paragraph and no additional advance notice of the vessel's arrival at the Snell Lock is required. Likewise, a master or agent of such vessel who indicates in this schedule the name of the first intended United States port of call and estimated time of arrival at that port shall be considered in constructive compliance with subparagraph (2) of this paragraph and no additional advance notice of arrival is required.

(6) When the arrival is a direct result of the operation of "force majeure," and it is not possible to give at least 24 hours advance notice of time of arrival, then advance notice as early as practicable shall be furnished.

(CGFR 55-33, 20 F.R. 5646, Aug. 5, 1955. CGFR 56-24, 21 F.R. 9565, Dec. 4, 1956. CGFR 62-24, 27 F.R. 7823, Aug. 8, 1962. CGFR 63-26, 28 F.R. 5297, May 29, 1963. CGFR 63-60, 28 F.R. 10819, Oct. 9, 1963. CGFR 66-32, 31 F.R. 10324, July 30, 1966)

124.14 Advance notice of arrival of vessel laden with explosives or certain specified dangerous cargoes. (a) The master, agent, or person in charge of any domestic or foreign vessel which is bound for a port or place in the United States and which is carrying as cargo any of the dangerous cargoes described in this paragraph, whether for discharge in the United States or not, shall, at least 24 hours in advance of arrival at each port or place, notify the Captain of the Port or the Commander of the Coast Guard District in which such port or place is located concerning the amount and location of stowage on board the vessel of any of the following:

(1) Explosives, Class A (commercial or military).

(2) Oxidizing materials for which a special permit for water transportation is required by 46 CFR 146.22.

(3) Radioactive materials for which a special approval by the Commandant for water transportation is required by 46 CFR 146.25-30.

(b) When the arrival is a direct result of "force majeure," and it is not possible to give at least 24 hours' advance notice, then advance notice as early as possible shall be furnished.

(CGFR 64-17, 29 F.R. 5277, Apr. 17, 1964)

124.16 Advance notice of fire or other abnormal condition on arriving vessel. (a) The master, agent, or person in charge of any domestic or foreign vessel which is bound for a port or place in the United States shall give notice to the Captain of the Port or the Commander of the Coast Guard District in which such port or place is located as early as possible in advance of arrival of any fire or other abnormal condition which may jeopardize the vessel's safety or that of other vessels or facilities in port.

(CGFR 64-17, 29 F.R. 5277, Apr. 17, 1964)

124.20 Penalties for violations. Failure to give advance notice will subject the master or agents of a vessel to the penalties of fine and imprisonment, as well as subject the vessel to seizure and forfeiture, as provided in section 2, Title II of the Act of June 15, 1957, as amended, 50 U.S.C. 192. In addition, such failure may result in delay in the movement of the vessel from the harbor entrance to her facility destination within the particular port.

(CGFR 60-15, 25 F.R. 2666, Mar. 30, 1960)

SUBCHAPTER L—SECURITY OF WATERFRONT FACILITIES

PART 125—IDENTIFICATION CREDENTIALS FOR PERSONS REQUIRING ACCESS TO WATERFRONT FACILITIES OR VESSELS

Sec.

AUTHORITY: §§ 125.01 to 125.57 issued under sec. 1, 40 Stat. 220, as amended; 50 U.S.C. 191; E.O. 10173, 15 F.R. 7005, 3 CFR, 1950 Supp., as amended by E.O. 10277, 16 F.R. 7537, 3 CFR, 1951 Supp., E.O. 10352, 17 F.R. 4607, 3 CFR, 1952 Supp. Interpret or apply; R.S. 4517, as amended, 4518, as amended, sec. 19, 23 Stat. 58, as amended, sec. 2, 23 Stat. 118, as amended, sec. 7, 49 Stat. 1936, as amended; 46 U.S.C. 570, 571, 572, 2, 689.

SOURCE: §§ 125.01 to 125.57 contained in CGFR 56-15, 21 F.R. 2940, May 3, 1956, except as otherwise noted.

125.01 Commandant. The term "Commandant" means Commandant of the Coast Guard.

125.03 District Commander. The term "District Commander" means the officer of the Coast Guard designated by the Commandant to command a Coast Guard District.

125.05 Captain of the Port. The term "Captain of the Port" means the officer of the Coast Guard, under the command of a District Commander, so designated by the Commandant for the purpose of giving immediate direction to Coast Guard law enforcement activities within the general proximity of the port in which he is situated.

125.06 Western rivers. The term "western rivers" as used in the regulations in this subchapter shall include only the Red River of the North, the Mississippi River and its tributaries above the Huey P. Long Bridge, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.
(CGFR 57-52, 22 F. R. 10301, Dec. 20, 1957)

125.07 Waterfront facility. The term "waterfront facility," as used in this subchapter, means all piers, wharves, docks, and similar structures to which vessels may be secured, buildings on such structures or contiguous to them, and equipment and materials on such structures or in such buildings.

125.08 Great Lakes. The term "Great Lakes" as used in the regulations in this subchapter shall include the Great Lakes and their connecting and tributary waters.
(CGFR 57-52, 22 F. R. 10301, Dec. 20, 1957)

125.09 Identification credentials. The term "Identification credentials," as used in this subchapter, means any of the following:

(a) Coast Guard Port Security Card (Form CG 2514).

(b) Merchant Mariner's Document bearing special validation endorsement for emergency service.

(c) Armed Forces Identification Card.

(d) Identification credentials issued by Federal Law enforcement and intelligence agencies to their officers and employees (e.g., Department of the Treasury, Department of Justice, Federal Communications Commission).

(e) Identification credentials issued to public safety officials (e. g., police, firemen) when acting within the scope of their employment.

(f) Such other identification as may be approved by the Commandant from time to time.

125.11 Form of Coast Guard Port Security Card. The Coast Guard Port Security Card issued by the Coast Guard under the provisions of this subchapter shall be a laminated card bearing photograph, signature, fingerprint, and personal description of the holder, and other pertinent data.

125.12 Period of validity of Coast Guard Port Security Cards. (a) The Coast Guard Port Security Card (Form CG-2514) shall be valid for a period of eight years from the date of issuance thereof unless sooner suspended or revoked by proper authority. On the first day after eight years from the date of issuance, the Coast Guard Port Security Card (Form CG-2514) is hereby declared invalid and shall be considered null and void for all purposes.

(b) The holder of a Coast Guard Port Security Card, which is about to expire or has expired, may apply for a new Coast Guard Port Security Card in accordance with the procedures set forth in Section 125.21. In the event the applicant's Coast Guard Port Security Card has expired, such card shall accompany the application for a new Coast Guard Port Security Card. In the event the applicant is holding a valid Coast Guard Port Security Card at the time he submits his application for a new card, such person shall surrender the old or expired Coast Guard Port Security Card at the time he is issued a new Coast Guard Port Security Card. In the event the old Coast Guard Port Security Card was lost, stolen, or destroyed, then the applicant shall comply with the provisions in Section 125.51, regarding the replacement of a lost Coast Guard Port Security Card and the new card issued as a replacement for a lost card which has expired or is about to expire shall bear a current issuance date.

(CGFR 58-52, 23 F.R. 9751, Dec. 18, 1958)

125.13 Captain of the Port Identification Cards. Captain of the Port Identification Cards issued under the form designation "Form CG 2514" prior to the revision of August 1950 were declared invalid by a notice published in the FEDERAL REGISTER on September 11, 1946 (11 F.R. 10103), which declaration is hereby reaffirmed.

125.15 Access to waterfront facilities, and port and harbor areas, including vessels and harbor craft therein. (a) The Commandant will, from time to time, direct Captains of the Port of certain ports to prevent access of persons who do not possess one or more of the identification credentials listed in Section 125.09 to those waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, where the following shipping activities are conducted:

(1) Those vital to the Military Defense Assistance Program.

(2) Those pertaining to the support of U. S. military operations.

(3) Those pertaining to loading and unloading explosives and other dangerous cargo.

(4) Those essential to the interests of national security and defense, to prevent loss, damage or injury, or to insure the observance of rights and obligations of the United States.

(b) No person who does not possess one of the identification credentials aforesaid shall enter or remain in such facilities, or port or harbor areas, including vessels and harbor craft therein.

(c) The Captain of the Port shall give local public notice of the restriction of access to waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, as far in advance as practicable, and shall cause such facilities and areas to be suitably marked as to such restriction.

(CGFR 56-15, 21 F.R. 2940, May 3, 1956. CGFR 58-43, 23 F.R. 8542, Nov. 1, 1958)

125.17 Persons eligible for Coast Guard Port Security Cards. (a) Only the following persons may be issued Coast Guard Port Security Cards:

(1) Persons regularly employed on vessels or on waterfront facilities.

(2) Persons having regular public or private business connected with the operation, maintenance, or administration of vessels, their cargoes, or waterfront facilities.

(b) A holder of a Merchant Mariner's Document, Validated for Emergency Service, shall not be issued a Port Security Card, unless he surrenders the Merchant Mariner's Document to the Coast Guard. In this connection, see Section 125.09.

(CGFR 62-39, 27 F.R. 11251, Nov. 15, 1962)

125.19 Standards. Information concerning an applicant for a Coast Guard Port Security Card, or a holder of such card, which may preclude a determination that his character and habits of life are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, shall relate to the following:

(a) Advocacy of the overthrow or alteration of the Government of the United States by unconstitutional means.

(b) Commission of, or attempts or preparations to commit, an act of espionage, sabotage, sedition or treason, or conspiring with, or aiding or abetting another to commit such an act.

(c) Performing, or attempting to perform, duties or otherwise acting so as to serve the interests of another government to the detriment of the United States.

(d) Deliberate unauthorized disclosure of classified defense information.

(e) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended.

(f) Having been adjudged insane, having been legally committed to an insane asylum, or treated for serious mental or neurological disorder, without evidence of cure.

(g) Having been convicted of any of the following offenses, indicative of a criminal tendency potentially dangerous to the security of such waterfront facilities and port and harbor areas, including vessels and harbor craft therein; arson, unlawful trafficking in drugs, espionage, sabotage, or treason.

(h) Drunkenness on the job or addiction to the use of narcotic drugs, without adequate evidence of rehabilitation.

(i) Illegal presence in the United States, its territories or possessions; having been found finally subject to deportation order by the United States Immigration and Naturalization Service.

125.21 Applications. (a) (1) Application for a Coast Guard Port Security Card shall be made under oath in writing and shall include applicant's answers in full to inquiries with respect to such matters as are deemed by the Commandant to be pertinent to the standards set forth in Section 125.19, and to be necessary for a determination whether the character and habits of life of the applicant are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States.

(2) The application also shall include applicant's complete identification, citizenship record, personal description, military record, if any, and a statement of the applicant's sponsor certifying the applicant's employment or union membership and that applicant's statements are true and correct to the best of sponsor's knowledge.

(3) The application shall be accompanied by two unmounted, dull finish photographs, 1 inch x $1\frac{5}{16}$ inches, of passport type, taken within one year of the date of application. The photograph shall show the full face with the head uncovered and shall be a clear and satisfactory likeness of the applicant. It shall portray the largest image of the head and upper shoulders possible within the dimensions specified.

(4) Fingerprint records on each applicant shall be taken by the Coast Guard at the time application is submitted.

(5) The applicant shall present satisfactory proof of his citizenship.

(6) The applicant shall indicate the address to which his Coast Guard Port Security Card can be delivered to him by mail. Under special circumstances the applicant may arrange to call in person for the Coast Guard Port Security Card.

(7) The applicant shall present his application, in person, to a Coast Guard Port Security Unit designated to receive such applications. Such units will be located in or near each port where Coast Guard Port Security Cards are required. Each Captain of the Port shall forward promptly to the Commandant each application for a Coast Guard Port Security Card received by him.

(b) If an applicant fails or refuses to furnish the required information or to make full and complete answer with respect to all matters of inquiry, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes the required information and fully and completely answers all inquiries directed to him.

125.23 United States citizens. Acceptable evidence of United States citizenship is described in this section in the order of its desirability; however, the Coast Guard will reject any evidence not believed to be authentic;

(a) Birth certificate or certified copy thereof.

(b) Certificate of naturalization. This shall be presented by all persons claiming citizenship through naturalization.

(c) Baptismal certificate or parish record recorded within one year after birth.

(d) Statement of a practicing physician certifying that he attended the birth and that he has a record in his possession showing the date and place of birth.

(e) United States passport.

(f) A commission in one of the armed forces of the United States, either regular or reserve; or satisfactory documentary evidence of having been commissioned in one of the armed forces subsequent to January 1, 1936, provided such commission or evidence shows the holder to be a citizen.

(g) A continuous discharge book, or Merchant Mariner's Document issued by the Coast Guard which shows the holder to be a citizen of the United States.

(h) If an applicant claiming to be a citizen of the United States submits a delayed certificate of birth issued under a State's seal, it may be accepted as prima facie evidence of citizenship if no one of the requirements in paragraphs (a) to (g) of this section can be met by the applicant and in the absence of any collateral facts indicating fraud in its procurement.

(i) If no one of the requirements in paragraphs (a) to (h) of this section can be met by the applicant, he should make a statement to that effect, and in an attempt to establish citizenship, he may submit for consideration data of the following character:

(1) Report of the Census Bureau showing the earliest record of age or birth available. Request for such information should be addressed to the Director of the Census, Washington, D.C., 20233. In making such request, definite information must be furnished the Census Bureau as to the place of residence when the first census was taken after the birth of the applicant, giving the name of the street and the number of the house, or other identification of place where living, etc.; also names of parents or the names of other persons with whom residing on the date specified.

(2) School records, immigration records, or insurance policies (the latter must be at least 10 years old).

125.25 Aliens. Alien registration records together with other papers and documents which indicate the country of which the applicant is a citizen shall be accepted as evidence of citizenship in a foreign nation.

125.27 Sponsorship of applicant. Applications for a Coast Guard Port Security Card shall not be accepted unless sponsored. The applicant shall be sponsored by an authorized official of applicant's employer or by an authorized official of applicant's labor union. Each company and each labor union concerned shall file with the appropriate Captain of the Port a list of officials of the company or union who are authorized to sponsor applicants. Other sponsorship may be accepted where the circumstances warrant.

125.29 Insufficient information. (a)(1) If, in the judgment of the Commandant, an application does not contain sufficient information to enable him to satisfy himself that the character and habits of life of the applicant are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, the Commandant may require the applicant to furnish, under oath in writing or orally, such further information as he deems pertinent to the standards set forth in Section 125.19 and necessary to enable him to make such a determination.

(2) If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

(b) Upon receipt, the application and such further information as the Commandant may have required shall be referred, except in those instances where action on an application is held in abeyance pursuant to Paragraph 125.21(b) or to subparagraph (a)(2) of this section, to a committee composed of a representative of the Legal Division, of the Merchant Vessel Personnel Division and of the Intelligence Division, Coast Guard Headquarters. The committee shall prepare an analysis of the available information and shall make recommendations for action by the Commandant.
(CGFR 59-63, 25 F.R. 1589, Feb. 24, 1960)

125.31 Approval of applicant by Commandant. (a) If the Commandant is satisfied that the character and habits of life of the applicant are not such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would be inimical to the security of the United States, he will direct that a Coast Guard Port Security Card be issued to the applicant.

(b) If the Commandant is not satisfied that the character and habits of life of the applicant are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he will notify the applicant in writing as provided for in Section 125.35.

125.33 Holders of Coast Guard Port Security Cards. (a) Whenever the Commandant is not satisfied that the character and habits of life of a holder of a Coast Guard Port Security Card are such as to warrant the belief that his presence on waterfront facilities and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he will request the holder to furnish, under oath in writing, such information as he deems pertinent and necessary for a determination on this issue.

(b) If the holder fails or refuses to furnish such information within thirty (30) days after receipt of the Commandant's request, the Commandant may issue the written notice provided for in Paragraph 125.35(a).

(c) The holder's failure or refusal to furnish such information shall preclude a determination that the holder's character and habits of life are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States.

(d) Upon receipt of such information as the Commandant may have required, the procedure prescribed in Paragraph 125.29(b) shall be followed.

(e) If the Commandant is satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he shall notify the holder accordingly.

(f) If the Commandant is not satisfied that the character and habits of life of the holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he shall notify the holder in writing as provided for in Section 125.35.
(CGFR 59-63, 25 F.R. 1589, Feb. 24, 1960)

125.35 Notice by Commandant. (a) The notice provided for in Sections 125.31 and 125.33 shall contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer.

(b) The applicant or holder shall have 20 days from the date of receipt of the notice of reasons to

file written answer thereto. Such answer may include statements or affidavits by third parties or such other documents or evidence as the applicant or holder deems pertinent to the matters in question.

(c) Upon receipt of such answer the procedure prescribed in Paragraph 125.29 (b) shall be followed.

(d) If the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a Coast Guard Port Security Card be issued to the applicant, or, in the case of a holder, notify him accordingly.

(e) If the Commandant is not satisfied that the applicant's or holder's character and habits of life are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, the Commandant shall refer the matter to a Hearing Board for hearing and recommendation in accordance with the provisions of this part.

125.37 Hearing Boards. The Commandant may establish a Hearing Board in each Coast Guard District. The Commandant shall designate for each Hearing Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a second member from a panel of persons representing labor named by the Secretary of Labor, and a third member from a panel of persons representing management named by the Secretary of Labor.

125.39 Notice by Hearing Board. Whenever the Commandant refers a matter to a Hearing Board, the Chairman shall:

(a) Fix the time and place of the hearing;

(b) Inform the applicant or holder of the names of the members of the Hearing Board, their occupations, and the businesses or organizations with which they are affiliated, of his privilege of challenge, and of the time and place of the hearing;

(c) Inform the applicant or holder of his privilege to appear before the Hearing Board in person or by counsel or representative of his choice, and to present testimonial and documentary evidence in his behalf, and to cross-examine any witnesses appearing before the Board; and

(d) Inform the applicant or holder that if within 10 days after receipt of the notice he does not request an opportunity to appear before the Hearing Board, either in person or by counsel or representative, the Hearing Board will proceed without further notice to him.

125.41 Challenges. Within five days after receipt of the notice described in Section 125.39 the applicant or holder may request disqualification of any member of the Hearing Board on the grounds of personal bias or other cause. The request shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. The affidavit may be supplemented by an oral presentation if desired. If after due consideration the Chairman believes a challenged member is qualified notwithstanding the challenge, he shall notify the person who made the challenge and arrange to proceed with the hearing. If the person who made the challenge takes exception to the ruling of the Chairman, the exception and data relating to the claim of disqualification shall be made a matter of record. If the Chairman finds that there is reasonable ground for disqualification he shall furnish the person who made the challenge with the name of an alternate in lieu of the challenged member and arrange to proceed with the hearing. In the event the Chairman is challenged, he shall forthwith notify the Commandant, furnishing the grounds for the claim of disqualification, and the Commandant shall act upon the challenge in accordance with the foregoing procedure. In addition to the right to challenge for cause, a person who has requested a hearing shall have two peremptory challenges, one challenge for the management member and one challenge for the labor member of the Hearing Board. Should the management member be so challenged, the person who made the challenge may elect to have the management member replaced by another management member or by a member not representing either management or labor; if the member peremptorily challenged represents labor, the person who made the challenge may elect to have the labor member replaced by another labor member or by a member not representing either management or labor.

125.43 Hearing procedure. (a) Hearings shall be conducted in an orderly manner and in a serious, businesslike atmosphere of dignity and decorum and shall be expedited as much as possible.

(b) The hearing shall be in open or closed session at the option of the applicant or holder.

(c) Testimony before the Hearing Board shall be given under oath or affirmation.

(d) The Chairman of the Hearing Board shall inform the applicant or holder of his right to:

(1) Participate in the hearing;

(2) Be represented by counsel of his choice;

(3) Present witnesses and offer other evidence in his own behalf and in refutation of the reasons set forth in the Notice of the Commandant; and

(4) Cross-examine any witnesses offered in support of such reasons.

(e) Hearings shall be opened by the reading of the Notice of the Commandant and the answer thereto. Any statement and affidavits filed by the applicant or holder may be incorporated in the record by reference.

(f) The Hearing Board may, in its discretion, invite any person to appear at the hearing and testify. However, the Board shall not be bound by the testimony of such witness by reason of having called him and shall have full right to cross-examine the witness. Every effort shall be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

(g) The applicant or holder may introduce such evidence as may be relevant and pertinent. Rules of evidence shall not be binding on the Hearing Board, but reasonable restrictions may be imposed as to the relevancy, competency and materiality of matters considered. If the applicant or holder is, or may be, handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the Hearing Board shall take the fact into consideration.

(h) The applicant or holder or his counsel or representative shall have the right to control the sequence of witnesses called by him.

(i) The Hearing Board shall give due consideration to documentary evidence developed by investigation, including membership cards, petitions bearing the applicant's or holder's signature, books, treatises or articles written by the applicant or holder and testimony by the applicant or holder before duly constituted authority.

(j) Complete verbatim stenographic transcription shall be made of the hearing by qualified reporters and the transcript shall constitute a permanent part of the record. Upon request, the applicant or holder or his counsel or representative shall be furnished, without cost, a copy of the transcript of the hearing.

(k) The Board shall reach its conclusion and base its determination on information presented at the hearing, together with such other information as may have been developed through investigation and inquiries or made available by the applicant or holder.

(l) If the applicant or holder fails, without good cause shown to the satisfaction of the chairman, to appear personally or to be represented before the Hearing Board, the Board shall proceed with consideration of the matter.

(m) The recommendation of the Hearing Board shall be in writing and shall be signed by all members of the Board. The Board shall forward to the Commandant, with its recommendation, a memorandum of reasons in support thereof. Should any member be in disagreement with the majority a dissent should be noted setting forth the reasons therefor. The recommendation of the Board, together with the complete record of the case, shall be sent to the Commandant as expeditiously as possible.

125.45 Action by Commandant. (a) If, upon receipt of the Board's recommendation, the Commandant is satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, he shall, in the case of an applicant, direct that a Coast Guard Port Security Card be issued to the applicant, or, in the case of a holder, notify him accordingly.

(b) If, upon receipt of the Board's recommendation, the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on waterfront facilities, and port and harbor areas, including vessels and harbor craft therein, would not be inimical to the security of the United States, the Commandant shall:

(1) In the case of an applicant, notify him that a Coast Guard Port Security Card will not be issued to the applicant, or,

(2) In the case of a holder, revoke and require the surrender of his Coast Guard Port Security Card.

(c) Such applicant or holder shall be notified of his right, and shall have 20 days from the receipt of such notice within which to appeal under this part.

125.47 Appeals. (a) The Commandant shall establish at Coast Guard Headquarters, Washington, D.C. 20226, an Appeal Board to hear appeals provided for in this part. The Commandant shall designate for the Appeal Board a Chairman, who shall be, so far as practicable, an officer of the Coast Guard. The Commandant shall designate, so far as practicable, a member from a panel of persons representing management nominated by the Secretary of Labor, and a member from a panel of persons representing labor nominated by the Secretary of Labor. The Commandant shall insure that persons designated as Appeal Board members have suitable security clearance. The Chairman of the Appeal Board shall make all arrangements incident to the business of the Appeal Board.

(b) If an applicant or holder appeals to the Appeal Board within 20 days after receipt of notice of his right to appeal under this part, his appeal shall be handled under the same procedure as that specified in Section 125.39, and the privilege of challenge may be exercised through the same procedure as that specified in Section 125.41.