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The Director
Central Intelligence Agency

Pro leg

Washington, D.C. 20505

OLC #78-399/12/2

OGC 78-7230
30 October 1978

Keith Raffel
Senate Select Committee on Intelligence
New Senate Office Building
Washington, D.C.

Dear Keith:

You have requested further explanation of the rationale underlying the Agency proposal that a new subsection be added to Section 421(a) of Title IV of S.2525 as follows:

> (x) pursuant to agreement, including any agreement regarding reimbursement, with any department, agency, or independent establishment of the government, provide such services, supplies, or equipment to such department, agency, or establishment that the Agency may be in a position to render, supply, or obtain by contract, and place orders for such services, supplies, or equipment that any department, agency or independent establishment may be in a position to render, supply, or obtain by contract;

This letter is in lieu of a memorandum, and is based upon my discussions of this matter with Bill Allard.

Sections 421(a)(1) and 421(b) of Title IV would provide authority for the transfer of funds between CIA and other agencies in terms similar to the authority now provided in subsection 5(a) of the CIA Act of 1949 (50 U.S.C. 403f(a)). Despite the broad language used in that subsection, it has never been clear that the subsection 5(a) language authorizes transfers of funds from other entities apart from those appropriated to the Agency and disguised in the budget of another entity. Despite the equally broad language of 421(a)(1) and (b), the similarly worded provisions of S.2525 may suffer from the same ambiguity. While this problem may be clarified by appropriate statements in the legislative history of these provisions, such an approach may be inadequate to avoid the narrower interpretation given to the subsection 5(a) language in some quarters. The proposed addition to Section 421(a) would eliminate the troublesome gap in authority which now exists between the narrow construction of the existing subsection 5(a) and the Economy Act (31 U.S.C. 686). The limitations of each leave a significant area of interagency cooperation and reimbursement for intelligence purposes without clear statutory authorization.

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The authority in subsection 5(a) of the CIA Act has been used to support transfers of funds appropriated to the Agency as part of the budget of another agency. Such transfers were the primary justification for subsection 5(a) according to the legislative history of the CIA Act, i.e., that Section 5 would allow the appropriation of funds to CIA in a secure manner and without public disclosure of the amount appropriated. * However, it was indicated also that this authority would support other types of fund transfers, such as between CIA and an interagency group engaging at the time in the standardization of foreign place names, between CIA and the Public Buildings Administration, and between CIA and agencies affording cover for CIA employees or activities.** While these dual purposes may truly have been the intent of subsection 5(a), the proper interpretation is not a matter of agreement between all parties. It might be argued that all manner of transfers between CIA and other agencies, whether of appropriations or otherwise, clearly are authorized by the broad language of subsection 5(a). However, this interpretation may fail to give proper meaning to the language in subsection 5(a) limiting transfers within its authorization to those "for the performance of any of the functions or activities authorized under [the National Security Act]." This could mean that transfers are authorized under subsection 5(a) only when in furtherance of CIA missions and functions. Tranfers from CIA to other agencies in this regard would be allowed, but transfers from other agencies to CIA may not be unless it can be argued that the transfer to CIA is connected with a service of common concern the performance of which is part of CIA's missions and functions. In the end, there remains considerable uncertainty regarding the scope of the subsection 5(a) authority.

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* EXPLANATION OF PROPOSED CIA LEGISLATION, 15 December 1948, attachment to letter from DCI Hillenkoetter to Director of the Bureau of the Budget Webb, 15 December 1948; H.R. Rep. 1853, 80th Cong., 2d Sess. p. 2 (1948); S. Rep. 1302, 80th Cong., 2d Sess. p. 2 (1948); H.R. Rep. 160, 81st Cong., 1st Sess. p. 5 (1949).

** Section-by-section analysis of H.R. 5871 accompanying Statement of the Director of Central Intelligence before the House Armed Services Committee -- April 1948.

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Difficulties arising from the uncertainty of the authority in subsection 5(a) to support transfers from other agencies to CIA have largely been avoided by relying on the broader authority of the Economy Act which, in general, authorizes any agency, if it is in the interest of the government to do so, to place orders with any other agency for equipment or services of any kind that the requisitioned agency may be in a position to supply or equipped to render. The requisitioned agency normally is reimbursed by the requisitioning agency. A proviso in the statute states, however, that the Departments of the Army, Navy and Treasury, the Federal Aviation Agency, and the Maritime Commission, may place orders for equipment or services that another agency may be in a position to supply or render or obtain by contract. The specific reference to contracting with regard to the five agencies identified by name has been interpreted to mean that there exists no similar authority under the statute for contracting arrangements between other agencies. The legislative history of the referenced proviso and pertinent Comptroller General decisions support this interpretation. This exclusion of authority to procure by contract on behalf of another agency presents a serious limitation upon CIA and its effective performance of certain intelligence activities. Most high technology equipment is procured by contract as needed and is not stockpiled in a supply inventory. Furthermore, most government-sponsored research and development is performed under contract with private laboratories. Strictly interpreted, the Economy Act does not authorize one agency to task and reimburse a second agency, except for the five named entities, to procure equipment or services by contract even where the special expertise of the second agency is important. By way of example, if the FBI were to task CIA to procure for it a variant of one of the Agency's specially developed devices, such requisition and reimbursement would not clearly be authorized by the Economy Act. While it may be argued that such a transaction would be authorized by the Agency's general responsibility to perform services of common concern for other members of the Intelligence Community, it would be beneficial for the law to indicate clearly that the Agency may perform such services pursuant to agreements for reimbursement.

S.2525 provisions such as 413(b)(3), which makes it an Agency function to "develop and provide support for technical and other programs which collect intelligence from outside the United States," might be read by implication, or in conjunction with 421(a)(1) and (b), to authorize such fund transfers. However, if 421(a)(1) and (b) are considered to

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apply, a situation would then exist in which relatively routine fund transfers, similar to those under the Economy Act, would take place with the transferred funds stripped of restrictions on their originating appropriation without any very compelling reasons for this result.

The proposed addition to 421(a) would authorize CIA to accept and levy requirements in the area of its missions and functions and greatly facilitate the Agency's central role of developing and coordinating the development of national intelligence on behalf of the federal government. For example, assuming the Agency was in the best position to do so, CIA could manage a research effort and contract for studies concerning the analysis of economic development of a particular foreign nation, all on behalf of another agency such as the Department of Commerce. Conversely, the Agency could expend funds for a particular purpose by requesting another agency to expand its study efforts in a way benefiting the Agency, assuming the other agency was better positioned to successfully undertake work in the area of interest. The principles here are no different than the considerations of efficiency and economy that formed the basis for the Economy Act itself. What is being proposed is explicit authority for the Agency to requisition and be requisitioned in the area of procurement of services and equipment by contract. It is submitted that this authority is necessary and appropriate for the Agency's performance of its duty to centrally coordinate and develop national intelligence on behalf of the federal government.

Very truly yours,

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Assistant General Counsel

cc: OLC

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