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Pro/Legislation

OLC 78-0199
30 January 1978

MEMORANDUM FOR THE RECORD

SUBJECT: Title I - Intelligence Charter Legislation - Comparison of Issues Raised at 11 January 1978 Meeting and 18 January 1978 Draft

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1. On 11 January 1978 members of OLC [redacted] and the undersigned); [redacted], OGC, as well as [redacted] IC Staff, met with Elliot Maxwell and Pat Norton, Senate Select Committee on Intelligence staff, to discuss issues relating to the SSCI's latest version of Title I of the intelligence charter legislation. Also present were representatives of the House Permanent Select Committee on Intelligence, Bill Funk and Mike O'Neil. Tom Latimer, of the HPSCI staff, and Bill Miller and John Elliff, of the SSCI staff, were present for a portion of the meeting.

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2. The purpose of the meeting was to allow Agency representatives to raise specific issues in Title I with a view to underscoring the problems posed thereby to the Agency. It was made clear to all attendees that any discussion on the issues was entered into in an unofficial manner and in no way represents or should be construed as representing the official CIA position on the issues.

3. On 13 January 1978 a paper outlining the issues raised and discussed at the 11 January 1978 meeting as well as the positions taken by various parties present was circulated. On 18 January 1978 SSCI submitted a revised draft of Title I.

4. Attached is a paper which compares the issues raised at the 11 January 1978 meeting with the language in the 18 January 1978 revised draft to determine if SSCI drafters took into account CIA concerns.

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Title I - Comparison of Issues Raised at 11 January 1978 Meeting and 18 January 1978 Draft

1. 18 January 1978 draft contains all sections previously left out of 9 January 1978 draft:

Section 102 - Statement of Findings
Section 104 - Definitions
Section 114-120 - Sensitive Intelligence Collection Projects and Special Activities and Restrictions/ Prohibitions
Section 125 - Oversight and Accountability
Section 126 - Congressional Committee Reports
Section 127 - Annual Reports of the Director

2. Section 102(1) and (2), p. 2 - retains the phrase "national defense" in "statement of findings."
Section 103(1), p. 3 - retains the phrase "national defense" in "Statement of Purposes."

3. Section 103(4), p. 3 - "judicial branch" dropped from phrase "to ensure that the executive and legislative branches are provided..."

4. Section 105, p. 10 - "counterterrorism" activities retained as a "national intelligence activity."

5. Section 106(a) -"Presidential Designation of National Intelligence Activities" - this section retained in its entirety notwithstanding our arguing that the same effect could be gained in a definition rather than in a separate section.

6. Section 106(b) - SSCI staff has dropped the congressional review portion of this subsection as agreed at 11 January 1978 meeting, only to restate it in section 112(a)(4).

7. Section 107(g), p. 14 - the second sentence of this subsection has been appropriately changed to include the phrase "whenever there is no Deputy Director" as suggested by CIA representatives at the 11 January 1978 meeting to rectify ambiguity of previous language.

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8. Section 108(b), p. 15 - under subsection (b)(3) the phrase "counterterrorism activities" has been retained notwithstanding CIA's arguments that CIA and particularly DDO do not engage in "counterterrorism activities." Note that at the 11 January meeting Bill Funk (HPSCI) pointed out that the definition of counterterrorism, as it appeared in the 18 October 77 draft Title I and as it appears in this, the 18 January 78 draft at p. 5, section 104(8), includes the "collection, retention, processing, or dissemination of counterterrorism intelligence" (Section 104(8)(A)). Bill Funk cautioned that we carefully consider our position on this point because of section 104(8)(A) subsection being included in the definition of "counterterrorism activity."

9. Section 108(b), p. 15 - with regard to the issue of the responsibilities of the DNI, SSCI attendees agreed to look to the Executive Order to consider how to handle this (E.O. signed 24 January 1978 #12036).

10. Section 108(c), p. 15 - in line 3 of this subsection the term "ensure" is retained notwithstanding arguments made to him by CIA and Bill Funk (HPSCI) that it: (a) creates an impossible statutory task and (b) could result in the creation of an entire bureaucratic entity within the CIA to monitor and "ensure" that each activity is done properly, etc.

11. Section 108(c), p. 15 - the phrase "in the most efficient manner" in lines 5 and 6 has been substituted for "at the lowest possible cost."

12. Section 108(c), p. 15 - all reference to the "judicial branch" in line 6 has been dropped.

13. Section 108(c), p. 15 - with regard to the phrase "that those activities do not affect adversely the national security, national defense or foreign relations of the U.S." appearing on lines 11, 12, 13, CIA representatives argued at the 11 January 78 meeting that this merely states the obvious, has a negative implication and therefore should not be included in the statute. CIA's argument was not heeded.

14. Section 108(c), p. 15 - the term "guidance" has been substituted for the term "direction" at line 16 in accordance with CIA admonition.

15. Section 108(d), p. 15 - the fact that the DNI will head the CIA has been clarified in this subsection per CIA admonition.

16. Section 108(e), p. 15 - the phrase "be responsible for" has been changed in this subsection to "shall coordinate and direct."

17. Section 108(e)(3), p.16 - CIA, at the 11 January 78 meeting, argued that this subsection is too restrictive and that the phrase "utilizing human sources" may be construed as limiting the Director to coordinating only foreign intelligence gathered by human sources. What about collection by technical means? Notwithstanding the fact that the SSCI attendees at 11 January 78 meeting agreed to consider striking the phrase "utilizing human sources" or, in the alternative, changing "utilizing" to "including the utilization of human resources," no changes have in fact been made in this subsection.

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18. Section 108(f)(2), p. 16 - the terms "fully" and "carefully" have been retained despite our pointing out the impracticality of using such qualifiers in statute.

19. Section 108(g)(2), p. 17 - at the 11 January 78 meeting, CIA questioned the meaning and value of the phrase "increase the usefulness ... of information" in statute. HPSCI agreed that use of such language in statute is an example of legislating "micromanagement." However, SSCI has made no change in the language of this subsection.

20. Section 108(g)(3), p. 17 - although the wording of this subsection has been changed, the effect is the same. CIA argued that not only might such language "require" access but also that it, along with subsection (g)(2) serve no purpose in statute.

21. Section 108(j)(1)(c), pp. 17-18 -

(a) in line 4 of this subsection the term "international" has been deleted from in front of the word "agreement";

(b) the phrase "at least 30 days before" has been retained notwithstanding:

(1) CIA's argument that the "30 days before" should be replaced by "60 days after" to make this provision comparable with the reporting requirements of the Case Act, and

(2) a compromise position supported by Bill Miller (SSCI) that would have the Director advise the appropriate committees of Congress of proposed intelligence liaison agreements that are "international agreements," in addition to passing the written text of such agreements within 60 days of implementation.

Neither the change to "60 days after" nor the compromise position shows up in the 18 January 78 draft.

(c) the phrase "is to become effective" in lines 4 and 5 at the top of page 18 has been substituted for "is entered into by any officer or employee of the U.S. on behalf of the U.S."

(d) No provision has been made in the 18 January 78 draft for transmittal of the agreements to the appropriate committees of Congress under an "injunction of secrecy," nor have the pertinent portions of S. Res. 400 re this issue been incorporated by reference into the 18 January 78 draft.

22. Section 108(1), p. 18 - sources and methods issue. The 9 January 78 draft language re this subsection read in pertinent part:

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"The Director shall, in order to protect intelligence sources and methods from unauthorized disclosure, establish common security standards for the handling of information and material relating to intelligence activities."

CIA argued that this language is unacceptable, that CIA would accept nothing less than the statutory authority presently in existence and that as written in the 9 January draft the language grants sources and methods authority only in so far as the Director is given authority to develop "common security standards." The 18 January 78 language separates the sources and methods duty from the duty to develop security standards and in doing so appears to give the Director authority equivalent to his present authority. Suggest that the phrase "such information and material" be changed to "intelligence sources and methods" since this is a term of art.

23. Section 108(m), pp. 18-19 - SSCI drafters made no change in the language from the 9 January to the 18 January drafts. As written this limits the Director's termination authority to "national security" situations and requires him to report to SSCI/HPSCI any and all exercise of his authority under the termination authority.

24. Section 108(o), p. 20, 9 January 78 draft - the 9 January draft section 108(o) read in pertinent part:

"In order to carry out the Director's duties under this title, the Director is authorized to obtain from any department or agency such information as the Director deems necessary to perform such duties; and each department and agency shall furnish such information to the Director upon request..."

At the 11 January 78 meeting CIA argued that the language of this subsection would arguably allow the DCI to get around FOIA. It was agreed that some limitations such as the phrase "in accordance with applicable laws and regulations" should be added at the end of the first sentence of this subsection. Instead it appears that the entire subsection has been dropped from the 18 January 78 draft.

25. Section 108(o), p. 19 is the former section 108(p) on p. 21 of the 9 January 78 draft - the phrase "... reports of the Inspectors General with the various entities of the IC ..." has been deleted. The subsection remains otherwise unchanged.

26. Section 110(a), p. 21 - CIA raised two issues in the corresponding subsection of the 9 January 78 draft: (1) why are not the Assistant DNI's placed at a level III on the Executive Schedule, and (2) why are these politicized by making them subject to the advice and consent of the Senate? No account of these discussions has been taken in the 18 January 78 draft.

27. Section 111(a) - (b). p. 23 - at the 11 January meeting CIA questioned the purpose of this whole section and stressed that as written it reads almost as if to say that nothing is delegable hereunder unless done pursuant to section 111. The 18 January draft contains the same language as the 11 January draft.

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28. Section 112(a), p. 24 - per our admonition DCI has "exclusive responsibility for the preparation and approval of the national intelligence budget..."

29. Section 113(a)(1), p. 26 - at the 11 January 1978 meeting, CIA stated that the Office of Finance wants to retain an annual budget and may not want to have provision made for appropriations on a two-year basis as section 113(a)(1) seems to provide. There is no change between the 9 January 1978 and 18 January 1978 draft; Office of Finance in follow-up comments dated 24 January 1978, however, reiterates that "it is important to continue to emphasize the cost effectiveness of conducting CIA activities under a one-year appropriation as has been done until now."

30. Section 113(a)(3), p. 27 of the 9 January 1978 draft has been transferred to Title IV. It read: "The Director shall have exclusive authority for reprogramming funds within the national intelligence budget." On 11 January 1978 CIA pointed out that this subsection must be modified since it reads as if the Director can reprogram between entities notwithstanding Elliot Maxwell's statement that the intent was not to allow reprogramming between entities. The former section 113(a)(3) therefore does not appear in the 18 January 1978 draft.

31. Section 113(b)(1), p. 26 - on 11 January 1978 CIA indicated to SSCI staffers that as written this section (as it appeared in the 9 January 1978 draft) was unclear as to whether the CRF is made up of CIA funds. Elliot Maxwell stated that this in fact was the intent, viz., to have the CRF made up of CIA funds. To clarify, SSCI attendees agreed to:

(a) insert the term "CIA" to indicate that only CIA monies would go into CRF. In the 18 January 1978 draft, instead of inserting "CIA," the phrase "Office of the Director" is inserted;

(b) To provide carry-over authority, it was agreed to include words allowing the Director to "establish and maintain" a fund; this has been done in the 18 January 1978 draft;

(c) The word "appropriated" in the fourth line (18 January 1978 draft) was to be changed to "designated" to avoid potential problems relating to the lack of a specific appropriation for CIA funds; the term "appropriated" has, however, been retained in the 18 January 1978 draft.

32. Section 113(b)(1)(B), pp. 26-27 - this subsection still contains onerous reporting requirements. The phrase "facts and circumstances" remains vague and is left to subsequent procedures to give it substance. Per our admonition the term "withdrawal" has been added in line 7 of the subsection. The term "[and] expenditure" after the term "withdrawal" has, however, been dropped.

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33. Section 113(c), p. 28 - on 11 January 1978 CIA indicated that "quarterly" reporting referred to on line 8 of the subsection should be relaxed. No subsequent change has been made in the 18 January 1978 draft.

34. Section 113(d)(1), p. 28 - this subsection is the former section 113(d) on pp. 29-30 of the 9 January 1978 draft. At the 11 January 1978 meeting CIA objected to inclusion of the phrase "... with the approval of any committee of the Congress having jurisdiction over..." which would on "approval of ..." have subjected funds appropriated to the Director to have been audited by the Comptroller General. Per our admonition this has been limited to request or approval of HPSCI or SSCI. Note, however, that the phrase "or upon the request of (C) any other committee of either House of Congress" is newly included. This appears to go beyond the 9 January 1978 draft and still does not answer the question of whether subcommittees can make such request or approval.

35. Section 114, pp. 31-34 - at the 11 January 1978 meeting CIA indicated that it found all of the 9 January 1978 draft section 114 language to be intolerable and that it should be redone utilizing as a base the draft E.O. The 18 January 1978 section 114 in entirety must be read against the newly signed E.O. #12036.

36. Section 122, pp. 46-50 must be reviewed to determine if reporting requirements are consistent with responsibilities, viz., to determine who--as between the DNI and the AG--has reporting responsibilities in the areas of domestic and foreign counterintelligence.

37. Section 123(a), p. 51 - at the 11 January 1978 meeting CIA made the point that as written, subsection (a) could be construed to require Cabinet-level persons to be directly involved in working level discussions re communications security. Despite agreement to change this subsection, to allow for the appointment of "designees" to handle such matters, no such provision has been made.

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