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CENTRAL INTELLIGENCE AGENCY
Office of Legislative Counsel
Washington, D. C. 20505
Telephone: [redacted]
9 August 1978

25X1

TO: Mr. Pat Swygert
General Counsel
Civil Service Commission

Dear Pat,

Here are two copies of what we sent to Mr. Sugarman's office, one copy for you and one for you to take to Si Lazarus per our conversation.

[redacted]

Assistant Legislative Counsel

25X1

FORM 6-68 1533 OBSOLETE PREVIOUS EDITIONS (40)

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THE DIRECTOR OF CENTRAL INTELLIGENCE

78-4187/12

WASHINGTON, D. C. 20505

Office of Legislative Counsel

17 AUG 1978

Mr. H. Patrick Swygert
General Counsel
Civil Service Commission
Washington, D.C. 20510

Dear Pat:

We appreciate having had the opportunity to discuss with you and Vice Chairman Sugarman, in Si Lazarus' office last Friday, 4 August 1978, our concerns with the Civil Service Reform legislation. To follow up that session, I would like to provide the following material reflecting our understanding as to specific problems:

1. The scope of the authority of the proposed Special Counsel. Attached at Tab A is a floor colloquy which we should clear with Representative Udall prior to our lining up members to present it during floor debate on H.R. 11280.

2. Several problems we have with particular provisions in section 1206 of Title II of H.R. 11280, relating to specific authorities of the Special Counsel. These issues, contained in Tab B, would be addressed at conference since it is our understanding the Administration does not plan to propose substantive amendments during the floor debate. These matters complement the floor colloquy noted above, which is contained in Tab A.

3. Three amendments that are in the nature of technical amendments, to be addressed during the floor debate on H.R. 11280; these are attached at Tab C.

4. Five matters that should be addressed during the conference on the legislation; these are addressed in Tab D. Two of these are report language matters and three would require amendatory language.

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I understand Chairman Campbell plans to meet with Representative Udall, possibly later today, at which time he will present our concerns, as outlined in the attachments to this letter. I would appreciate being kept fully informed of activities in this regard so we ensure a coordinated effort, and so that we are able to assist in answering any questions or requests for additional information that may come up. We appreciate very much your support in this endeavor, and look forward to working closely with you to arrive at a mutually satisfactory resolution.

Sincerely,

/s/

Frederick P. Hitz
Legislative Counsel

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COLLOQUY TO MAKE CLEAR THE SCOPE OF THE AUTHORITY OF THE SPECIAL COUNSEL UNDER TITLE II OF H.R. 11280

_____: The legislation now before us would effect significant changes to the Government's Civil Service system in order to prevent abuses of personnel practices. One of the mechanisms in this process is the establishment of a Special Counsel to receive and investigate alleged prohibited personnel practices and to monitor remedial action therefor. Now, it is my understanding, after careful review of and consultation on these provisions of the bill, that the powers of the Special Counsel to investigate substantive allegations of misconduct are exerciseable only to the extent that there is involved an alleged prohibited personnel practice as defined in section 2302 of Title I. I would simply like to make clear that this is in fact the intended scope of the Special Counsel's authority, which seems to me the appropriate scope of his power consonant with the manner in which he would function pursuant to the terms of sections 1204 through 1207.

_____: My distinguished colleague is correct on this point. This legislation would establish a Special Counsel with authority to receive allegations of misconduct only in connection with prohibited personnel practices; he would also monitor remedial measures. Title I of H.R. 11280 defines what are "prohibited personnel practices." Title II establishes the mechanism whereby these practices and related allegations are to be received, considered and remedied; that is, the Special Counsel.

_____: I thank the distinguished member of the Post Office and Civil Service Committee for his clarification of this matter.

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SPECIFIC CONCERNS RELATING TO PARTICULAR AUTHORITIES OF THE SPECIAL COUNSEL UNDER SECTION 1206 OF TITLE II OF H.R.11280

1. Subsection 1206(c) provides authority for the Special Counsel and the Comptroller General to become involved in investigating alleged reprisals against Federal employees who disclose alleged abuses, illegalities or improprieties. Pursuant to subparagraph 1206(c)(1)(A), page 154 of the 31 July Committee Print, this authority does not extend to disclosures of alleged violations of any law, rule or regulation that are "prohibited by law or Executive order" (e.g., classified information or information involving intelligence sources and methods, which the Director of Central Intelligence is responsible for protecting from unauthorized disclosure, 50 U.S.C. 403(d)(3)). However, subparagraph 1206(c)(1)(B), also on page154 of the 31 July Committee Print, which concerns not "any disclosure" as in (A) but disclosures to the Special Counsel or Inspectors General that relate to mismangaement, waste of funds, or abuse of authority, contains no provision similar to that in (A) which, in essence, "protects" only those disclosures that are "not prohibited by law or Executive order." This could be read to mean the Special Counsel (and derivatively GAO) would have jurisdiction over any alleged reprisal for any disclosure by an employee under 1206(c)(1)(B), even involving information that is classified or protected by law against disclosure. In the case of the CIA, this would be inconsistent with present procedures based on the statutory authorities and responsibilities of the CIA and the Director of Central Intelligence. It is therefore essential that the following language which appears in subparagraph 1206(c)(1)(A) be added to subparagraph 1206 (c)(1)(B): "...[such disclosure], not prohibited by law or Executive order..."

2. Subsection 1206(c) of H.R. 11280, as amended during mark-up, would, among other things, and unlike the Senate bill: (1) authorize the Special Counsel to require an agency head to conduct investigations; (2) authorize the Special Counsel to require investigations of "related matters"; (3) require that agency heads submit very detailed reports of investigations; and (4) provide for access by the GAO to detailed investigative activities. Moreover, paragraph 1206(c)(6) could be construed to provide GAO an independent investigatory power. These provisions are of concern because they could all result in requiring access by external entities to intelligence information that is now protected by Executive Order or by provisions of the National Security and CIA Acts, as amended (e.g., 50 U.S.C. 403(d)(3), 50 U.S.C. 403g, and 50 U.S.C. 403j). These problems could be remedied by the amendment suggested above to sub-

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paragraph 1206(c)(1)(B), and by amending paragraph 1206(c)(7) to make clear that subsection 1206 (c) is not intended to authorize any disclosure of information that is classified or protected from disclosure by law. This latter change would remove the implication that national security information would be disclosed by an agency, GAO, or the Congress.

3. The requirement in subsection 1206(d), that the Special Counsel publish a "list of noncriminal matters referred to agency heads" (lines 17 through 19 of page 160 of the 31 June 1978 Committee Print), does not make clear that information protected against disclosure by law or Executive Order shall not be included in such public list.

Since it may not always be clear on the face of the information concerning alleged violations or improprieties which the Special Counsel may receive that classified or otherwise protected information is contained therein, it should be clarified--by amendment or by Report language, or both--that the provision is not intended to authorize the Special Counsel to disclose information that is classified or is protected against disclosure by statute. The matters that would be contained in such a public list by the Special Counsel would constitute only information he had received under his investigatory jurisdiction described in this section (the report should make this point clear). To ensure that no information that is classified or protected against disclosure by statute is contained in a public list, it should be made clear that the Special Counsel, prior to including any information in a public list, shall consult with the head of the agency involved to determine if any classified or protected informationis involved, in which case the information shall not be included in a public list.

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TECHNICAL AMENDMENTS TO H.R. 11280

1. Add the words ", as amended" immediately following the four statutory citations contained in section 2304 of Title I of H.R. 11280 (page 143 of the 31 July 1978 Print). The section so amended would read as follows:

> "§2304. Coordination with certain other provisions of law
>
> "Nothing in this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), as amended, the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), as amended, Public Law 86-36 (73 Stat. 63; 50 U.S.C. 402 note), as amended, and Public Law 88-290 (78 Stat. 168; U.S.C. 831-835), as amended."

2. §1206(e)--page 160 of the 31 July 1978 print of H.R. 11280--authorizes the Special Counsel to investigate certain specified categories of allegations other than those authorized in section 1206. Subparagraph 1206(e)(1)(A) relates to political activity that is prohibited under subchapter III of chapter 73 of Title 5, U.S.C. As this subparagarph is intended to place the Special Counsel in the shoes of the present Civil Service Commission insofar as practices and procedures relating to the investigation of Hatch Act violations are concerned, it is recommended that the following language be inserted before the semi-colon at the end of the subparagraph: "...in the competitive service;" This additional language simply clarifies the intended scope of this subparagraph.

3. Also under subparagraph 1206(e)(1)(C) the Special Counsel would have the authority to investigate allegations concerning "arbitrary or carpricious withholding of information prohibited under section 552 of" Title 5, U.S.C. As it is intended that this authority run only to withholding of information under subparagraph 552(a)(4)(F) of Title 5, the citation in this subparagraph of H.R. 11280 should be amended to read in pertinent part as follows: "(C)... under section 552(a)(4)(F) of this title;"

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MATTERS TO BE ADDRESSED AT THE CONFERENCE ON H.R. 11280/S.2640
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1. Clarifying report language is necessary for the following two matters:

a. Report language to make clear that CIA would continue to remain completely exempt from all laws regarding preference eligibles:

Subchapter II, Title II (sections 7511-7514)--"Notwithstanding subparagraph 7511(a)(1)(B), it should be noted that the current enabling statutes for the CIA (the National Security Act of 1947, as amended (50 U.S.C. 403) and the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403a et seq.)), exempt the CIA from all laws regarding preference eligibles."

b. Report language also is necessary to make clear that the adjudication and appeals authority of the Civil Service Commission would be passed, as is, to the new Merit Systems Protection Board pursuant to a Presidential reorganization; agencies' present statutory exemptions would remain in effect. Therefore, the following language is suggested--"Any exemptions from the adjudication and appeals authority of the Civil Service Commission currently enjoyed by agencies will remain in effect vis-a-vis the adjudication and appeals authority of the Merit Systems Protection Board contained in Chapter 77."

2. Amendments to H.R. 11280 which are necessary to be made during the conference:

a. The definition of "agency" provided in paragraph 7103(a)(3) of Title VII of H.R. 11280 exempts, among other agencies, the Central Intelligence Agency and the National Security Agency. Section 7103 also provides (at page 298 of the 31 July 1978 print) that the Federal Labor Relations Authority may exclude from coverage of the chapter other agencies or units thereof whose primary function is intelligence or counterintelligence. It is necessary to provide a further explicit exemption from the definition of "agency" for "Offices for the collection of specialized intelligence through reconnaissance programs." These offices are extremely sensitive and cannot be subject to any kind of examination by external authorities outside of national security channels. Such an exemption would be consistent with the specific exemptions already provided for the CIA and NSA, and is essential to ensure that all agencies or components thereof with particularly sensitive national security functions are in fact, and in the first instance, excluded from the provisions of proposed chapter 71 of Title 5, U.S.C.

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b. The exemption for intelligence agencies from provisions of the Hatch Act Reform Title of H.R. 11280 (Title IX) is inadequate. The exemption operates by way of defining a "restricted position" (i.e., a position remaining under the provisions of the Hatch Act) to exclude those positions (not agencies) involving, as a substantial portion of the duties thereof, "foreign intelligence activities relating to national security" (pages 364-365 of the 31 July 1978 print of H.R. 11280). This formulation is inadequate because, among other things, it is contingent on a case-by-case finding made by the Office of Personnel Management that (1) a particular postion (2) substantially (3) involves foreign intelligence activities (4) relating to national security. Such a formulation, for example, could result in a finding that certain positions in the CIA or the NSA would be exempt while others would not, depending on the particular duties of individual employees. Also, the administrative process to be used by OPM to determine which positions shall be "restricted" contains no provisions to protect against the disclosure of information concerning intelligence sources and methods. The exemption from the provisions of Title IX of H.R. 11280 for intelligence employees is and should be based on the unique nature of the mission and tasks of the agencies themselves, rather than on the circumstances of individual employees' duties. The definition of "restricted position" in paragraph 7322(8), therefore, should be amended to specifically include all positions in the CIA and the NSA and other entities of the Intelligence Community,

c. Title XI of H.R. 11280 provides for the Office or Personnel Management to conduct a "detailed study" of the "decentralization of Federal government functions." In order to ensure that the details of certain sensitive functions and organziation aspects of the CIA and other intelligence entities are not disclosed, section 1101 of Title IX H.R. 11280 should be amended to include the following additional subsection immediately following present subsection 1101(c): "(d) nothing in this section shall be considered to authorize the disclosure of any information which is specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs, or which is protected from disclosure by statute."

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