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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

OLC RECORD COPY

Office of Legislative Counsel

21 April 1978

Mr. Robert E. Carlstrom
Legislative Reference Division
Office of Management and Budget
Washington, D.C. 20503

Dear Bob:

I would like to provide you with additional background regarding our interest in S. 1437, the "Criminal Code Reform Act of 1978," to follow up our telephone conversation on 19 April 1978.

As you are aware, we have been in contact periodically with the Department of Justice concerning S. 1437 since our initial views letter on the bill was sent to the Office of Management and Budget on 26 May 1977. Most recently, on 12 April 1978, we met to discuss these concerns with the staff of the House Permanent Select Committee on Intelligence (HPSCI), and with Mr. Ronald Gainer, Deputy Assistant Attorney General for the Office for Improvements in the Administration of Justice. During that meeting, we explained the nature of our concern with this legislation; namely, the legislation's failure to provide explicitly, in some manner, for a "defense of public authority," and the resulting uncertainty and potential problems that might develop if and when intelligence officers carry out lawfully authorized activities that are at the same time on their face violative of provisions in this legislation. It was stressed that, although S. 1437 contains, in section 501, reference to the general common law public authority defense, and although the CIA has in the past been advised by the Department of Justice that certain existing criminal statutes do not extend to official activities otherwise authorized pursuant to law, the broad reach of this legislation and the current environment in which intelligence officers must operate, requiring a much greater degree of attention than previously to engaging only in those activities that are clearly if not explicitly authorized, makes us uncomfortable with this legislation, which sets forth numerous explicit proscribed activities without corresponding recognition of the fact that intelligence activities carried out pursuant to lawful authority are not within the scope of these provisions. (We are aware that the specific defenses, including the public authority defense, previously incorporated in S. 1, the predecessor legislation, were dropped from S. 1437 in the interest of compromise.)

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In our view, perhaps the key question with which Congress must come to grips is what activities are or should intelligence agencies be authorized to conduct (particularly those related to civil rights). The intelligence charter legislation, now before both intelligence oversight committees, in large part will address the basic question of what activities Congress intends intelligence agencies and officers to be able to conduct. For the following reasons, however, we believe this would not provide the best forum from which to address the matter of the inter-relationship between proper intelligence activities and Federal criminal statutes applicable to persons generally. In our view, this basic issue should be considered in the context of congressional consideration of S. 1437.

--There necessarily would not be a complete overlap between the authorizing provisions in the charter legislation and the enumerated proscribed activities in the criminal code revision.

--It would be extremely difficult, if not impossible, and undesirable at any rate, to attempt to specifically identify each and every activity which intelligence officers and agencies should be authorized to perform, and, conversely, each and every civil or criminal proscriptive statute that should be made inapplicable to intelligence officers and agencies.

--There may very well be an extended period of time before which the intelligence charter legislation will be enacted.

--The current environment in which intelligence officers must operate, with increasing oversight and required deference to regulations and statutes, is creating great uncertainty and hesitancy to engage in intelligence or intelligence-related activities absent very clear and unambiguous authority to carry out such activities. Increasingly, individual officers are concerned that they run the risk of being liable for civil or criminal sanctions for conducting an intelligence activity that, although fully and appropriately authorized at the time, later is determined to be without sufficiently explicit statutory authority.

Neither the fact that future prosecutions would be unlikely, nor that authorized intelligence activities subsequently would likely be found not to fall within the intent of a criminal statute, addresses these practical problems.

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Those with whom we have spoken have indicated informally that they are sympathetic to our concerns and agree that it would be appropriate to raise the issue with the House Judiciary Committee now considering the legislation. We believe these important issues should be raised in as open a manner as possible with both the Judiciary and Intelligence Committees. Given the key role being played by Senator Edward Kennedy in this legislation, and in light of the sponsors' clear intent to move the legislation through the Congress as quickly as possible, we are also contemplating checking with Senator Kennedy to obtain his ideas on this matter. In our view, it would be beneficial to raise this matter even if all that might result at this time would be a commitment to consider the matter apart from S. 1437 in order not to hold up that bill.

We appreciate your interest in this matter. As we discussed, we will continue to work closely with the Department of Justice, and particularly Mr. Ronald Gainer, regarding our concerns with and activities on this matter. Please let me know if there are additional considerations you believe relevant. As we agreed also in our telephone conversation, we will submit a formal report in satisfaction of your request for views on S. 1437 after additional discussions.

Sincerely,

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Assistant Legislative Counsel

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