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OLC OMB LSN

THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

Office of Legislative Counsel

31 March 1978

OLC 78-0487/c

Honorable Alan K. Campbell, Chairman
United States Civil Service Commission
Washington, D.C. 20415

Dear Mr. Campbell:

It is understood that it is the position of the Administration to support a complete exemption from the Civil Service Reform Bill (H.R. 11280 and S. 2640) for the Central Intelligence Agency as discussed between you and Mr. John F. Blake, the Agency's Deputy Director for Administration, on 27 February 1978, representatives of our respective staffs and representives of OMB.

In connection with your testimony on H.R. 11280 before the House Post Office and Civil Service Committee scheduled for 4 April 1978, it would be deeply appreciated if you would support this CIA exemption. Enclosed for your consideration is a short statement setting forth the rationale and justification for such an exemption.

Following your presentation, it would be our intention, in collaboration with your staff, to work with the staff of the House Post Office and Civil Service Committee on the specific language necessary to implement the Administration's position with respect to this matter. In this connection, also please find enclosed a copy of our views letter to OMB and a response to certain questions which have been raised by your staff.

Sincerely,

Acting Legislative Counsel

Enclosures

cc: NSA
Distribution:
Orig. - Addressee, w/encl
1 - SA/DO/O, w/encl
1 - OP, w/encl, 1 - OGC, w/encl
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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

Office of Legislative Counsel

17 February 1978

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in response to your request for our views on the Civil Service Commission draft bill, the "Comprehensive Civil Service Reform Act."

CIA has serious problems with the substance of this legislation. Numerous provisions conflict with present CIA authorities. Its detailed disclosure requirements, as well as its inadequate exclusions and refusal to recognize the Director of Central Intelligence's termination authority or CIA excepted status could pose serious security problems for the Agency and compromise the Director of Central Intelligence's ability to fulfill his statutory responsibilities to protect sources and methods. We therefore ask to be excluded from the provisions of this legislation.

Enclosed you will find our specific comments and recommendations of the draft legislation, as well as on the draft reorganization plan. We appreciate this opportunity to present our views to you. In view of the short period provided to review this complex paper, we may want to provide additional views based on further study.

Sincerely,

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Acting Legislative Counsel

Enclosures

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VIEWS OF THE CENTRAL INTELLIGENCE AGENCY ON THE CIVIL SERVICE COMMISSION REORGANIZATION PLAN OF 1978

Section 202(f) of the proposed Reorganization Plan gives the Special Counsel to the Merit Systems Protection Board (Merit Board) the general authority to receive and investigate allegations of reprisals against whistle-blowers, i.e., for lawful disclosures of information concerning the violation of laws and regulations. The Special Counsel is also given the authority to prescribe regulations governing the handling of such matters. These authorities would conflict with the oversight role of the Intelligence Oversight Board (IOB) as stated in Section 3-1 of Executive Order 12036; the Board was specially created in order to keep intelligence agency whistle-blowing within national security channels.

The procedures for implementing the Special Counsel's whistle-blowing authorities have been placed in Title II of the draft legislation and will be commented upon in our analysis of that title.

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VIEWS OF THE CENTRAL INTELLIGENCE AGENCY ON THE COMPREHENSIVE CIVIL SERVICE REFORM ACT

Title I prescribes rigid merit system principles that shall apply to all departments and agencies in the Executive Branch, including the CIA. The eight merit system principles concern, for example, personnel recruitment, performance evaluation and grievance procedures.

As described in Title I, the merit system principles would conflict with the exempted status of the CIA under 50 U.S.C. 403j. This section has consistently been interpreted as providing CIA with a statutory exemption from the competitive service in order to allow the Agency greater flexibility in performing its functions. Furthermore, the Agency's excepted status is not governed by Civil Service Commission excepted position schedules.

The rigid merit system principles in Title I of the proposed Civil Service Reform Act would hamper CIA in its staffing flexibility and requirements. For example, section 202(1) provides that selection and advancement of applicants must be determined through "fair and open competition." Also, section 202(2) would require CIA to give equal consideration to all applicants, regardless of political affiliations and national origins, a procedure which could conflict with necessary security considerations.

Moreover, section 205 provides that the Government Accounting Office would conduct audits and reviews to assure compliance with the laws, Executive Orders, directives, rules and regulations governing employment in the Executive Branch. It would also assess the effectiveness and systematic soundness of Federal personnel management.

This Agency is not subject to audit or oversight by the GAO, a position based on security considerations and the need to protect intelligence sources and methods. The provisions in section 205 of the proposed Plan, however, would authorize an entity outside the Agency to insure its compliance with certain laws and regulations. This situation would conflict with the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods, particularly the organization, functions and other personnel-related matters of the Agency from disclosure, as provided by 50 U.S.C. 403(d)(3) and 403g.

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The provisions of Title II relating to protection of employee rights, present the Agency with many difficulties. Many of the provisions interfere with, impair, or are completely inconsistent with present CIA statutory authorities. Section 202 would grant subpoena power to the proposed Merit Systems Protection Board (Merit Board), its Special Counsel and other designated personnel. This power could be utilized by the Special Counsel in the course of a whistle-blowing investigation. By the authority of section 204, the Special Counsel could also freeze any personnel action with substantial economic impact on the complaining employee until an investigation concerning that employee is complete. The Agency head would be required to take whatever corrective action the Special Counsel deemed necessary, if a reprisal against an employee was found to have occurred because of the employee's disclosure of information relating to a violation of law or regulation. If the action was not carried out, section 207 provides that the Special Counsel could take the matter before the Merit Board for final determination. These procedures would conflict with the authority of the Director of Central Intelligence to terminate employees when in the interests of the United States (50 U.S.C. 403(c)), with the Director's mandate to prevent disclosure of intelligence sources and methods (50 U.S.C. 403(d)(3) and 403g), with the role of the Intelligence Oversight Board (section 3-1 of Executive Order 12036), and with CIA's excepted personnel system (50 U.S.C. 403j).

Under section 205 performance appraisal systems must be established by certain agencies for certain employees. The appraisal systems must also conform to Office of Personnel Management (OPM) regulations. However, there is a discrepancy between the language of the legislation and that of the report concerning the agencies covered by the legislation. The report contends that the Tennessee Valley Authority is included, while the legislation states that it is excluded. The report also contends that CIA, unlike the Foreign Service, is not meant to be excluded, though the legislation allows for such an exclusion by OPM regulation. Even so, the thrust of this section would be to subject CIA performance appraisals to OPM control. This would conflict with the aforementioned 50 U.S.C. 403(d)(3), 50 U.S.C. 403g and 50 U.S.C. 403j.

The procedures in section 205 of the proposed bill, pertaining to demotions or dismissals based on unacceptable performance, include a requirement for 30 days advance notice, and the right to reply and to representation. The procedures also provide the affected employee the right to appeal the matter to the Merit Board for final determination pursuant to section 207. These features could conflict with the DCI's termination authority (50 U.S.C. 403(c)), with the Director's mandate to prevent disclosure of sources and methods (50 U.S.C. 403(d)(3) and 403g) and with the Agency's statutory exemption from the competitive service.

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Section 206(a) deals with adverse actions designed to promote the efficiency of the service, including removals, suspensions and furloughs for 30 days or less. There are two sets of adverse action procedures. When the suspension is for more than 30 days, removals and other adverse actions must be processed under procedures similar to those in section 205. CIA would be covered by those procedures only to the extent that it would employ preference eligibles. When the suspension is for 30 days or less, less rigorous notice, right-to-reply and representation procedures would be required for all CIA employees. CIA employees covered by either set of adverse actions procedures could not be excluded from these procedures because both exclusion provisions use the "confidential or policy determining" language of Schedule C, which is inapplicable to CIA, as their criteria. Thus, these procedures would tend to create the same statutory conflicts created by the section 205 procedures. Moreover, it should be noted that while adverse action by CIA management must conform to the aforementioned procedures, the procedures curiously exclude from coverage national security adverse actions taken under 5 U.S.C. 7532.

In accordance with section 207, any matter to be decided by the Merit Board would be processed under regulations established by the Merit Board and the decision would be reviewed by the U.S. Court of Claims or a U.S. Court of Appeals. Such practices would also conflict with the aforementioned statutes giving the Director the authority to terminate employment, the responsibility to protect intelligence sources and methods and this Agency's exemption from the competitive services.

Title III, concerning staffing, provides for the examination, selection and retaining of Federal employees. The Agency fully supports the provisions of section 306 which would enable the Agency to equip an employee with the skills necessary to fill a different position or to acquire new skills needed for a position in another agency. Overall, this would appear to be of benefit to the Government by retaining competent employees in the Federal service. We recommend that a provision be added providing for the placement of a RIF employee within his or her own Agency as a result of additional training.

Section 308 would require OPM approval of a special early retirement authority. Presently, CIA has authority to declare surplus situations regarding early retirement without obtaining Civil Service Commission approval. If enacted, this section would conflict with the DCI's authority to protect the numbers and functions of employees from disclosure (50 U.S.C. 403g).

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Title IV would establish a Senior Executive Service (SES) comprising all managerial and supervisory positions correctly classified GS-16 through Executive Schedule IV.

Section 402(b) would give the Office of Personnel Management (OPM) authority to prescribe all implementing regulations for the SES. This section would allow an agency to be excluded from SES by the President, but the agency would have to do so through OPM, with that Office making a recommendation to the President as to whether an exclusion is advisable. If the exclusion were granted, OPM could recommend to the President a revocation at any subsequent time.

The SES would be composed of career reserved positions for career appointees and general positions for career and non-career appointees. OPM would prescribe the position criteria and regulations governing the designation of career reserved positions. Also, OPM would have to approve the managerial qualifications of initial career appointees in such positions.

All agencies covered by SES would be required to submit to OPM requests for SES positions which would include program, budget, and workload breakdowns to justify each request. OPM, in consultation with the Office of Management and Budget, would then allocate the positions per agency, although OPM would reserve the right to reduce any allocation at will. Additionally, OPM would be required to submit a biennial report to the Congress which would reveal the numbers of SES positions in each Agency.

Lastly, the number of non-career appointees would be limited to 15 percent of SES positions Government-wide; these positions would be allocated biennially by OPM according to demonstrated need. OPM would reserve the right to make adjustments in allocations to meet any emergency needs.

The degree of OPM control over the allocation of SES positions allowed by section 402(b) would severely limit the adaptability of the CIA personnel system and hamper its functions and operations. Such OPM controls also conflicts with the statute establishing CIA's excepted personnel system (50 U.S.C. 403j). Further, the vast amount of detailed information which would have to be disclosed in order for the statutory scheme of SES to function would conflict with the DCI's statutory responsibilities under 50 U.S.C. 403(d)(3) and 50 U.S.C. 403g.

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According to section 403, SES pay levels would be set according to OPM criteria. The section also would require that the staffing of SES career appointees be competitive, according to a process meeting OPM standards. Once a career executive is in place, that executive could not be involuntarily reassigned or transferred within 120 days after the appointment of an agency head. These restrictions present the same statutory conflicts raised by the provisions of section 402(b).

While the removal criteria set by section 404 for SES non-career employees is the functional equivalent of the DCI's termination authority (50 U.S.C. 403(c)), the removal criteria for career appointees does not include anything resembling this authority.

All agencies, unless excluded by the President from SES, would be required to create an SES performance appraisal system under section 405. If an appraisal system is not in conformity with OPM regulations, OPM could order corrective action. This also would conflict with the aforementioned statutory responsibilities of the DCI.

Both the suspension for 30 days or more of SES employees and their removal to promote the efficiency of the service are governed by the procedures of section 411. These procedures include a requirement of a 30 days' advance notice, a right to reply and representation, and an appeal to the Merit Board. This section then would result in more disclosures and statutory conflicts.

Title V concerns the merit pay plan for supervisory and managerial positions from GS-9 through GS-15. Section 501 would place all managers in grades 9 through 15 and non-managers in grades 16 through 18 under the coverage of a merit pay plan to be established by OPM and implemented by OPM regulations. Again, OPM control would conflict with existing statutes and would result in the removal of an important management tool.

The Agency has no comments on Title VI, Research and Demonstration Authority, and Title VII, Miscellaneous.

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SUMMARY

On 3 March 1978, the Civil Service Reform Bill (H.R. 11280 and S. 2640) was introduced in Congress. The bill would effect a major reform of the Civil Service system. The thrust of the bill appears to strengthen individual agency responsibilities and authorities.

The CIA fully supports the spirit and intent of the proposed changes in the Civil Service system. Indeed, as an administrative policy we have always followed the basic philosophy of the merit system. However, a complete exemption from the coverage of the bill is necessary because of our need to maintain secrecy and security regarding intelligence activities and functions, and because of our special personnel requirements which demand maximum flexibility.

The procedures and mechanism established by the bill to implement the merit system principles would conflict with the statutory responsibilities of the Director of Central Intelligence to prevent disclosure of sources and methods (50 U.S.C. 403(d)(3) and 403g), with the Director of Central Intelligence's termination authority (50 U.S.C. 403(c)), and with the unique statutory expected status of CIA personnel (50 U.S.C. 403j).

Because this legislation is so complex and comprehensive, the exemptions covering the Agency and the other entities of the Intelligence Community should be clearly drawn and written.

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Proposed Statement for Chairman Campbell

It is intended that the CIA and the other entities of the Intelligence Community be exempted from the provisions of the Civil Service Reform Bill; this position is in accord with the Administration's program. Such exemption is based essentially on security reasons, that is, because of the need to maintain secrecy and security regarding intelligence activities and functions, and because of the special personnel requirements of intelligence agencies which demand maximum flexibility.

The administration of the Central Intelligence Agency is governed by the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. The former imposes on the Director of Central Intelligence responsibility for protecting intelligence sources and methods from unauthorized disclosure (50 U.S.C. 403). It also grants the Director the discretion to terminate the employment of any officer or employee of the Agency "whenever he shall deem such termination necessary or advisable in the interests of the United States" (50 U.S.C. 403). The Director of the National Security Agency has similar termination authority (50 U.S.C. 833). These statutory authorities are considered to be absolutely essential in the management of our foreign intelligence efforts.

As I noted before, the intent was to exclude from coverage the Intelligence Community. However, there are provisions in the bill which require modification in order to reflect fully this intent. As to these sections, we will be offering amendatory language so that the bill is in conformity with the Administration's position.

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COMMENTS OF THE DIRECTOR OF CENTRAL INTELLIGENCE
ON THE CIVIL SERVICE REFORM BILL (H.R. 11280 AND S.2640)

1. Title I, Merit System Principles

In Title I, the CIA and other entities of the Intelligence Community are exempt from only proposed section 2301 (section 101(a) of the bill, which would amend Title 5, U.S.C.), the Merit System Principles, but not from the other two sections, Prohibited Practices and the GAO audit. As noted in our report on the draft bill, submitted to OMB on 17 February 1978 and herein attached as Appendix B, it is necessary that the CIA and other intelligence entities be exempt from all of Title I.

A complete exemption from all of Title I would exempt the CIA and the other entities of the Intelligence Community from the provisions referring to the Special Counsel in Title II (sections 1201 to 1207 amending Title 5 of the U.S.C.) which authorize the Special Counsel to investigate allegations of prohibited personnel practices described in Title I.

It is therefore proposed that section 2101(a)(2) be amended to read: "(2) This chapter shall not apply to --"

2. Title II, Civil Service Functions; Performance Appraisal; Adverse Actions

In Title II, the CIA is explicitly exempted from Chapter 43, Performance Appraisal, and from Subchapter I of Chapter 75 relating to short-term suspension (sections 203(a) and 204(a) of the bill which would amend Title 5, United States Code).

As for the provisions of Subchapter II, which involve Removal or Suspension for more than 30 days (sections 7511-7514), it should be noted that CIA is exempt from such provisions because of the nature of its excepted personnel system (50 U.S.C. 403j). Though this Subchapter applies to preference eligibles serving in the excepted service generally, the broad scope of the statute which governs CIA 's excepted status has been universally interpreted as excepting the Agency from all laws regarding preference eligibles.

Chapter 77, Appeals, would present no conflict for CIA if the Agency were completely exempted from the provisions of the bill. Presently, the Agency is exempt from various statutes which give the Civil Service Commission its adjudication and appeals authority and its authority to promulgate rules and regulations. The adjudication and appeals authority of the CSC would be passed, as is, from the CSC to the new Merit Board pursuant to a presidential reorganization. However, our statutory exemptions from such adjudications and appeals would remain in effect. The only statutory basis for any new rights

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of appeal to the Merit Board would be this bill; thus, we require a complete exemption from this bill.

3. Title IV, Senior Executive Service

Regarding Title IV, the only exemption provided the CIA is unacceptable. As this title is drafted, the CIA would have to seek exemption under the general exemption provisions of subsection (c). These provisions would require CIA to make a presentation to Office of Personnel Management, in support of the Agency's request for exemption. Moreover, OPM is given the authority to conduct any independent investigation it deems appropriate, before it makes its recommendation to the President on whether the Agency should be exempted from the Senior Executive Service. If the Agency is exempted by subsection (c), it still must attempt to make its personnel system conform to SES as much as possible. Finally, OPM is given the authority to recommend the revocation of a subsection (c) exemption at any time. The prominent role to be played by OPM in the process of allocating and policing subsection (c) exemptions would necessarily require detailed examination by OPM of the personnel systems exempted or seeking exemption under subsection (c).

CIA must be specifically by name exempted from Title IV, as well as from the other titles of the bill, in order to preserve the secrecy and security required by the Agency's mission and functions. Though the drafters of the bill decided that CIA did not need a specific exemption from Title IV because it could be exempted under subsection (c), the detailed examination of the Agency's personnel system that would result from the Agency having to obtain a subsection (c) exemption would itself defeat the entire purpose behind CIA receiving an exemption in the first place. In short, we regard a subsection (c) exemption as tantamount to no exemption at all.

4. Title V, Merit Pay

Neither the CIA nor any other entity of the Intelligence Community is exempted from Title V, which concerns Merit Pay. This title would result in OPM control and regulations which would conflict with the Director's statutory responsibility to prevent disclosure of sources and methods (50 U.S.C. 403(d)(3) and 403g). Furthermore the title would abrogate the Director of Central Intelligence's authority to establish pay systems to meet the operating requirements of the Agency. (5 U.S.C. 5101 et seq.) We, therefore, propose the following amendment to section 5402(a):

> "(a) In accordance with the purposes set forth in section 5401 of this title, the Office of Personnel Management shall establish a merit pay system which shall cover any employee in a position which regularly requires the exercise of managerial or supervisory

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responsibilities and which is in GS-13 through GS-15, but which shall not cover employees of Central Intelligence Agency, Defense Intelligence Agency, and National Security Agency, and any executive agency or unit thereof, designated by the President, that conducts foreign intelligence or counterintelligence activities."

5. Title VI, Research, Demonstration, and Other Programs

The language which apparently is intended to exempt CIA from Title VI is not drawn as clearly as we believe necessary. In our view, every effort should be made to provide the clearest possible provisions concerning the scope of this legislation. We, therefore, propose that CIA be exempted from Title VI specifically by name rather than by reference.

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