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OLC #78-2722

OGC 78-4771
20 July 1978

MEMORANDUM FOR : Office of Legislative Counsel

ATTENTION : [redacted] STAT

FROM : [redacted]

SUBJECT : Comments on S. 3108, "Federal Employee Protection Act of 1978"

1. This memorandum is in response to your recent request for comments from this Office on S. 3108, "Federal Employees Protection Act of 1978."

2. The purpose of this proposed legislation is to encourage federal employees to disclose illegal or improper government actions. This would be accomplished by prohibiting an agency from taking any disciplinary action against an employee for reporting actions which the employee considers to be illegal or improper. The bill would establish a Merit System Protection Board in the executive branch to investigate employee complaints that such an action has been taken, and would establish procedures for investigation, appeal, and judicial review arising from such complaints.

3. My overall impression is that the bill in its present form would have a substantial -- and adverse -- impact upon this Agency. It would nullify certain of the Agency's present security procedures. Likewise, it could nullify Agency internal management procedures, such as the Inspector General system. It would also probably undermine certain of the Agency's special authorities, such as the Director's termination authority contained at Section 102(c) of the National Security Act of 1947, and might also conflict with the present system of executive and congressional oversight of intelligence activities.

4. As for items of specific interest to this Agency, proposed Subchapter I specifically refers to the executive agencies in defining the scope of the bill's coverage. Thus, this Agency would be subject to the proposed legislation. (Section 7802).

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5. Subchapter II establishes a Merit Systems Protection Board and Special Counsel, and sets forth their duties. The Board, through the Special Counsel, investigates complaints made under oath by a federal employee that the employee is being subjected to a prohibited disciplinary action, or that any employee or agency is involved in any illegal or improper action [Subsection 7813(a)].

6. If this legislation were enacted, an employee of this Agency would appear to have the choice of reporting alleged improprieties or illegal activities through this mechanism or reporting them to the established intelligence oversight groups. In my opinion, the employee would be wise to choose this mechanism since it offers the employee a benefit which the oversight committees cannot -- protection from most types of disciplinary actions.

7. If the employee simply seeks counseling from officers of the Board concerning an action by an agency or another employee which may be improper or illegal, the identity of the employee seeking counseling is not to be disclosed. There is a criminal penalty for doing so. [Subsection 7813(e)].

8. There seems to be a requirement that the Board members and the Special Counsel must be persons who can qualify for security clearances. [Subsections 7811 and 7814(a), through reference to Subsection 7821(b)(4)]. However there is no specific requirement that other officers or employees of the Board or the Special Counsel's office must also meet this standard.

9. The Board is required to make an annual report to the Congress which would include a statement concerning the nature of all complaints made during the year, and including the names of all employees on whom a penalty had been imposed. No allowance is made for the protection of classified information in this report.

10. Subchapter III sets forth the procedures involving prohibited disciplinary actions. Basically, it appears to forbid any disciplinary action against an employee who reports any information concerning an alleged improper or illegal activity conducted by an agency or another employee, to the Congress, the Board, the Special Counsel, any court of the United States, or the agency (and its employees) that is directed to conduct an investigation of the employee's complaint. [Sections 7821 and 7841]. Insofar as the Congress is concerned, there seems to be no limitation imposed. An employee can apparently report his or her concerns to any member, or any committee of the employee's choosing. And, as to the entities set out above, there seems to be no limitation upon the types of information which an employee is authorized to report.

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11. The proposed legislation also enables an employee to report much information directly to the public without penalty. However, information required by executive order to be kept secret and which is properly classified, information which is prohibited by statute from being released, and several other specific categories of information may not be released to the public. [Section 7821].

12. The Special Counsel is granted very broad authority by this legislation. Among other things, the Special Counsel may stay in whole or in part any prohibited disciplinary action which his investigation reveals to have occurred, grant other temporary relief as may be appropriate, and continue any temporary relief which has been granted while an appeal which is brought under this legislation is pending. The Special Counsel is also authorized to require that the Agency which has allegedly committed the offense conduct a timely and comprehensive investigation reporting the result to the Special Counsel for his determination in the matter, including remedies for the aggrieved employee, and the referral of apparent criminal violations to the Attorney General. The Special Counsel can also institute certain actions against an agency head to compel compliance, including an action to withhold the agency head's pay during the period of noncompliance. [See Subchapter III generally].

13. Subchapter IV authorizes an employee or agency who is aggrieved by certain determinations made by the Special Counsel to appeal that determination. The appeal, however, involves a public hearing except where the appeal is brought by the employee whose conduct is questioned, and the employee requests that the hearing be closed. Each party can be represented by counsel, present evidence, and cross-examine witnesses, and is entitled to a verbatim transcript of the hearing. However, when classified information, information protected pursuant to statute, and several other categories of information are involved, these hearings or proceedings are to be closed to the public. An aggrieved party is also entitled to move for judicial review of any final determination made by the Board.

14. The proposed legislation would also authorize officers or representatives of certain federal employee organizations, or "any person who has a reasonable interest in the outcome of the complaint" to participate in hearings conducted pursuant to this legislation. [Section 7851(a)]. Participation by such persons apparently would not constitute a proceeding which is open to the public. Thus, classified information or other protected information would apparently be subject to disclosure in a proceeding where such persons are present.

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