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☐ UNCLASSIFIED ☐ INTERNAL USE ONLY ☐ CONFIDENTIAL ☐ SECRET

ROUTING AND RECORD SHEET

SUBJECT: (Optional)
FY 1980 Intelligence Authorization Bill/Proposed Legislative Program for the First Session of the 96th Congress

FROM:
Anthony A. Lapham
General Counsel

EXTENSION [redacted] NO.

STAT

DATE 19 December 1978

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Legislative Counsel				OLC #78-3579/1
2.				IMMEDIATE
3.				
4.				Form 3-65 160c Budget (13)
5.				
6.				
7.				
8.				
9.				
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11.				
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MORI/CDF

FORM 3-62 610 USE PREVIOUS EDITIONS ☐ SECRET ☐ CONFIDENTIAL ☐ INTERNAL USE ONLY ☐ UNCLASSIFIED

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OGC 78-8385

19 December 1978

MEMORANDUM FOR: Legislative Counsel

FROM: Anthony A. Lapham
General Counsel

SUBJECT: FY 1980 Intelligence Authorization Bill/ Proposed Legislative Program for the First Session of the 96th Congress

REFERENCE: Your memo to multiple addresses, same subject, dated 14 December 1978

Fred:

1. This comment relates to Title VII of the proposed authorization legislation, which contains provisions that would make it a crime to disclose certain intelligence information, and that would empower the Attorney General to obtain injunctions restraining such disclosures. [redacted] will comment separately on Title VIII, which contains provisions that would amend the Freedom of Information Act.

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2. In my view it would be a serious mistake to go forward with an uncoordinated anti-disclosure proposal. As you know, the Justice Department has been at work in this area since at least last summer, when the Director wrote to the Attorney General offering a proposal that differs from your Title VII proposal (see the Director's letter to Bell dated 17 August). The Attorney General has said that the results of the Department's review would be available by Christmas (see the attached memorandum from the Attorney General to Dr. Brzezinski dated 11 December). I think we should wait for that paper, and for the discussions to which that paper will surely lead, before launching any legislative initiatives. Any such initiative will be difficult to advance in the Congress under the best of circumstances. It is absolutely certain to fall flat unless it has unified Administration support. Not only does your Title VII proposal not have such support, so far as I know it has not even been seen by anybody outside the Agency. When it is seen, a number of difficult questions will be raised.

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So, for example, constitutional questions will be raised regarding the injunctive provisions in the proposal, there being no other statute of which I am aware, except the Patent Secrecy Act, that authorizes prior restraint on publication. To the best of my knowledge we have no research to back up the view that the injunctive provisions of Title VII are constitutional, and reliance on the Patent Secrecy Act will not count for much because that statute, which is very vulnerable in my opinion, has never been challenged on constitutional grounds. Likewise the meaning of the criminal provisions will be the subject of a good many questions for which I suspect we have no good answers. For example, it would become a crime simply to reveal the identity of a certain class of persons or entities. Suppose nothing was disclosed about the nature of the relationship between such persons or entities and CIA? By the terms of the proposal, the conduct would still be criminal, so long as identities are revealed, even though there was no compromise of the relationships that the proposal is evidently intended to protect. How would the proposal apply, if at all, to Philip Agee, who presumably is an intended target of such a law but whose disclosures, at least the recent ones, cannot easily be said to involve information that he obtained "in the course of service" as an Agency employee? Would a crime be committed even though the information involved was not classified? If classification is not an element of a crime, which it does not appear to be, how could the Government say that it had taken steps to protect the information against disclosure, and how could it be demonstrated that any particular defendant was "not authorized to receive" the information? On the other hand, if classification is to be an element, must it not also be shown that the information meets the criteria for classification, and that its disclosure could reasonably be expected to cause damage to the national security? How about conspirators and aiders and abettors? Would journalists be subject to prosecution under these theories?

3. This is just a sampling of the issues that must be confronted in connection with this kind of a proposal. All in all, I think it would be far wiser to wait for a coordinated Administration position rather than go out on a limb with a proposal that does not now have and is not likely to attract much support, and which we ourselves do not really understand.

STAT

Anthony A. Lapham

Attachments

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Central Intelligence Agency

OGC 78-7429

Washington, D.C. 20505

17 August 1978

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D. C. 20530

Dear Griffin:

I am writing to urge your support of a limited legislative initiative having as its objective protection under law of a narrow category of national security information that I believe to be inadequately protected by existing statutes. The category of information to which I refer consists of classified information concerning the identity of CIA officers or agents, and their relationships with CIA. I am sure you will agree that this sort of information ranks close to the top on any sensitivity scale, and that it is at the innermost core of what must be protected against disclosure if an effective clandestine intelligence service is to be maintained.

I am not suggesting of course that there are no existing laws dealing with the unauthorized disclosure of this category of information. I am satisfied, for example, that in classic espionage situations, where the information is communicated in a clandestine fashion to an agent of a foreign power, the conduct is punishable under 18 U.S.C. §794. However, equally damaging effects occur where the information is published in an attributed article or book, or otherwise placed in the public domain by persons not necessarily engaged in clandestine intelligence activities. It is in these latter situations that the law is weak and unclear at best and altogether inapplicable at worst.

The recent actions of Philip Agee make a particular distressing case in point. As you know, Mr. Agee has made a practice over the last few years of exposing Agency personnel and operations whenever and wherever possible. He is now involved in the publication of a second book, Dirty Work: The CIA in Western Europe, which according to its advance promotions will include "detailed biographies of more than 700 undercover CIA and NSA personnel lurking in embassies

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and military installations in virtually every corner of the earth." He has also been instrumental in the formation of a group that intends to publish a new periodical known as the "Covert Action Information Bulletin." It is evident from the first issue of this journal, dated July 1978, that the purpose is not merely criticism of CIA, which is certainly a protected form of speech, but also a systematic disclosure of the names of Agency personnel, which in my view is a form of speech that Congress can properly regulate, at least to the extent of legislating criminal sanctions that would be clearly applicable following an unauthorized act of publication. A copy of this first issue is enclosed for your review.

I deeply appreciate the personal consideration that you gave to the question of obtaining an order restraining the publication of Dirty Work. I also appreciate the fact that you have referred the entire matter to the Criminal Division. Here again, however, the trouble is that the available legal tools are very probably inadequate. I am told that the only two statutes that arguably cover the conduct involved are 18 U.S.C. §793(d) and (e), and that the applicability of these statutes is highly questionable.

There is reason to believe that the Congress would be responsive to a narrow piece of anti-disclosure legislation, if the Administration were to bring forward an appropriate agreed proposal. A readiness to consider such a proposal was evident yesterday at an informal hearing before the House Permanent Select Committee on Intelligence.attended by members of your staff. In addition, a bill introduced in 1977 by Senator Bentsen, S. 1578, a copy of which is enclosed, has attracted a good deal of sympathetic attention in light of Mr. Agee's recent ventures.

One idea, and certainly the simplest one, would be to propose an amendment to an existing statute, namely, 18 U.S.C. §798. As you are aware, that statute was enacted without controversy in 1950. It proscribes the unauthorized disclosure, including publication, of classified information concerning cryptographic systems, cryptographic or communications intelligence equipment, or communications intelligence activities. I am enclosing a marked-up copy of this statute showing one way in which it might be amended in order to extend its coverage to the narrow category of additional information that is my greatest immediate concern. There are of course alternative ideas, such as Senator Bentsen's bill or some modified version of that bill. Obviously there is room for divergent views as to the best approach, but I think it is critically important that we face and resolve any differences and put forward a concrete Administration proposal.

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I would like to suggest that members of our staffs meet promptly to discuss this problem, and that representatives of OMB, the Department of Defense, and perhaps the National Security Council and the Department of State be involved in such discussions,

Yours,

STANSFIELD TURNER

Enclosures

cc: Assistant to the President
for National Security Affairs

Secretary of State

Secretary of Defense

Director, Office of Management
and Budget

OGC:AAL:sin
1 - DCI
1 - DDCI
1 - ER via Ex Secty
1 - OGC Subj: Legislation
1 - AAL signer
1 - Chrono

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OGC 78-7437

7 November 1978

MEMORANDUM FOR: Director of Central Intelligence

VIA: Deputy Director of Central Intelligence

FROM: Anthony A. Lapham
General Counsel

SUBJECT: Leak Legislation

1. Action Requested: That you sign the attached memorandum to Dr. Brzezinski. You may also wish to send a related letter to the Attorney General, and such a letter is attached for your consideration.

2. Background: On 17 August you wrote to the Attorney General, referring to the recent actions of Philip Agee and urging a limited legislative initiative respecting the unauthorized disclosure of classified information. A copy of your 17 August letter is at Tab A. There has been no response to that letter.

3. According to item 20 of your 1 November memorandum summarizing your 31 October conversation with Dr. Brzezinski, copy attached at Tab B:

> I raised the problem of need for an Administration position on criminal sanctions or whatever else to slow down leaks. He suggested I send him a memo pointing out that our progress on this issue is way behind (the Attorney General has been sitting on it) and that we need some action here. He would then, in turn, task the Attorney General.

The attached proposed memorandum to Dr. Brzezinski is intended as the follow-up to the 31 October conversation. Should you think that a reminder to the Attorney General is appropriate at this point, a proposed letter for that purpose is also attached.

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4. Recommendation: That you sign the attached memorandum for Dr. Brzezinski and consider for signature the attached letter to Judge Bell.

Anthony A. Lapham

Anthony A. Lapham

Attachments

OGC:AAL:sin
Original - Addressee
1 - DDCI
1 - ER via Ex Secty
1 - OGC Legislation (NI)
1 - AAL signer
1 - Chrono

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The Director
Central Intelligence Agency

Washington, D.C. 20505

Executive Registry
78-2336/6

OGC 78-7773

13 November 1978

MEMORANDUM FOR: Honorable Zbigniew Brzezinski
Assistant to the President
for National Security Affairs

SUBJECT : Leaks of Classified Information

1. At our meeting on 31 October, I referred to the lack of progress in arriving at an Administration position regarding the need for new legislation dealing with leaks of classified national security information. I referred also to the delay we had encountered in getting any movement from the Justice Department on this score, and in that connection I am attaching a copy of my 17 August letter to the Attorney General, to which there has been no response.

2. As I understand it, the Justice Department is considering not just the narrow approach outlined in my 17 August letter but some broader approaches as well.

3. I think we need to get off dead center on this problem.

/s/ Stansfield Turner
STANSFIELD TURNER

Attachment

OGC:AAL
1 - DCI
1 - DDCI
1 - ER via Ex Secty
1 - OGC Subj: Legislation (NI) w/OGC 78-7437
1 - AAL signer
1 - Chrono

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The Director
Central Intelligence Agency

Washington, D.C. 20505

OGC 78-7772

13 NOV 1978

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D. C. 20530

Dear Griffin:

On 17 August I wrote to solicit your support for a limited legislative initiative respecting the unauthorized disclosure of national security information. I continue to believe that new legislation in this field is badly needed, and I therefore want to renew my request for your consideration of my August proposal or other variations of that proposal.

Yours,

/s/ Stansfield Turner

STANSFIELD TURNER

OGC:AAL:sin
1 - DCI
1 - DDCI
1 - ER via Ex Secty
1 - OGC Subj: Legislation (NI) w/OGC 78-7437
1 - AAL signer
1 - Chrono

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Office of the Attorney General
Washington, D.C. 20530

Executive Registry
78-2336/8

DEC 1 1 1978

MEMORANDUM FOR THE HONORABLE ZBIGNIEW BRZEZINSKI
Assistant to the President for National Security Affairs

Re: Legislation Concerning "Leaks" of Classified Information

This Department has been working for some months on a legislative project on the subject of "leaks." In light of your memorandum of November 13, 1978, I want to bring you up-to-date on what we have been doing.

Our aim is to determine whether the Administration could make any legislative proposal of a comprehensive nature that (1) would stand a realistic chance of passage and (2) would actually help solve the problem of "leaks." As you know, this is an old problem. A number of comprehensive proposals have been advanced in the past, without conspicuous success.

The CIA's recent proposal, to which Stan Turner referred in his memorandum to you, came to us in the midst of this project. It is a limited and appealing proposal, dealing with the identities of CIA agents and sources; but because it deals with only part of the problem, we have undertaken to evaluate it in light of the more comprehensive proposals that the Administration might wish to consider. I should add that since receiving the CIA proposal we have kept the General Counsel for CIA advised of our work plan and have consulted with members of his staff on a regular basis.

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We expect to complete our project before Christmas.

Griffin B. Bell
Attorney General

cc: Honorable Stansfield Turner
Director
Central Intelligence Agency

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