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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

December 15, 1983

LEGISLATIVE REFERRAL MEMORANDUM

**TO:** Legislative Liaison Officer  
  
Department of Defense  
Department of Health and Human Services  
Department of State  
Central Intelligence Agency

**SUBJECT:** Department of Justice substitute draft language for OPM draft bill respecting prohibition of payment of annuities to Federal employees convicted of certain felonies (see Legislative Referral Memorandum of 6/13/83).

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than January 13, 1984.

Questions should be referred to Frank White (395-6156 ) or to Hilda Schreiber ( 395-4650 ), the legislative analyst in this office.

*Naomi R Sweeney*  
Naomi R. Sweeney for  
Assistant Director for  
Legislative Reference

Enclosures

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Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 12 1983

Mr. Joseph A. Morris  
General Counsel  
Office of Personnel Management  
Washington, D.C. 20415

Dear Mr. Morris:

Reference is made to your letter of October 20, 1983, regarding our comments on the OPM draft bill to amend 5 U.S.C. §8312 to prohibit the payment of annuities to federal employees convicted of certain felonies. Specifically, you requested our assistance in developing a list of offenses the conviction of which would appropriately be the basis for denial of annuities.

We recommend that the amendment of 5 U.S.C. §8312 contain a general description of the types of violations which are appropriate for pension denial and authority for the Attorney General to promulgate regulations listing specific provisions of law for the categories described by the statute. We believe that this approach would be preferable to proposing a list of specific offenses for inclusion in 5 U.S.C. §8312 because of the difficulties of subjecting to the legislative process a detailed list of criminal provisions. Moreover, a regulatory approach would allow for greater flexibility in response to changing needs in the future. Assigning responsibility for promulgating regulations in this area to the Attorney General is most appropriate because the proposal is essentially a law enforcement matter.

We have enclosed a draft amendment of 5 U.S.C. §8312 which outlines in general terms the types of offenses to be included in regulations. The draft provides that the offense, which may subject the violator to pension denial, must be related to the violator's federal employment. Without such a limitation federal employees would be bound by an unfairly harsh standard of care as compared to private employees, who are not by law generally subject to pension denial for felony convictions. For this reason we do not believe that violations of State law are appropriate for inclusion in 5 U.S.C. §8312.

The enclosed draft amendment of 5 U.S.C. §8312 establishes a parallel denial of military retired pay by the Department of Defense. In addition, the draft provides for the prospective application of the new areas of pension denial so that federal

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employees will be on notice prior to the commission of an included offense that they may be subject to the loss of pension rights which have otherwise accrued to them.

Although we believe that the enclosed draft amendment of 5 U.S.C. §8312 would be preferable to the version prepared in your office, we are, nevertheless, concerned about the effect on the plea bargaining process of any expansion of this provision. We, therefore, strongly recommend that you include a statement in any transmittal of this proposed legislation to the Congress that when a guilty plea rests in significant degree on a promise or agreement of the prosecutor, the promise must be fulfilled. The transmittals should further state that in reaching a plea agreement a federal prosecutor may agree to waive the government's right to deny the defendant his pension under 5 U.S.C. §8312. See Santobello v. New York, 404 U.S. 257 (1971). We believe it essential to urge the inclusion of these statements in committee reports that accompany this legislation, since, without such statements in the legislative history, plea bargaining in cases involving violations subject to the expanded 5 U.S.C. §8312 may be severely hampered.

We are also concerned that an expanded pension-denial authority could unfairly affect innocent survivors and beneficiaries in certain cases. Under our draft OPM and the Department of Defense would have discretion to impose pension denial following conviction of an offense listed in the regulations. Thus, even if the criteria for pension denial are met, discretion may be exercised not to impose this penalty. We believe that one of the factors OPM and Defense should weigh in exercising their discretion to impose pension denial is the impact such denial would have on innocent third parties. We urge you to include a statement to this effect in your transmittals to Congress and to recommend eventual inclusion of the statement in the relevant legislative history.

If you wish to discuss this matter further, please contact Vicki Portney, Office of Legislation, Criminal Division, at 633-4182.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell  
Assistant Attorney General  
Office of Legislative Affairs

Enclosure

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 8312 of title 5, United States Code, is amended by adding at the end thereof the following:

"(d) The Office of Personnel Management, after notice and opportunity for hearing, may deny payment of an annuity to an individual or his survivor or beneficiary on the basis of the service of the individual which is creditable toward the annuity if the Office of Personnel Management finds that --

"(1) the individual is convicted of any felony described in subsection (f); and

"(2) the circumstances regarding the commission of the offense and the seriousness of the crime are such that the interests of justice require denial of the annuity.

"(e) The Department of Defense, after notice and opportunity for hearing, may deny payment of retired pay to an individual or his survivor or beneficiary on the basis of the service of the individual which is creditable toward the retired pay if the Department of Defense finds that --

"(1)(A) the individual is convicted of any felony described in subsection (f) in connection with his or her service as a civilian employee; or

"(B) the individual is convicted of an offense within the purview of a current article of the Uniform Code of Military Justice (or an earlier article on

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which the current article is based) on the basis of charges and specifications describing a violation described in subsection (f); and

"(2) the circumstances regarding the commission of the offense and the seriousness of the crime are such that the interests of justice require denial of the retired pay.

"(f) Subsections (d) and (e) apply to any violation of federal criminal law listed in regulations which may be promulgated under this subsection by the Attorney General and committed after the promulgation of such regulations (or after the addition of a particular offense through an amendment of the regulations so promulgated). The list of violations in the regulations shall be limited to any offense (other than an offense described in subsections (b) or (c)) which involves:

"(1) intentional misuse of public office punishable by imprisonment for a term of 3 or more years;

"(2) intentional violence or injury to another person punishable by imprisonment for a term of 5 or more years if committed in connection with the individual's employment;

"(3) intentional damage to or destruction of federal property punishable by imprisonment for a term of 5 or more years if committed in connection with the individual's employment;

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"(4) the manufacture, distribution, or dispensing, or the possession with intent to manufacture, distribute, or dispense, a controlled substance, punishable by imprisonment for a term of 3 or more years if committed in connection with the individual's employment; or

"(5) an attempt or conspiracy to commit any of the above.

For purposes of this subsection, an individual's conduct is intentional if it is the individual's conscious objective or desire to engage in the conduct."