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Secrecy legislation

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The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Jim:

In your letter of 30 January 1975 to me, you requested that we provide a written report on the status of discussions between the Agency and the Department of Justice on proposed amendments to the National Security Act providing criminal sanctions for unauthorized disclosure of intelligence sources and methods. I submitted to OMB a legislative package on this subject by letter dated 14 January 1974.

Since that time my staff and the staff of the Department of Justice have attempted to resolve the various issues that arose concerning the wording of that legislation. There have also been considerable discussions concerning the appropriateness of submitting such legislation to the Congress. For your information I am enclosing copies of two of my letters to the Attorney General, dated 24 April 1974 and 17 September 1974, which reflect most of the issues. Since the 17 September 1974 letter, the Department of Justice has withdrawn its objections to the proposal for statutory injunction authority and we have also modified, in a manner we believe appropriate and responsive to its objections, the in camera court review aspects of the legislation. The Department has also withdrawn, as inappropriate, its objection to submission of this legislation insofar as the objection is based on its opinion that in the present atmosphere the legislation will arouse stiff opposition. I am not now aware that the Department of Justice has significant objections to the recommendation that other departments and agencies engaging in intelligence activities may designate protected information. I am enclosing also the current version of the legislation which has been provided to the Department of Justice for comment. It reflects many excellent suggestions from the Department and from elsewhere.

We have continued to negotiate with the Department of Justice, but their letter of 25 March 1975 (enclosed) in response to our most recent suggestions

AMERICAN REVOLUTION BICENTENNIAL 1776-1976 makes it apparent that they are unlikely to further modify their position. I take particular exception to their belief that intelligence information will be adequately protected by S.1, the proposed omnibus revision of the Criminal Code of the United States, and their objection to the creation of special exceptions for any agency or type of information. I do not feel that any provisions of S.1 will accomplish what I am seeking to accomplish by my proposed legislation. Sections 1121, 1122 and 1123 of S.1 will retain the same impediments to prosecution in cases involving intelligence sources and methods as now exist in 18 U.S.C. 793 and 794.

The Department has emphasized section 1124 as providing an acceptable alternative to the Agency's proposed legislation. However, this section provides for affirmative defenses based upon a de novo review of the classification of intelligence information by the Interagency Classification Review Committee (ICRC). This could result in a declassification decision by a body not skilled in intelligence sources and methods and thus might require a decision to abstain from prosecution because of the risk of further disclosures of sensitive information. Furthermore, one can speculate that the task of congressional approval of the entire Criminal Code of the United States is a mammoth job and may well take several years.

At this time I do not believe it necessary to elaborate on my concerns about the lack of effective criminal sanctions for unauthorized disclosure of intelligence sources and methods. The justification for such legislation is amply set forth in my previous presentation to OMB and additional justifications are included in the enclosed letters to the Attorney General. I believe that the current investigations by the President's Commission on CIA Activities Within the United States and the two congressional Select Committees offer an opportunity for careful consideration of what I perceive to be a definite need to fill a gap in the statutory framework. My review of the criminal statutes convinces me that there is simply no adequate criminal sanction for an unauthorized disclosure of intelligence sources and methods, and that S.1 will not change this.

The only tool that I have is the contract theory under which the injunction was issued in the Marchetti case (466 F.2d 1309 (4th Cir.) cert. denied, 409 U.S. 1063 (1972)), reaffirmed by the Fourth Circuit Court of Appeals in Knopf v. Colby, decided 7 February 1975. I should note here that in their petition to the United States Supreme Court to review this decision appellants argue that the Court of Appeals erred in holding that injunctive relief could be granted in the absence of such statutory authorization.

The Department of Justice's comments have just been received. I am certain that careful consideration will be given this legislation, both by our oversight committees as well as by the two Select Committees. If there are minor differences, either in concept or wording, these could be worked out in the legislative process. A revised package for submission to the Congress will be submitted to you in a few days. In the meantime, we would appreciate your consideration of our proposed legislation for approval for submission to the Congress.

Sincerely,

/s/ Bill

W. E. Colby
Director

Enclosures:
Tab A - DCI Letter to Attorney General, 24 April 1974
Tab B - DCI Letter to Attorney General, 17 September 1974
Tab C - Proposed Legislation
Tab D - Department of Justice Response to Proposed Legislation