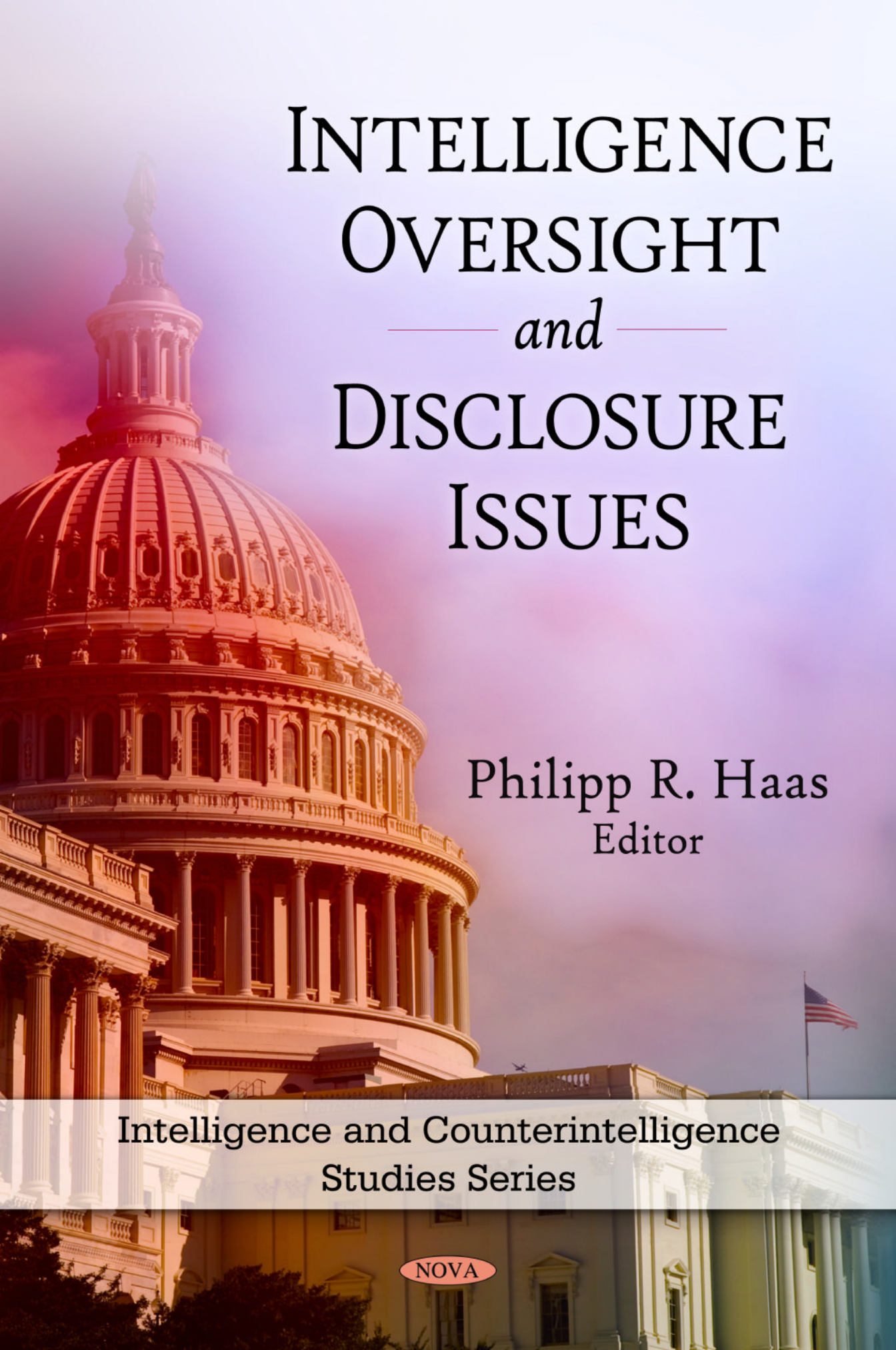
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Philipp R. Haas
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PREFACE

Interest in congressional oversight of intelligence has risen again in the 110th Congress, in part because of the House Democratic majority's pledge to enact the remaining recommendations from the U.S. National Commission on Terrorist Attacks upon the United States, commonly known as the 9/11 Commission. Its 2004 conclusions set the stage for reconsideration of the problems affecting Congress' structure in this area. The commission's unanimous report, as detailed in this book, covers many issues, and concludes that congressional oversight of intelligence was "dysfunctional". This book proposes two distinct solutions:(1) creation of a joint committee on intelligence (JCI), modeled after the defunct Joint Committee on Atomic Energy (JCAE), or (2) enhanced status and power for the existing select committees on intelligence, by making them standing committees and granting both authorization and appropriations power.

This book consists of public domain documents which have been located, gathered, combined, reformatted, and enhanced with a subject index, selectively edited and bound to provide easy access.

Chapter 1 - Interest in congressional oversight of intelligence has risen again in the 110th Congress, in part because of the House Democratic majority's pledge to enact the remaining recommendations from the U.S. National Commission on Terrorist Attacks Upon the United States, commonly known as the 9/11 Commission. Its 2004 conclusions set the stage for reconsideration of the problems affecting Congress's structure in this area. The commission's unanimous report, covering many issues, concluded that congressional oversight of intelligence was "dysfunctional" and proposed two distinct solutions. These were: (1) creation of a joint committee on intelligence (JCI), modeled after the defunct Joint Committee on Atomic Energy (JCAE), with authority to report legislation to each chamber; or (2) enhanced status and power for the existing select committees on intelligence, by making them standing committees and granting both authorization and appropriations power.

Congress's interest in a joint committee on intelligence dates to 1948 and the early years of the Central Intelligence Agency (CIA) and Director of Central Intelligence (DCI). Similar recommendations have arisen in the meantime, although the lion's share were made before separate Intelligence Committees were established in the House (1977) and Senate (1976). The numerous proposals for a JCI, which would end the two existing intelligence panels, moreover, vary in their specifics and raise competing viewpoints over practical matters and matters of principle.

Although it did not adopt either of the 9/11 Commission proposals, Congress has pursued other initiatives to change its intelligence oversight structure and capabilities in the 110th

Congress. The House altered its arrangements (H.Res. 35), when it created an advisory Select Intelligence Oversight Panel on the Appropriations Committee, a hybrid structure that combines members of the House Permanent Select Committee on Intelligence and the Committee on Appropriations. The Senate has also changed its relationship between appropriations and intelligence and its Intelligence Committee has advanced others in this regard. Other proposals, some with a long heritage, include clarifying the independent audit authority of the Government Accountability Office (GAO) over the intelligence community, particularly the CIA; placing the CIA expressly under the Government Performance and Results Act; increasing the coordinative capabilities and reporting of relevant inspectors general (IGs); and adding a new IG covering the entire intelligence community and separate ones for certain Defense Department entities.

This report first describes the current select committees on intelligence and then the former Joint Committee on Atomic Energy, often cited as a model for a counterpart on intelligence. The study also sets forth proposed characteristics for a joint committee on intelligence, differences among these, and their pros and cons. The report, to be updated as events dictate, examines other actions and alternatives affecting congressional oversight in the field.

Chapter 2 - To address the challenges facing the U.S. Intelligence Community in the 21st century, congressional and executive branch initiatives have sought to improve coordination among the different agencies and to encourage better analysis. In December 2004, the Intelligence Reform and Terrorism Prevention Act (P.L. 108- 458) was signed, providing for a Director of National Intelligence (DNI) with substantial authorities to manage the national intelligence effort. The legislation also established a separate Director of the Central Intelligence Agency.

Making cooperation effective presents substantial leadership and managerial challenges. The needs of intelligence "consumers" — ranging from the White House to cabinet agencies to military commanders — must all be met, using the same systems and personnel. Intelligence collection systems are expensive and some critics suggest there have been elements of waste and unneeded duplication of effort while some intelligence "targets" have been neglected.

The DNI has substantial statutory authorities to address these issues, but the organizational relationships will remain complex, especially for Defense Department agencies. Members of Congress will be seeking to observe the extent to which effective coordination is accomplished. FY2008 intelligence authorization legislation (H.R. 2082/S. 2996) addresses some of these concerns.

International terrorism, a major threat facing the United States in the 21st century, presents a difficult analytical challenge. Techniques for acquiring and analyzing information on small groups of plotters differ significantly from those used to evaluate the military capabilities of other countries. U.S. intelligence efforts are complicated by unfilled requirements for foreign language expertise. Whether all terrorist surveillance efforts have been consistent with the Foreign Intelligence Surveillance Act of 1978 (FISA) has been a matter of controversy. Changes to FISA were enacted in legislation (H.R. 6304) signed by the President on July 10, 2008.

Intelligence on Iraqi weapons of mass destruction was inaccurate and Members have criticized the performance of the Intelligence Community in regard to current conditions in Iraq and other situations. Improved analysis, while difficult to mandate, remains a key goal. Better human intelligence, it is argued, is also essential.

Intelligence support to military operations continues to be a major responsibility of intelligence agencies. The use of precision guided munitions depends on accurate, real-time targeting data; integrating intelligence data into military operations will require changes in organizational relationships as well as acquiring necessary technologies.

Counterterrorism requires the close coordination of intelligence and law enforcement agencies, but there remain many institutional and procedural issues that complicate cooperation between the two sets of agencies. This report will be updated as new information becomes available.

Chapter 3 - Although the United States Intelligence Community encompasses large Federal agencies — the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office, the National Geospatial-Intelligence Agency (NGA), and the National Security Agency (NSA) — among others — neither Congress nor the executive branch has regularly made public the total extent of intelligence spending. Rather, intelligence programs and personnel are largely contained, but not identified, within the capacious budget of the Department of Defense (DOD). This practice has long been criticized by proponents of open government and many argue that the end of the Cold War has long since removed any justification for secret budgets. In 2004, the 9/11 Commission recommended that "the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret."

The Constitution mandates regular statements and accounts of expenditures, but the courts have regarded the Congress as having the power to define the meaning of the clause. From the creation of the modern U.S. Intelligence Community in the late 1940s, Congress and the executive branch shared a determination to keep intelligence spending secret. Proponents of this practice have argued that disclosures of major changes in intelligence spending from one year to the next would provide hostile parties with information on new program or cutbacks that could be exploited to U.S. disadvantage. Secondly, they believe that it would be practically impossible to limit disclosure to total figures and that explanations of what is included or excluded would lead to damaging revelations.

On the other hand, some Members dispute these arguments, stressing the positive effects of open government and the distortions of budget information that occur when the budgets of large agencies are classified. Legislation has been twice enacted expressing the "sense of the Congress" that total intelligence spending figures should be made public, but on several separate occasions both the House and the Senate have voted against making such information public. The Clinton Administration released total appropriations figures for intelligence and intelligence-related activities for fiscal years 1997 and 1998, but subsequently such numbers have not been made public. Legal efforts to force release of intelligence spending figures have been unsuccessful.

Central to consideration of the issue is the composition of the "intelligence budget." Intelligence authorization bills have included not just the "National Intelligence Program" — the budgets for CIA, DIA, NSA *et al*., but also a wide variety of other intelligence and intelligence-related efforts conducted by the Defense Department. Shifts of tactical programs into or out of the total intelligence budgets have hitherto been important only to budget analysts; disclosing total intelligence budgets could make such transfers matters of concern to a far larger audience. Legislation reported by the Senate Intelligence Committee in January 2007 (S. 372) would require that funding for the National Intelligence Program be made public but it does not address other intelligence activities. Earlier versions of this Report were

entitled *Intelligence Spending: Should Total Amounts Be Made Public*? This report will be updated as circumstances change.

Chapter 4 - In passing the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) in 2004, Congress approved the most comprehensive reform of the U.S. Intelligence Community since it was created over 50 years ago. Principal among enacted changes was the establishment of a new position of the Director of National Intelligence (DNI) to manage the Intelligence Community (IC).

Some observers have questioned whether the act provides the DNI the authority necessary to effectively implement Congress's 2004 intelligence reforms. Others assert that the DNI's authorities are significantly stronger than those of the former Director of Central Intelligence (DCI), but suggest that the DNI has failed to aggressively assert the authorities he has been provided.

In 2007, DNI Michael McConnell acknowledged his authorities are stronger than those of the DCI and conceded that he had not issued certain guidance to the IC clarifying the new authorities. Nevertheless, he argued effectively managing the IC would require additional authorities on top of the ones Congress agreed to in 2004.

In response to these entreaties, the Senate Intelligence Committee further strengthened the DNI authorities in the FY2008 Intelligence Authorization bill (S. 1538; S.Rept. 110-75), authorizing the DNI to conduct accountability reviews of significant IC failures, address interagency information sharing deficiencies, and approve interagency funding of national intelligence centers.

Similarly, but on a more limited basis, the House Intelligence Committee also strengthened certain DNI authorities in its version of the FY2008 authorization bill. The Committee, however, said it was disappointed that the DNI had not assumed a more directive role in coordinating the IC.

Despite these differences in emphasis, Senate and House intelligence committee conferees agreed to accord the DNI several new authorities (H.Rept. 110-478). President Bush, however, vetoed the congressional conference report, citing, among other concerns, the limitations the legislation imposed on terrorist interrogations conducted by the Central Intelligence Agency. Although an attempt in the House to override the President's veto failed, the congressional intelligence committees are likely to revisit the issue of strengthening DNI authorities during consideration of the FY2009 intelligence budget.

In examining the DNI's current authorities, it is clear that they are significantly stronger than those that were available to the DCI, but whether they are sufficient to implement intelligence reforms mandated by Congress will continue to depend on several factors. They include the extent to which the authorities themselves are adequate, the DNI's willingness to assert those authorities, and the extent to which the DNI receives presidential and congressional support. This report will be updated as new information becomes available.

Chapter 5 - Published reports have suggested that in the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counter-terrorism intelligence activities as part of what the Bush Administration terms the global war on terror. Some observers have asserted that the Department of Defense (DOD) may be conducting certain kinds of counterterrorism intelligence activities that would statutorily qualify as "covert actions," and thus require a presidential finding and the notification of the congressional intelligence committees.

Defense officials assert that none of DOD's current counter-terrorist intelligence activities constitute covert action as defined under the law, and therefore, do not require a

presidential finding and the notification of the intelligence committees. Rather, they contend that DOD conducts only "clandestine activities." Although the term is not defined by statute, these officials characterize such activities as constituting actions that are conducted in secret, but which constitute "passive" intelligence information gathering. By comparison, covert action, they contend, is "active," in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target.

Some of DOD's activities have been variously described publicly as efforts to collect intelligence on terrorists that will aid in planning counter-terrorism missions; to prepare for potential missions to disrupt, capture or kill them; and to help local militaries conduct counter-terrorism missions of their own.

Senior U.S. intelligence community officials have conceded that the line separating Central Intelligence Agency (CIA) and DOD intelligence activities has blurred, making it more difficult to distinguish between the traditional secret intelligence missions carried out by each. They also have acknowledged that the U.S. Intelligence Community confronts a major challenge in clarifying the roles and responsibilities of various intelligence agencies with regard to clandestine activities. Some Pentagon officials have appeared to indicate that DOD's activities should be limited to clandestine or passive activities, pointing out that if such operations are discovered or are inadvertently revealed, the U.S. government would be able to preserve the option of acknowledging such activity, thus assuring the military personnel who are involved some safeguards that are afforded under the Geneva Conventions. Covert actions, by contrast, constitute activities in which the role of the U.S. government is not intended to be apparent or to be acknowledged publicly. Those who participate in such activities could jeopardize any rights they may have under the Geneva Conventions, according to these officials.

This report examines the statutory procedures governing covert action and associated questions to consider. This report will be updated as warranted.

Chapter 6 - The protection of classified national security and other controlled information is of concern not only to the executive branch — which determines what information is to be safeguarded, for the most part[1] — but also to Congress, which uses the information to fulfill its constitutional responsibilities. It has established mechanisms to safeguard controlled information in its custody, although these arrangements have varied over time between the two chambers and among panels in each. Both chambers, for instance, have created offices of security to consolidate relevant responsibilities, although these were established two decades apart. Other differences exist at the committee level. Proposals for change, some of which are controversial, usually seek to set uniform standards or heighten requirements for access. This report will be updated as conditions require.

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Chapter 1

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES

Frederick M. Kaiser

SUMMARY

Interest in congressional oversight of intelligence has risen again in the 110th Congress, in part because of the House Democratic majority's pledge to enact the remaining recommendations from the U.S. National Commission on Terrorist Attacks Upon the United States, commonly known as the 9/11 Commission. Its 2004 conclusions set the stage for reconsideration of the problems affecting Congress's structure in this area. The commission's unanimous report, covering many issues, concluded that congressional oversight of intelligence was "dysfunctional" and proposed two distinct solutions. These were: (1) creation of a joint committee on intelligence (JCI), modeled after the defunct Joint Committee on Atomic Energy (JCAE), with authority to report legislation to each chamber; or (2) enhanced status and power for the existing select committees on intelligence, by making them standing committees and granting both authorization and appropriations power.

Congress's interest in a joint committee on intelligence dates to 1948 and the early years of the Central Intelligence Agency (CIA) and Director of Central Intelligence (DCI). Similar recommendations have arisen in the meantime, although the lion's share were made before separate Intelligence Committees were established in the House (1977) and Senate (1976). The numerous proposals for a JCI, which would end the two existing intelligence panels, moreover, vary in their specifics and raise competing viewpoints over practical matters and matters of principle.

Although it did not adopt either of the 9/11 Commission proposals, Congress has pursued other initiatives to change its intelligence oversight structure and capabilities in the 110th Congress. The House altered its arrangements (H.Res. 35), when it created an advisory Select Intelligence Oversight Panel on the Appropriations Committee, a hybrid structure that combines members of the House Permanent Select Committee on Intelligence and the Committee on Appropriations. The Senate has also changed its relationship between appropriations and intelligence and its Intelligence Committee has advanced others in this

regard. Other proposals, some with a long heritage, include clarifying the independent audit authority of the Government Accountability Office (GAO) over the intelligence community, particularly the CIA; placing the CIA expressly under the Government Performance and Results Act; increasing the coordinative capabilities and reporting of relevant inspectors general (IGs); and adding a new IG covering the entire intelligence community and separate ones for certain Defense Department entities.

This report first describes the current select committees on intelligence and then the former Joint Committee on Atomic Energy, often cited as a model for a counterpart on intelligence. The study also sets forth proposed characteristics for a joint committee on intelligence, differences among these, and their pros and cons. The report, to be updated as events dictate, examines other actions and alternatives affecting congressional oversight in the field.

INTRODUCTION

Congress has long considered various ways to oversee intelligence, an often perplexing and always difficult responsibility because of the secrecy and sensitivity surrounding intelligence findings, conclusions, dissemination, and sources and methods.[1] The first oversight proposal — to create a joint committee on intelligence (JCI) — appeared in 1948.[2] This was just one year after the establishment of the Cental Intelligence Agency (CIA) and the Office of Director of Central Intelligence (DCI), both integral parts of the most far-reaching executive reorganization in United States history.[3] Numerous initiatives to change Congress's oversight structure have materialized in the meantime, including, most importantly, the creation of parallel Select Committees on Intelligence in both chambers. Nonetheless, Congress's oversight capability in this area has been questioned. The 9/11 Commission's report, released in 2004, notably, concluded that congressional oversight of intelligence was "dysfunctional" and recommended either a merger of appropriations and authorization powers into each select committee or the creation of a Joint Committee on Intelligence.[4] Since then, the House's and Senate's actions modifying each body's own structure have followed different paths, diverging not only from the 9/11 Commission proposals but also from each other.[5]

This report reviews the basic characteristics of proposed joint committees on intelligence, differences among them, and perceived advantages and disadvantages.[6] It also covers the congressional panels a JCI would replace: namely, the House and Senate Select Committees on Intelligence. Along with this is a brief review of the defunct Joint Committee on Atomic Energy (JCAE) — often cited as an organizational model for a joint intelligence panel, as it has been for the 9/11 Commission.

In addition, the report looks at recent actions, such as the creation of a new (and possibly unique in the history of Congress) intelligence oversight panel on the House Appropriations Committee, consisting of Members from both the parent committee and the Select Committee on Intelligence; the new panel would make recommendations regarding the annual intelligence community appropriations to the Defense Appropriations Subcommittee. This report also covers separate developments in the Senate, including a Memorandum of Agreement (MOA) in 2007, designed to improve coordination and transparency between the Intelligence Committee, which handles authorizations for the intelligence community, and the

Appropriations Committee, which handles appropriations for the same. Other ways seen as strengthening oversight in this field would be to: (1) clarify and expand the authority of Government Accountability Office (GAO) over the intelligence community, particularly the CIA; (2) remove the Agency's exemption from coverage of the Government Performance and Results Act; and (3) increase coordination and strengthen reporting requirements among the relevant offices of inspector general.

HOUSE AND SENATE SELECT COMMITTEES ON INTELLIGENCE

A joint committee on intelligence would replace the current House Permanent Select Committee on Intelligence, established in 1977, and the Senate Select Committee on Intelligence, created a year earlier.[7] These units emerged after extensive, detailed congressional and executive investigations revealed widespread abuses in the intelligence community and concluded that effective congressional oversight was lacking. The panels were set up to consolidate legislative and oversight authority over the entire intelligence community, supplanting the fragmented system at the time, which relied exclusively on disparate standing committees. Although titled "Select," the intelligence panels are hybrids of standing and select committees, adopting characteristics of both types. For instance, the panels have only temporary membership, as select committees have, because they are usually short-term constructions; yet each panel holds authority to report legislation to its own chamber, a power usually reserved to standing committees.

Jurisdiction and Authority

The Intelligence Committees have broad jurisdiction over the intelligence community and report authorizations and other legislation for consideration by their respective chambers. A recent change in the House places three members of the Intelligence Committee on a new Select Intelligence Oversight Panel on the Appropriations Committee (H.Res. 35, 110th Congress). The new panel, which appears unprecedented in the history of Congress, is to study and make recommendations to relevant appropriations subcommittees. This includes the Defense Appropriations Subcommittee, which continues to prepare the annual intelligence community budget, as part of the classified annex to the bill making appropriations for the Department of Defense.

Most of the jurisdiction of the current Intelligence Committees is shared. The select committees hold exclusive authorizing and legislative powers only for the Central Intelligence Agency, the Director of National Intelligence (as it had over the now-defunct Director of Central Intelligence), and the National Foreign Intelligence Program. This leaves the intelligence components in the Departments of Defense, Homeland Security, Justice, and Treasury, among other agencies, to be shared with appropriate standing committees.

The House and Senate intelligence panels have nearly identical jurisdictions for the intelligence community. The House panel's domain, however, also extends over an area that the Senate's does not: "tactical intelligence and intelligence-related activities," which covers tactical military intelligence. In another departure, the House select committee has been given

authority to "review and study on an exclusive basis the sources and methods of entities" in the intelligence community.[8]

Membership and Leadership

The membership of the committees has been limited in time, staggered, and connected to the standing committee system and political party system in Congress. These features, moreover, differ between the two panels. Each select committee, for instance, reserves seats for members from the chamber's committees on Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary. The specifics differ, however: the Senate requires two persons, a majority and minority Member, from each of these standing committees, while the House calls for only one Member from each standing committee with overlapping jurisdiction.

The two panels also differ in size (21 on the House panel and 15 on the Senate counterpart, plus ex officio members on each), tenure, and other membership features, including partisan composition and leadership arrangements. Since its inception, the Senate panel has had only one more Member from the majority party than the minority (an eight-to-seven ratio); and its vice chairman, who takes over if the chair is unavailable, must come from the minority party. The House select committee, in contrast, reflected the full chamber party ratio when it was established in 1977: two-to-one plus one, resulting in an initial nine-to-four majority-minority party membership on the panel. In the meantime, however, the minority party has been granted additional seats on the committee and the majority-minority party ratio in the full House has grown closer. The result is a select committee membership party ratio of 12-to-9 in the 110th Congress.

Secrecy Controls

The committees also have different secrecy arrangements regarding controls over their classified holdings. Secrecy oaths distinguish the two chambers. All Members of the House, including, of course, those on the Intelligence Committee, must swear or affirm not to disclose classified information, except as authorized by the rules of the chamber; the current oath is modeled after a previous one which had been required only for the members of the House Permanent Select Committee on Intelligence. The Senate does not impose a similar obligation on its Members.[9]

Non-member access to classified materials also separates the two panels. The House committee has a more detailed and exacting set of requirements for nonmembers than its Senate counterpart.

In addition, the Senate panel is authorized to disclose classified information publicly on its own (following elaborate procedures in which the President and the full Senate have an opportunity to act). By comparison, the House select committee cannot do so, if the President objects to its release; in that case, the House itself makes the determination by majority vote.

JOINT COMMITTEE ON ATOMIC ENERGY AS A MODEL

The Joint Committee on Atomic Energy (JCAE) — set up by the Atomic Energy Act of 1946, along with the Atomic Energy Commission (P.L. 585, 60 Stat. 772-773) — is often cited as an appropriate organizational model for a joint committee on intelligence, a reference the 9/11 Commission also adopted.[10] The JCAE, an 18-member panel composed of an equal number of Members from each house of Congress, held authority to report legislation to the floor of both chambers, a power unique among joint committees.[11] Many reasons have been offered for considering the JCAE as a model:

- favorable record for keeping highly confidential material secret;
- largely bipartisan approach to policy-making;
- considerable unity among its members;
- close working relationship with the executive (here, the Atomic Energy Commission) in this secretive and sensitive area;
- consolidated jurisdiction for a growing field;
- explicit, comprehensive oversight mandate, supported by a then-unprecedented directive that the executive keep the joint committee "fully and currently informed"; and
- ability to streamline the legislative process in general and to act rapidly, if necessary, in particular instances.

Given these attributes, the joint committee became a formidable congressional panel. In its prime, JCAE was even considered by some as "probably the most powerful congressional committee in the history of the nation."[12] Despite this — or perhaps because of it — the JCAE was abolished in 1977, nearly 30 years after its birth. It was evidently the victim of a number of reinforcing developments: concerns inside and outside Congress about JCAE's close, some thought cozy, relationship with the executive agency it was overseeing; changing executive branch conditions, such as the breakup of the Atomic Energy Commission into the Nuclear Regulatory Commission and the Energy Research and Development Administration, now the Department of Energy; new rivals in Congress, as the expanding nature of atomic energy and nuclear power extended into the jurisdictions of a number of House and Senate committees; efforts in the Senate at the time to realign and consolidate standing committee jurisdictions and reduce the number of assignments for each Member; and a relatively high number of vacancies on the JCAE (six of the 18 seats).[13]

PROPOSED JOINT COMMITTEE ON INTELLIGENCE CHARACTERISTICS

Recommendations to create a joint committee on intelligence have surfaced over nearly five decades, most predating the establishment of the two select committees on intelligence in the mid-1970s. Although many of these suggestions, including that from the 9/11 Commission, have followed the design of the Joint Committee on Atomic Energy, not all have; consequently, the specifics in the blueprints have varied in a number of fundamental ways. Differences extend to (1) the range and exclusivity of the panels' jurisdiction; (2) makeup of their membership; (3) selection and rotation of chairmen; (4) possibility of and

characteristics of a vice chairmanship; (5) requirements for representation of certain other committees as well as at-large members; (6) special secrecy requirements for members and staff, including a secrecy oath and security clearances; (7) staff size, method of selection, and restrictions on activities; (8) official disclosures of classified information; (9) mechanisms for investigating suspected unauthorized disclosures of such information; and (10) access by non-members to the joint committee's classified holdings. Even suggested methods of establishment have varied.

Methods of Establishment

A joint committee on intelligence could be created by a concurrent resolution, a joint resolution, or a regular bill. The Joint Committee on Atomic Energy, for instance, was established by public law through the regular bill process (i.e., the Atomic Energy Act of 1946, P.L. 580, 60 Stat. 772-773).

A concurrent resolution has the advantage (for its proponents) of requiring only the approval of Congress, while a joint resolution or regular bill must be signed by the President or his veto overridden. A joint resolution or a bill, however, may offer certain benefits to its supporters over a concurrent resolution. A number of existing provisions in public law, especially ones dealing with intelligence reporting requirements to Congress, designates the House and Senate Select Committees on Intelligence as recipients (e.g., the intelligence oversight provisions and the reporting requirements for the CIA Inspector General, codified at 50 U.S.C. 413-415 and 50 U.S.C. 403q, respectively). A bill or joint resolution, when creating a joint committee, could amend these statutory provisions, whereas a concurrent resolution could not do so directly. But a concurrent resolution, although solely a congressional device, could have the same effect. By changing the rules of both chambers, a concurrent resolution could recognize that the powers, authority, and jurisdiction of the former select committees would be transferred to a new joint committee.

Jurisdiction and Authority

A joint Intelligence Committee could consolidate jurisdiction for the entire intelligence community, extending to all intelligence entities as well as intelligence and intelligence-related activities, including significant anticipated activities (i.e., covert operations). Legislative authority over intelligence could be shared for all entities with overlapping jurisdiction; or, as is now the case in the House and Senate, it could be held exclusively for certain specified components (e.g., CIA and DNI), while being shared for others.

Membership

A bicameral body requires equal membership from both the Senate and House. In addition to bicameralism, a joint committee on intelligence could be directed to accommodate three other criteria: bipartisanship, representation of specified standing committees, and at-large selection of members.

For example, the membership from each chamber could be required to have representatives from standing committees with overlapping jurisdiction (e.g., Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary), as both the House and Senate Intelligence Committees do now. This selection might include both a majority and a minority party member from each represented committee. A JCI could also call for a specified number of members selected at large, as the Senate intelligence panel does now. As an illustration, an 18-member JCI could include nine Senators and nine Representatives, with five majority and four minority party members from each chamber. At least one member, but not more than two, could come from each of the four committees with overlapping jurisdiction; this option (a maximum of eight from each chamber) would still allow for one selection at large from each house. By comparison, a larger committee or a panel requiring only a single member from each of the specified standing committees would allow for more members to be selected at-large.

Provision could also be made for *ex officio* members, particularly the majority and minority party leaders from the Senate and the Speaker and minority leader from the House.

Terms and Rotation

Membership on the joint committee could have no term limits or be given a maximum length of service (six or eight years, as the House and Senate Intelligence Committees have had, or shorter or longer terms). Under term limits, the total time on the committee might be measured either by continuous service or by noncontinuous service accumulated over a specified number of Congresses (e.g., a total of eight years over six Congresses). If a JCI had maximum lengths of service, it could be treated as a temporary assignment, which might not count against other standing committee assignments in each chamber. By comparison, membership on the JCI could be permanent.[14] If so, it might be treated as if it were a standing committee in each chamber, counting against other committee assignments.

Member terms could also be staggered, so that new members would arrive with each new Congress. Staggered terms, however, would mean that a portion of the original membership could not serve the maximum period, at least not as part of the original composition.

Leadership

The chair, selected at the beginning of each Congress or each session (as some proposals called for), could alternate between the two chambers and/or political parties. A vice chairmanship could also be established; this officer would replace the chair when he or she is absent (as occurs now on the Senate Intelligence Committee). The vice chair could be a member of the other body and/or the other political party.

Secrecy Controls

Various types of secrecy controls could be applied to a joint committee on intelligence to regulate access to its classified holdings by non-committee members, protect against the

unauthorized disclosure of classified information, and allow its authorized release. Such controls could (1) set requirements for determining access by non-members; (2) require security clearances, oaths, and/or secrecy agreements for committee members and staff; and (3) provide for investigation of suspected security breaches, conducted by the House and Senate Ethics Committees.

Controls could also spell out procedures for disclosing classified information to which the President objects, either by a joint committee itself, by the joint committee in concert with either or both chambers, or by either or both chambers as the final arbiter. One of five distinct options might be adopted: (1) the joint committee on intelligence could act alone; (2) the panel could act only after one house responded to a request from it to release classified information; (3) the JCI could act only after both houses responded; (4) a single house could disclose the information; or (5) both chambers would have to agree to do so. Currently, disclosure procedures differ between the House and Senate intelligence panels. The House select committee does not have authority to release classified information on its own. The full House must act to disclose it, at the request of its intelligence panel, if the President objects to the release. On the Senate side, the select committee may disclose classified information on its own, after both the President and full Senate have acted.[15] It appears that this procedure has not been used by the Senate panel.

Staffing

The number of staff on a new JCI would presumably be smaller than the combined total for both the House and Senate Intelligence Committees. Hiring could be accomplished in seven different ways: (1) by the majority party on the full JCI; (2) by the majority party from each chamber on the committee; (3) by full committee vote; (4) by the majority party and minority party separately; (5) by the chair alone; (6) by the chair and vice chair/ranking minority member together; or (7) by individual members (with each legislator selecting a single staff member). Additionally, staff could be selected by a combination of several compatible ways (e.g., individual member selections for some plus committee-wide selections for others). The staff could also be required to meet certain agreed upon criteria set by the committee, such as fitness for the duties and without regard to party affiliation.[16]

Staffers could be required to have an appropriate security clearance (for Top Secret and access to Sensitive Compartmented Information), as is now mandated by both House and Senate select committees. They could also be directed to sign a nondisclosure or secrecy agreement not to reveal classified information, again a requirement for the staff of both intelligence panels.

Budget and Funding

The budget for a joint committee on intelligence would presumably be smaller than the combined budgets of the House and Senate intelligence panels. Funding could be shared by both chambers, deriving equally from the contingent funds of the Senate and House.

Pros and Cons

Differences over the establishment of a joint committee on intelligence tie into practical matters as well as matters of principle.

Pros

Supporters of a joint committee on intelligence argue that it would make for a more effective and efficient overseer than the current arrangement, which the 9/11 Commission concluded "is now dysfunctional," because of limitations on the two select committees.[17] According to its proponents, a single joint committee, housing fewer members and staff than the two existing ones combined, would:

- Strengthen oversight of intelligence for four primary reasons. The executive would be more open and forthright with a single, small oversight body than with two with a larger combined membership; the legislators and staff on the JCI, recognizing that there is no other authorizing panel to conduct oversight, would attach a greater importance to this responsibility; a committee composed of legislators from both chambers could better integrate and take advantage of congressional expertise and experience in the field; and a JCI could be established with fewer restraints and restrictions than the separate select committees now have.
- Improve coordination, cooperation, and comity between the House and Senate and among other relevant committees (with overlapping jurisdiction) in both chambers. A joint committee could serve as a conduit of information and advice and as a facilitator for policy formulation between the two chambers as well as between the political parties; a JCI could also encourage mutual respect and trust between the chambers and parties; this could occur by treating all of its members equally in committee leadership posts and voting, by merging the stands of Members of both houses in committee deliberations and decisions, by taking a joint committee consensus on legislation, endorsed by Members of both chambers, to the floor of each house, and by providing an opportunity for House Members to be involved, if only marginally and informally, in a Senate function (i.e., confirmation of presidential nominees).
- Streamline the legislative process, because only one committee, rather than two, would have to consider and report legislative proposals and authorizations to the floors of both chambers; members from the same joint committee, moreover, might comprise all or a majority of the membership of conference committees, which might be less necessary in the first place because of the bicameral, bipartisan makeup of a joint committee.
- Respond rapidly to investigate a major development, when conditions dictated.
- Increase the stature of overseeing and legislating on intelligence matters and, thus, make serving on an intelligence panel more attractive and important than on either select committee. This could result from making the joint committee the equivalent of a standing committee, by granting it permanency and authority to report legislation to each chamber and giving the members indefinite tenure. A JCI with

these characteristics would be unique in the current era, the first of its kind since 1977, and apparently one of only a few in the history of Congress, also elevating its stature.

- Make for more efficient government. A single panel, versus two, would probably reduce the amount of time that the Administration and intelligence officials would spend on Capitol Hill testifying, briefing, notifying, and meeting with members and panels.
- Improve the protection of classified information in Congress's possession. A smaller number of legislators and staff on a joint committee would have access to it, and a single office would be easier to secure.
- Encourage trust between Congress and the Executive in this sensitive field. This could occur by reducing the number of panels, Members, and staff with access to such highly classified information and by easing the cooperative relationship between the branches by way of a single committee, instead of two.
- Pinpoint responsibility in Congress for oversight and legislation affecting intelligence, thereby avoiding any confusion or uncertainty about it.
- Cut back the total number of committee seats for legislators in the House and Senate combined, by replacing the two panels with a single committee with fewer seats; for instance, a new 18-member joint committee with nine Senators and Representatives would be half the size of the combined total of 37 on the two select committees. The replacement would modestly help reduce the number of legislators holding too many committee assignments and/or being "spread too thin." Reducing the number of seats available for Representatives and Senators would allow them to concentrate on one less committee assignment.
- Reduce costs, because of fewer staff and a single suite of offices.

Cons

Critics of proposals for replacing the current House and Senate Intelligence Committees with a single joint committee contend that it would weaken oversight and compromise a fundamental feature of the Congress, namely, two different (and sometimes competing) bodies.[18] As viewed by its opponents, a JCI would:

- Adversely affect oversight of intelligence. This would occur by reducing the number of legislators and staff who have an incentive and opportunity to conduct oversight and by reducing the number of separate panels, with different characteristics and incentive structures, to conduct it; in this regard, the number of committees to which the President reports covert action plans is now only two (the select committees on intelligence), having been reduced from eight in 1980, at the request of the executive.
- Undercut the legislative benefits (e.g. longer deliberation time and different viewpoints) of relying on two committees from separate and distinctive chambers. This usual situation allows two panels — each reflecting different chambers, types of constituencies, and electoral schedules — to examine the same legislation and authorizations and conduct oversight from different vantage points, based on their own priorities and demands; the loss of a second view would be felt not only in the

initial committee deliberations but also in later conference committee action, which might be dominated by joint committee members.

- Cause a loss in continuity, stability, and experience. This would be especially evident in joint committee leadership, if the chair (and ranking member or vice chair) rotated every two years; this in turn would make membership on the joint committee less desirable than on other panels; the turnover could also extend to staff, because of the frequent change in leadership; finally, this loss of stability and experience could hamper Congress's ability to influence public policy and compete with the executive.
- Result in a more acute impact on Congress if a joint committee develops a close and supportive relationship with the executive entities it oversees, rather than a neutral and critical one. With a single panel, Congress would have only one locus for oversight and checks on the executive, not two; if this happens, the impact on Congress, on oversight, and on legislation would be more extensive and significant, because of the absence of a possible balance from a second committee.
- Operate contrary to the long-term tendency to end reliance on joint committees, either by abolishing them or not establishing them in the first place.[19] A JCI, if authorized to report legislation to the floor of both houses, would be unique currently; it would be the only such empowered joint committee since 1977 (when the JCAE was abolished), and one of the few in the history of the Congress; a joint committee on intelligence would also raise the prospect of similar panels for other policy areas, including homeland security, which have wide-ranging jurisdictions that cross a number of executive agencies and programs along with congressional committee jurisdictions.
- Harbor uncertainty regarding confirmation of presidential nominees. It might be unclear whether House Members should play any role at all in the process or, if so, perhaps only at certain stages (e.g., initial meetings and interviews, background investigations, formal hearings).
- Artificially make the political parties equal or nearly so. This could occur, even though the differences in party ratios in each chamber could be substantial, as they have been in the past.
- Artificially make the two chambers equal on the joint committee. The number of Members from each chamber would be the same, even though the House is more than four times larger than the Senate; because of this situation, Representatives would have proportionately fewer opportunities to serve on a joint committee than Senators.
- Cut back the possibility of serving on an intelligence panel for all Members of Congress, especially if there are no term limits on JCI membership. This reduction in numbers would, in turn, reduce the diversity and representational characteristics of the membership compared to two separate committees.
- Bring about a change in the different jurisdictions that the current select committees now hold. The House panel having a broader jurisdiction than its Senate counterpart.
- Not necessarily improve protection of classified information over the current two select committees. Their controls over it are exacting and their reputations in this regard are good; a JCI could also require new procedures for the public release of classified intelligence information held by the joint committee; this would raise the

prospect of (and cause disagreement over) whether the joint committee alone could do so, whether one chamber could do so, or whether both houses must act together as the final arbiter.
- Add confusion and conflict over investigations of suspected unauthorized disclosures of classified information. This could arise, for instance, if the ethics committee from one chamber conducted investigations which involved members of the other body, even if only tangentially and in an initial inquiry.
- Raise practical difficulties in setting meeting schedules, times, and locations for panel members from two different chambers of Congress.

ALTERNATIVES TO A JOINT COMMITTEE

There are other options which might enhance and regularize congressional oversight of intelligence. These changes, both formal and informal, could have an impact not only on the structure of the current select committees on intelligence, but also on their relationship with other committees and Members in its respective chamber and its counterparts in the opposite chamber, as well as the relationship between the legislature and the executive.

Changing the Select Committees' Structure and Powers

The most direct and immediate among the options to increase and improve oversight of intelligence would be ways to enhance the status, stature, and resources of the existing select committees on intelligence or replace them with standing committees.[20] This might be accomplished through several different (and sometimes competing) means:

- Grant the current select committees status as standing committees, along with indefinite tenure for their membership, to reduce turnover; increase experience, stability, and continuity; and make membership on the panel more attractive.
- Expand the authority of such committees, giving them power to report appropriations as well as authorizations and to hold subpoena authority on their own.
- Place members of the Select Committee on Intelligence on their chamber's Appropriations Subcommittee on Defense or create a new Appropriations Subcommittee on Intelligence, possibly including Intelligence Committee members, with comprehensive jurisdiction over IC appropriations.
- Establish a special advisory and oversight body on the Appropriations Committee, combining Intelligence Committee and Appropriations Committee members, as the House has done; under this plan, the new panel would report its findings and recommendations for IC funding to the defense or other appropriate subcommittee, thereby modestly expanding the effective jurisdiction and influence of the select committee.[21]
- Add professional staff, hire temporary consultants, set up short-term task forces, and/or increase the use of congressional support agencies, especially in fields where the panels might require new or expanded expertise and skills.

Although neither the House nor the Senate adopted the 9/11 Commission recommendations for intelligence oversight, other changes have occurred through a variety of mechanisms. These include the chambers' leadership, existing committees, and a Senate bipartisan working group; these efforts have led to the Senate's restructuring its oversight panels and each chamber instituting new working arrangements between its intelligence and appropriations panels.

Senate Action

The Senate's response to the 9/11 Commission and other recommendations for oversight of intelligence has proceeded through several phases.

Initial Changes in 2004

Several of these suggestions were approved by the Senate on October 9, 2004, when it agreed to S.Res. 445 (108th Congress) affecting its oversight of intelligence. The resolution eliminated certain restrictions on serving on the select committee, reduced the number of members (from 17 to 15), and modified security procedures regarding the public disclosure of classified information. S.Res. 445, however, did not transfer authority and jurisdiction over intelligence appropriations to the Intelligence Committee; instead, it created an Intelligence Subcommittee on the Senate Appropriations Committee.

Structural Changes Involving the Committees on Intelligence and Appropriations in 2007

Additional steps have been taken in the 110th Congress. A prominent one is a Memorandum of Agreement (MOA), designed to improve coordination and transparency between the Intelligence Committee and Appropriations Committee.[22] The MOA — signed by the chairman of the select committee (but not its ranking minority member) and the chairs and ranking minority members of the Senate Appropriations Committee and its defense subcommittee — advanced several changes to accomplish this:

- notify staff and allow them to attend the intelligence hearings of the other body;
- allow each Intelligence Committee member who is also an appropriator to bring his or her intelligence staff members to Appropriations Committee hearings and markups;
- permit all Senators and cleared staff of one committee to review the bill, report, and classified annex of the other before action is taken; and
- give the chairmen and ranking minority members of each the committee the opportunity to appear before the other panel to present their views prior to the markup of either the intelligence authorization or appropriations bills.[23]

Notwithstanding the effort, the effectiveness of the new arrangements under the Memorandum of Agreement has elicited differing impressions. The chairman of the Senate Intelligence Committee emphasized that the agreement "has made great strides toward

bringing our committees together in a unity of effort that was lacking before."[24] A competing interpretation was offered by the Intelligence Committee's ranking minority member, who is also an appropriator. He determined that the MOA was "ineffective," adding that "in my experience I've seen more evidence of the need for a better synthesis of the two."[25]

Proposed Changes Involving the Committees on Intelligence and Appropriations in 2008

In March 2008, 14 of the 15 members of the Senate Select Committee on Intelligence — led by Chairman Rockefeller and Vice Chairman Christopher S. Bond — offered another proposal to the Senate leadership.[26] It called for the establishment of a Subcommittee on Intelligence on the Appropriations Committee, which would include members of the Intelligence Committee and would appropriate all funds for the National Intelligence Program (NIP), as opposed to the current situation where such appropriations are divided among several appropriations subcommittees. In defense of this option, Senators Rockefeller and Bond reminded the Senate leadership that the 9/11 Commission's bolder recommendation — to consolidate authorization and appropriations authority in the SSCI — "was considered and rejected by the Senate during consideration of S. Res. 445 in October 2004."[27]

This plan for a new Appropriations Intelligence Subcommittee was opposed by the leadership of the Senate Appropriations Committee. Its chairman, Robert C. Byrd, and ranking member, Thad Cochran, noted that other changes in oversight, including those by way of the 2007 MOU, have been put into effect.[28] They argued that the proposed Intelligence Appropriations Subcommittee, "led by members of the Intelligence Committee," would prove counterproductive: "We strongly believe that consolidating authority over intelligence in a smaller group of Senators is precisely the wrong way to improve the Senate's oversight of intelligence."[29] The Senators added that the separation of authorization and appropriations functions should be maintained and that consolidating appropriations for the entire NIP in one subcommittee would have an adverse impact on other policies, such as foreign policy, that are handled by different subcommittees.[30]

Despite this opposition, a formal proposal to create a new Appropriations Subcommittee on Intelligence (S.Res. 655, 110th Congress) was sponsored on September 11, 2008, by the vice chairman and chairman of the Senate Intelligence Committee.[31] In addition to placing the two Intelligence Committee members from Appropriations on the new Appropriations Subcommittee on Intelligence, S.Res. 655 would also include the chairman and ranking member of the Defense Appropriations Subcommittee and, as *ex officio* members, the chairman and vice chairman of the Intelligence Committee. In introducing the resolution, Senator Bond emphasized that "on the seventh anniversary of 9/11, it is noteworthy that there remains one unaddressed 9/11 commission recommendation, and that is to reform the legislative branch's oversight of intelligence and terrorism activities which the commission rightly described as 'dysfunctional'."[32] As an alternative to the "bolder" 9/11 commission recommendations, which had been rejected, the Senator argued that "many of us believe there is a better, less disruptive way to achieve reform through a carefully constructive intelligence appropriations subcommittee."[33]

House Action

In the House, the option to consolidate authority — by reserving seats for Intelligence Committee members on the Defense Appropriations Subcommittee — was raised at the end of the 109th Congress by Representative Nancy Pelosi, then House Minority Leader and presumptive Speaker of the House in the 110th Congress.[34] The final product was a variation on this theme. H.Res. 35 (110th Congress), which passed the House on January 9, 2007, created a new Select Intelligence Oversight Panel — consisting of 13 members and an eight-to-five interparty ratio — with three representatives from the Intelligence Committee joining 10 from appropriations, including the chairman and ranking minority member of the full committee, the chairman and ranking minority member of the Defense Subcommittee, and six additional members from appropriations. This special panel is authorized to study and make recommendations to all appropriations subcommittees on relevant areas, specifically the annual intelligence appropriations to the Defense Subcommittee, which retains authority to report it to the full committee.

Concerns about Restructuring the Intelligence Committees

The set of changes producing a restructured and strengthened Intelligence Committee in each chamber, as called for by the 9/11 Commission, might also generate concerns and criticisms. A new standing committee — smaller than the existing select committees in each chamber (if combined), with representation from four standing committees with overlapping membership and indefinite tenure for its members — would substantially reduce (1) the number of Members in each chamber serving on an intelligence panel at any one time; (2) the number of at-large seats available; (3) the number of vacancies available over time; and, thus, (4) the likelihood of a Member finding a seat on the committee. These changes in tandem would also lead to fewer former members from the committee, thus, reducing the ability of the full chamber and non-members to be knowledgeable about how the intelligence community operates and intelligence policy; and it could result in a decline of the ability to question if not challenge the committee (as well as the executive). Arguably, this could result in the prospect of a closed system, making it easier for the intelligence panels to dominate the agenda and debate in their respective chambers and in the full Congress.

A second set of cautions might surround the proposed new authority, particularly, adding appropriations to its authorizing control and independent subpoena power. Such subpoena authority, which could cover either or both materials and individual testimony, would be held (and used) without needing approval in each instance by the chamber. This might be seen as infringing on an important full-chamber power and removing a check on this particular committee, which would be already subject to fewer constraints than the current select committees have.

The addition of appropriations approval would apparently produce a unique situation in the contemporary Congress and a rarity in its entire history. A reversal of this plan — placing Intelligence Committee members on the defense appropriations subcommittee — also appears to be a rare, if not unprecedented action; this revamped panel could better coordinate and complement the actions of both committees. This change, moreover, could indirectly increase the power of the select committee. By reserving seats for its members on the relevant appropriations subcommittee, the Intelligence Committee would play a more direct and

influential role in appropriating IC funds than it does now. At this time, no other committee has a comparable guarantee of seats on a relevant appropriations subcommittee. Consequently, the left-out authorizing committees, particularly those dealing with sensitive national security matters, might make the same appeal as intelligence: that is, to have seats reserved on the appropriate appropriations subcommittee. Following either avenue, the intelligence panel's power would be enhanced if it held both appropriations and authorization authority, either directly or indirectly (via its members on the defense appropriations subcommittee).

In either event, however, the intelligence panel might be perceived as too powerful. It would hold two impressive and reinforcing authorities and would no longer be subject to a check and competition from a significant outside source (i.e., the Appropriations Committee in its chamber). At the same time, the transfer of appropriations would remove an important part of the Appropriations Committees' jurisdiction. Reserving seats for Intelligence Committee members on defense appropriations could also reduce competing viewpoints and an independent check on IC appropriations. Either change might encourage other authorizing committees to request the same treatment, that is, to control both appropriations and authorizations. Although the appropriations and authorization processes are parallel to one another, they are not identical and not always reinforcing or complementary. The combined authority could result in substantially more work for the Intelligence Committee in each session, with the need to "scrub" the intelligence budget twice each year. Or, alternatively, the transfer could lessen its examination of the appropriations and authorization, if each were to occur only in alternate sessions within a single Congress. The potential increase in the panel's workload could have two adverse ramifications: (1) short-change either the appropriations or authorization process, or both; or (2) reduce the panel's time for other legislative and oversight efforts.

By comparison to these two proposed changes — consolidating authorization and appropriations in the Intelligence Committee or reserving seats on the Defense Appropriations Subcommittee for Intelligence Committee members — the establishment of the special intelligence oversight panel on the House Appropriations Committee is more limited in its impact. Only three of its 13 seats are reserved for Intelligence Committee members; and the new panel can only make recommendations to the Defense Appropriations Subcommittee, which continues to report the annual intelligence community appropriations.

Improving Coordination between the Two Intelligence Panels

Such changes would affect the Intelligence Committees' individual structure and powers. Others could be designed to increase coordination and shared responsibility between the two intelligence panels — so as to avoid duplication, encourage cooperation, develop working relationships across chambers, enhance understanding, and share expertise, information, and knowledge — while at the same time, maintaining the distinct characteristics of each panel. These might include joint hearings and cross-committee leadership meetings, which may already exist on a regular basis.

Joint Hearings

One option along these lines is to schedule joint hearings for relatively routine and regular matters, such as the initial annual authorization briefings from the Executive. Another opportunity for a joint session would occur when the inspectors general in the intelligence community, especially at the CIA, submit their semiannual reports to Congress. These shared enterprises could allow the combined membership to receive the same information and data as each panel would individually, establish working relationships among the two groups of members, encourage cross-fertilization among them, and reduce duplication for the Executive. Of course, followup hearings could be handled separately by the two panels and may even be stimulated by such joint efforts. The shared experience over the initial budget submission could also help to avoid duplication of effort over some modest matters, while helping to set priorities for more significant ones.

Joint hearings could also be conducted into critical events, as they were with the select Intelligence Committees combined inquiry into 9/11 attacks.[35] Another example of an inquiry with panels from both chambers was the Iran-contra affair, an investigation conducted by two temporary committees working together and issuing a joint report.[36]

Leadership Meetings

Another means of encouraging inter-chamber cooperation is for the leadership of the two panels to meet regularly to discuss issues, concerns, and priorities (recognizing, of course, the practical and political limitations on such exchanges). These efforts might include only the full committee chairs or might extend to subcommittee heads and majority and minority members. These sessions could be supplemented by meetings of senior staff on both panels, at the direction of the leadership. Whatever the arrangement, a number of different opportunities exist to enhance awareness of common concerns and cooperation in examining them between the two panels.

Constraints on Coordination

Coordination between two panels from different chambers may encounter practical and political problems. Scheduling meetings and hearings, especially if a large number of members is involved, for instance, runs into several hindrances. These include: (1) different priorities and meeting arrangements for each committee; (2) competing chamber and committee responsibilities for Members, especially Senators, each of whom serve on more committees than Representatives; and (3) different electoral and campaign requirements, which affect the demands on Members and the time they spend in the capital. In addition, rival political affiliations and policy stands, along with competition between the chambers for influence over public policy, might make cooperative ventures few and far between.

Enhancing Interchanges with Other Panels and Members

Other approaches to increasing the powers of each panel and their cooperative ventures might be considered: ease the exchange of information with non-committee members, allow

for more oversight by other committees, and/or increase contacts among members of the appropriations and authorizing panels. Along these lines, the 9/11 Commission wrote: the "new committee or committees should conduct studies of the activities of the intelligence agencies and report problems relating to the development and use of intelligence to all members of the House and Senate."[37]

Placing Intelligence Committee members on the defense appropriations subcommittee or on a special appropriations intelligence oversight panel, as the House has done, also eases interchanges between these two committees. Other ways of increasing coordination between the appropriations and authorizing committees — through formalized member and staff involvement in the other panel's hearings, for instance — have been advanced in the Senate, as noted above.

Goals

This type of change could reduce the challenge of intelligence oversight on the select committees, bring different viewpoints to bear on intelligence matters, expand the knowledge of Members not on the panels, and allow for their informed judgments on intelligence policy and programs as well as on committee activities and operations. Strict controls over the classified information would have to be maintained. The current committee rules — which on the House side are more stringent than on any other committee — might be modified to accommodate additional sources for review and oversight. Such a revision could begin with a comparison of access controls by other panels, particularly the committees with overlapping membership. In addition, House and Senate chamber rules authorizing secret or closed sessions might be used more often to allow for an open exchange of information between the Intelligence Committees and all the Members of a particular chamber. Along with this, committee members might be allowed to present "declassified" versions of sensitive or otherwise classified reports to their colleagues, in secret or open sessions.

Techniques

Several potential techniques to expand non-committee involvement and non-member access to information follow:

- Ensure that relevant information is appropriately and expeditiously shared with committees with overlapping membership.
- Give greater allowance for other committees to conduct oversight of intelligence components, activities, and programs, including standing committees without overlapping membership.[38]
- Ease access for non-members to Intelligence Committee holdings, by reducing the exacting requirements over the availability of the classified.
- Encourage the Intelligence Committees, on their own initiative, to share information as appropriate with the full membership of their house.
- Make more information available to non-members by securing declassification of certain intelligence reports or by providing classified and declassified versions of IC reports (for the committees and for the general membership, respectively); the

agencies proper or their inspectors general (charged with preventing and detecting waste, fraud, and abuse) might do either or both, possibly at the request or directive of the Intelligence Committees.

Limitations

Interchanges between the Intelligence Committees, on the one hand, and other panels and Members, on the other, might be limited for several reasons. Concerns about the unauthorized disclosures of classified information might be raised as the possibility of leaks rises, because of the increased number of individuals with access to sensitive information. Along with this, intelligence agencies would likely be reluctant to respond to congressional requests for sensitive and classified information, even from the Intelligence Committees, if the agencies anticipate that all or some of it will be disclosed outside the sequestered Intelligence Committee rooms, possibly to the floors of both houses.

Another possibility, which might retard information-sharing by the Intelligence Committees, could be a concern about a reduction in their control over the intelligence agenda and debate. As more Members and panels became familiar with the relevant information and policies, more questions might arise relating to the committees' policy positions. This development might be seen as weakening the committees, a condition that might reduce their (and, in turn, Congress's) influence over intelligence agencies and policies in dealings with the Executive.

Other Options

Several other options could enhance congressional oversight over the Intelligence community.

Using Congressional Support Agencies

Other options might enhance the oversight capabilities of the select committees on intelligence along with other appropriate panels.

Increased Use

One approach is to increase the use of the legislative support agencies — Congressional Budget Office, Congressional Research Service, and Government Accountability Office (GAO), formerly the General Accounting Office — where appropriate.[39]

New Authority for GAO to Audit the IC

A supplemental proposal would be to clarify and expand GAO's independent authority to audit all components of the Intelligence Community (IC). Legislation has been introduced in the 110th Congress (H.R. 978 and S. 82) to accomplish this; and hearings have been held on the Senate version.[40] These and similar proposals, which date to the mid-1970s, are the result

of a fundamental disagreement between GAO and the IC with regard to the Office's authority and jurisdiction over all of them.

The Government Accountability Office possesses nearly unfettered jurisdiction to audit and investigate the federal government. GAO's access, however, may be precluded in certain situations: by the President, if it involves sensitive or classified records, such as foreign intelligence and counterintelligence activities; in instances where records are statutorily exempted from disclosure; or in cases where an executive agency holds competing powers which are used to prevent GAO access.[41]

The last of these obstacles to full access has led to conflicts between the Government Accountability Office and the Intelligence Community, particularly the Central Intelligence Agency (CIA).[42] The CIA views its own statutory authority as keeping it off-limits to independent GAO audits and investigations. Under this interpretation, the CIA has declined to participate in GAO reviews (as well as in some congressional oversight hearings held by panels other than the Select Committees on Intelligence); and the Agency has, on occasion, attempted to enlist other components to do the same.[43] In contrast to the CIA's position, however, other IC entities have not asserted the same proscription against GAO audits. For instance, the Department of Defense, which houses the largest number of intelligence units, has issued the following instructions:

> It is DoD policy that the Department of Defense cooperate fully with the GAO and respond constructively to, and take appropriate corrective action on the basis of, GAO reports .... [But DoD is also to] be alert to identify errors of fact or erroneous interpretation in GAO reports, and to articulate the DoD position in such matters, as appropriate.[44]

GAO has taken exception to the CIA's position, emphasizing that the Office has authority to audit the Agency independently but lacks enforcement power.[45] If enacted, the Intelligence Community Audit Act would change this situation. These and similar proposals, which were first raised in the mid-1970s, are designed to "reaffirm the authority of the Comptroller General to audit and evaluate the programs, activities, and financial transactions of the intelligence community."[46]

Applying GPRA Requirements to the CIA

A different scheme would affect the executive directly: place the CIA expressly under the requirements of the Government Performance and Results Act, commonly referred to by its initials (GPRA) or as the Results Act. This 1993 enactment emphasizes assessing agencies based on outcomes (that is, their performance and results) rather than outputs (for instance, meeting certain deadlines, quotas for issuing grants, or expenditure levels).[47] The CIA remains the only significant explicit exemption to GPRA's mandates. These include developing a broad mission statement; a five-year strategic plan flowing from it; an annual performance plan, setting specific objectives and ways to carry out the strategic plan; and a followup evaluation of the agency's accomplishments, failures to meet expectations, and reasons for both. These GPRA reports from the CIA could be submitted to the House and Senate Intelligence Committees in a classified version.

Enhancing the Inspectors General

A different set of alternatives would rely upon changes in offices of inspector general (OIGs), established in executive departments and entities to combat waste, fraud, and abuse and to keep the agency head and Congress fully and currently informed about these matters.[48] Changes that might directly or indirectly benefit congressional oversight of intelligence would be to: (1) ease and increase coordination among the relevant offices of inspectors general through existing or new councils and other mechanisms;[49] (2) establish a new post of inspector general with comprehensive jurisdiction over the intelligence community;[50] (3) place several of the administratively established IGs in the Defense Department under the Inspector General Act of 1978, as amended; [51] (4) clarify and strengthen the jurisdiction and authority of the statutory OIGs over the administrative counterparts within an agency or department; and (5) augment the authority, jurisdiction, independence, and reporting requirements of the IG in the Office of the Director of National Intelligence.[52]

OBSERVATIONS ON OVERSIGHT OF INTELLIGENCE

Obstacles to Oversight

Congressional oversight of intelligence meets obstacles that are not usually present in other areas.[53]

Secrecy Constraints

The most significant constraint is the high degree and pervasiveness of secrecy surrounding intelligence policy, information, activities, operations, resources, and personnel. For Congress, this means that the legislature, its committees, and its Members are circumscribed in a number of ways: what they know; who receives the information, how, and in what form and forum; who provides it; what information can be shared with other Members and panels, how, and in what detail; and what non-governmental sources can contribute to legislators' knowledge, to what degree, and in what ways.

The secrecy imperative results in a system that is often closed to outsiders — not just the general public but also Representatives and Senators who do not have seats on the select committees on intelligence. The impact of official secrecy is evident in the restrictions on access to and disclosure of classified information in the panels' custody as well as on restraints covering what the select committee members themselves can discuss outside its confines.[54] These restrictions and their demanding requirements not only slow down or prevent access by non-members, because of an anticipated lengthy delay in complying with the procedures, but might also harbor a "chilling effect" for some, because of the strict limitations on disclosure and use of the information among colleagues outside the Intelligence Committees. As noted above, moreover, other access controls adopted by the executive set limits on the Government Accountability Office, Congress's chief audit and investigative agency.

The impacts and implications of secrecy are extensive and burdensome. The 9/11 Commission summarized the effects this way: "Secrecy stifles oversight, accountability, and information sharing."[55]

Appeal of Intelligence Oversight

Along with this is the apparently limited appeal of overseeing intelligence and making intelligence policy, including authorizing the budget. Congressional efforts here remain largely hidden and may have only marginal direct effects on Members' constituencies, districts, or states.[56]

Overcoming the Obstacles

Objectives and Goals

The impact of these limitations on Congress's oversight of intelligence is that it is significantly more difficult than in other fields. And the usual incentives for Members to serve on certain committees and conduct oversight appear to be more modest or even non-existent for intelligence.

Steps have been advanced, however, to increase Congress's capacity to overcome these hurdles. Prospects along this line include (1) heightening the appeal of serving on the intelligence panel; (2) enhancing the expertise and knowledge of Members (both on and off the panels); (3) reinforcing the shared responsibilities between an Intelligence Committee, on the one hand, and panels with overlapping memberships, on the other; (4) expanding the contacts and coordination between the intelligence authorizors and appropriators; (5) changing the relationship between the two chambers on intelligence matters, through, for instance, a joint committee or increased contacts between the existing committees; and (6) developing new connections between Congress and the executive that could lend themselves to more effective oversight.

The Joint Committee Approach and Alternatives

Growing out of these goals are a number of recommendations to strengthen oversight of intelligence, which have arisen since the genesis of the modern intelligence community six decades ago. Recent ones have come from the 9/11 Commission, which proposed two distinct alternatives. One was to create a joint committee on intelligence. Yet over the years, the drafts for a JCI have differed in important respects: membership, leadership, jurisdiction, authority, staffing, and controls over classified information, among other matters. Moreover, rationales for a JCI have met with competing objections and concerns.

A second major option advanced by the 9/11 Commission was to enhance the powers and status of the Intelligence Committee in each house, along with realigning committee jurisdiction over intelligence appropriations, with the prospect of merging authorizing and appropriations in one committee. The Senate — in S.Res. 445 (108th Congress), approved October 9, 2004 — followed this path, but only part of the way, when it removed the term

limits on serving on its intelligence panel, reduced the number of members, and created a separate Subcommittee on Intelligence on the Appropriations Committee. In separate action, leaders on the Senate Intelligence and Appropriations Committees issued a Memorandum of Agreement in 2006, designed to improve coordination and transparency between the two panels. In the meantime, the Senate Intelligence Committee leaders have advanced a proposal to modify the Appropriations Intelligence Subcommittee. It would have comprehensive jurisdiction for the intelligence budget and its membership would include Intelligence Committee members who are already on Appropriations, the chairman and ranking minority member of the Defense Appropriations Subcommittee, and the chairman and vice chairman of the Intelligence Committee as *ex officio* members. The Senate Appropriations Committee leaders have opposed this plan. The House has traveled a different route. It has created a Select Intelligence Oversight Panel on its Appropriations Committee, to serve as an advisory body, which includes members of the Intelligence Committee.

Other approaches to change legislative oversight of intelligence have been proposed. These include several that would affect the executive directly as well as Congress's own structure and capabilities: increase the use of congressional support agencies; clarify and extend independent access for GAO to audit intelligence community agencies, particularly the CIA; require the CIA to meet the GPRA planning and reporting obligations, as other IC components must do; increase the independence of and the coordination among IC inspectors general; improve their reporting to Congress, where needed; and establish a new inspector general with jurisdiction over the entire intelligence community as well as statutory IGs in four prominent Defense Department intelligence agencies.

END NOTES

[1] See, among other sources, CRS Report RL32617, *A Perspective on Congress's Oversight Function,* by Walter J. Oleszek; CRS Report RL33742, *9/11 Commission Recommendations: Implementation Status*, by Richard F. Grimmett, Coordinator; and CRS Report RL33715, *Covert Action: Legislative Background and Possible Policy Questions*, by Alfred Cumming;

[2] H.Con.Res. 186, 80th Cong., 2nd sess., introduced by Rep. Devitt, Apr. 21, 1948.

[3] The monumental National Security Act of 1947 also gave birth to the National Security Council and National Military Establishment, later re-designated as the Department of Defense (61 Stat. 496 et seq.).

[4] U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report* (Washington: GPO, 2004), p. 420. The commission offered a second option to strengthen oversight: i.e., "a single committee in each house of Congress, combining authorization and appropriating authorities .... (Ibid.)."

[5] The House and Senate have considered proposals in this broad area through their existing committees as well as a bipartisan working group in the Senate, which has recommended enhancing the powers and status of the current Intelligence Committee. Sen. Mitch McConnell, "Senators Reid and McConnell Convene Meeting of Bipartisan Working Group to Reform Congressional Oversight of Intelligence," Press Release, Oct. 4, 2004; Sen. Bill Frist, "Frist, Daschle Appoint Members to Working Group Evaluating 9/11 Commission Proposals," Press Release, Aug. 25, 2004.

[6] Additional coverage of JCI recommendations, characteristics, and perceived advantages and disadvantages, which are detailed below, is available in U.S. Congress, House Committee on Rules, Subcommittee on Rules of the House, *House Rule XLVIII*, hearing, 101st Cong., 2nd sess. (Washington: GPO, 1990); Frederick M. Kaiser, "A Proposed Joint Committee on Intelligence: New Wine in an Old Bottle," *Journal of Law and Politics*, vol.5, fall 1988, pp. 127-186; and Independent Task Force, Council on Foreign Relations, *Making Intelligence Smarter: The Future of U.S. Intelligence* (New York: Council on Foreign Relations, 1996), pp. 32-33.

[7] In addition to the citations in note 6 above, the development of and proposals for congressional oversight of intelligence are examined in, among many other sources, U.S. Congress, Senate Select Committee on Intelligence, *Legislative Oversight of Intelligence Activities,* S.Prt. 103-88, 103rd Cong., 2nd sess. (Washington:

GPO, 1994); U.S. Congress, House Select Committee on Intelligence, *Recommendations of the Final Report*, H.Rept. 94- 833, 94th Cong., 2nd sess. (Washington: GPO, 1976), pp. 1-4; U.S. Congress, Senate Select Committee to Study Governmental Activities with respect to Intelligence Activities, S.Rept. 94-755, 94th Cong., 2nd sess., Book II, *Intelligence Activities and the Rights of Americans* (Washington: GPO, 1976), p. 339; Frederick M. Kaiser, "Congress and the Intelligence Community," in Roger Davidson, ed., *The Postreform Congress* (New York: St. Martins Press, 1992), pp. 279-300; Loch K. Johnson, "Accountability and America's Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency," *Foreign Policy Analysis*, 2005, vol. 1, pp. 99-120, "Congressional Supervision of America's Secret Agencies," in Loch K. Johnson and James J. Wirtz, eds., *Strategic Intelligence* (Los Angeles: Roxbury Publishing, 2004), pp. 414-426; David M. Barrett, *The CIA and Congress: The Untold Story from Truman to Kennedy* (Lawrence, Kansas: University of Kansas Press, 2006); Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington: CQ Press, 2006), Chapter 10; "Oversight and Accountability;" Center for Strategic and International Studies, *Congressional Oversight of National Security: A Mandate for Change* (Washington: CSIS, 1992); and Center for the Study of the Presidency, Project on National Security Reform, *Ensuring Security in an Unpredictable World: Preliminary Findings, July 2008*, pp. v-vii, 60-63, and 87-90, available at [http://www.pnsr.org].

[8] House Rule 3(l), added by H.Res. 5, 107th Cong., January 3, 2001.

[9] CRS Report RS20748, *Protection of Classified Information by Congress: Practices and Proposals*, by Frederick M. Kaiser.

[10] For background and further citations on the JCAE, see CRS Report RL32538, *9/11 Commission Recommendations:Joint Committee on Atomic Energy — A Model for Congressional Oversight?*, by Christopher M. Davis; Harold P. Green and Allen Rosenthal, *Government of the Atom: The Integration of Powers* (New York: Atherton Press, 1963); and Kaiser, "A Proposed Joint Committee on Intelligence," pp. 138-141.

[11] One caveat to the unique status of the JCAE is the Temporary Joint Committee on Deficit Reduction; it was authorized to report legislation but only on a narrow subject and on a case-by-case basis. In contrast to the JCAE, this joint panel was a short-term, periodic addition to Congress, set up by the Gramm-Rudman-Hollings Act of 1985. The panel could come into existence only when legislation on budget sequestration was needed and was empowered to report only a joint resolution setting forth specified reports from the Directors of the Office of Management and Budget and the Congressional Budget Office. P.L. 99-177, 99 Stat. 1037, 1100 (1985). This provision apparently was never activated and was not included in the 1987 revision of GRH.

[12] Green and Rosenthal, *Government of the Atom*, p. 266.

[13] Kaiser, "A Proposed Joint Committee on Intelligence," pp. 140-141.

[14] The 9/11 Commission — referring to both a joint committee on intelligence and a new standing committee in each house — recommended that "Members should serve indefinitely on the committees, without set terms, thereby letting them accumulate expertise." 9/11 Commission, *Report*, p. 421.

[15] The select committee's charter provides for three responses from the full Senate to an Intelligence Committee request to release classified information, if the President objects to it. The chamber can (1) approve the disclosure; (2) disapprove the disclosure; or (3) "refer all or any portion of the matter back to the committee, in which case the committee shall make the final determination with respect to the public disclosure of the information in question" (Sec. 8(b)(5), S.Res. 400, 94th Cong., 2nd sess.).

[16] The 9/11 Commission, for instance, recommended that the "staff of this committee should be nonpartisan and work for the entire committee and not for individual members." 9/11 Commission, *Report*, p. 420.

[17] Competing views on a joint committee on intelligence are available from Members and committees of Congress, among other sources. Supportive arguments are included in: U.S. Congress, Senate Temporary Select Committee to Study the Senate Committee System, *Report* (Washington: GPO, 1984), pp. 13-14; Sen. Howard Baker and Rep. Henry Hyde, statements before the Temporary Select Committee, *Senate Resolution 127, To Study the Senate Committee System* (Washington: GPO, 1984), part 1, pp. 5-11 and part 2, pp. 83-85; Rep. Henry Hyde, statement before the Joint Committee on the Organization of Congress, Committee Structure, hearings, 103rd Cong., 1st sess. (Washington: GPO, 1993), pp. 832-841; and Minority, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and House Select Committee to Investigate Covert Arms Transactions with Iran, *Report,* S.Rept. 100-216 and H.Rept. 100-433, 100th Cong., 1st sess. (Washington: GPO, 1987), p. 583.

[18] Criticisms and concerns are voiced by Rep. Dan Glickman, Rep. Larry Combest, and Sen. Dennis DeConcini, statements before the Joint Committee on the Organization of Congress, *Committee Structure*, hearings, 103rd Cong., 1st sess., pp. 64-79 and 406-412; Rep. Larry Combest, Chairman of the House Permanent Select Committee on Intelligence, *IC21 — The Intelligence Community in the 21st Century, The Intelligence Community Act of 1996*, Mar. 4, 1996, p. 7; U.S. Congress, House Permanent Select Committee on Intelligence. *IC21: Intelligence Community in the 21st Century* (staff study), committee print, 104th Cong., 2nd sess. (Washington: GPO, 1966), pp. 316-318 and 328; House Select Committee on Committees, *Final Report* (Washington: GPO, 1980), p. 416; and Majority, Senate and House Select Committees Investigating the Iran-Contra Affair, *Report*, p. 427.

[19] The 9/11 Commission (p. 421), for instance, did not advocate a joint committee for homeland security. Instead, it called for consolidating jurisdiction in a permanent standing committee in each chamber. For additional discussion on such a transformation, see CRS Report RS21901, *House Select Committee on Homeland Security: Possible Questions Raised If the Panel Were to Be Reconstituted as a Standing Committee*, by Judy Schneider.

[20] The 9/11 Commission emphasized the need for "substantial change" in congressional oversight, either by establishing a joint committee or by creating "a single committee in each house of Congress, combining authorization and appropriating authorities .... " Each panel would be a standing committee and hold subpoena authority. The membership would be relatively small and serve without term limits. Its composition would be nearly equal between the parties, with the majority having only one more member than the minority, and representing four panels with overlapping jurisdiction (i.e., Armed Services, Judiciary, Foreign Affairs, and the Defense Appropriations Subcommittee) with one seat each on the new committee. 9/11 Commission, *Report*, p. 420-421. For further information and analysis, see CRS Report RS21908, *Senate Select Committee on Intelligence: Term Limits and Assignment Limitations,* by Judy Schneider.

[21] This proposal materialized in 2007 in the House with members of the Intelligence Committee serving on a special oversight panel on the Appropriations Committee (H.Res. 35, 110th Congress). The concept was raised in late 2006 by Rep. Nancy Pelosi, then House Minority Leader and prospective Speaker of the House. Tim Starks, "Pelosi Wants Intelligence Appropriations Oversight Panel," *CQ.com*, Dec. 14, 2006; David Rogers, "Pelosi Plans Panel to Oversee Spy-Agency Funds," *Wall Street Journal*, Dec. 14, 2006, p. A3; and "Pelosi Looks to Boost Oversight of Intelligence and Ethics," *Washington Post*, Dec. 15, 2006.

[22] Hon. John D. Rockefeller, Chairman, Opening Statement, in U.S. Congress, Senate Select Committee on Intelligence, *Congressional Oversight*, hearing, 110th Cong., 1st sess., Nov. 13, 2007, p. 2. See also, letter to Hon. Harry Reid, Senate Majority Leader, and Hon. Mitch McConnell, Senate Minority Leader, on changes in Senate oversight of intelligence, by Hon. John D. Rockefeller, Chairman, Senate Select Committee on Intelligence, and others, Feb. 28, 2007.

[23] Ibid., pp. 2-3.

[24] Ibid., p. 3.

[25] Hon. Christopher S. Bond, Opening Statement, in Senate Intelligence Committee, *Congressional Oversight*, pp. 4-5.

[26] Letter to Hon. Harry Reid, Senate Majority Leader, and Hon. Mitch McConnell, Senate Minority Leader, on proposals to change Senate oversight of intelligence, from Hon. John D. Rockefeller, Chairman, and Hon. Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, and others, March 6, 2008, pp. 2-3. Reprinted in *Congressional Record*, vol. 154, Sept. 11, 2008, pp. S8419-S8420.

[27] Letter from Senators Rockefeller and Bond, on proposed changes (2008), p. 1. Despite its rejection in the 108th Congress, an identical measure (S.Res 375) has been introduced in the 110th.

[28] Letter to Hon. Harry Reid, Senate Majority Leaders, and Hon. Mitch McConnell, Senate Minority Leader, in response the proposal from the Senate Select Committee on Intelligence, from Hon. Robert C. Byrd, Chairman, and Hon. Thad Cochran, Ranking Member, Senate Committee on Appropriations, April 5, 2008, p. 1.

[29] Ibid., p. 2.

[30] Ibid.

[31] S.Res. 655, 110th Cong., 2nd sess., introduced by Hon. Christopher S. Bond, for himself, and Hon. John D. Rockefeller and Hon. Sheldon Whitehouse, "Senate Resolution 655 — To Improve Congressional Oversight of the Intelligence Activities of the United States," *Congressional Record,* vol. 154, Sept. 11, 2008, pp. S8416-S8417.

[32] Ibid., p. S8418.

[33] Ibid., p. S8419.

[34] Sources in footnote 21.

[35] U.S. Congress, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001,* S.Rept. 107-351 and H.Rept. 107-792, 107th Cong., 2nd sess. (Washington: GPO, 2002).

[36] U.S. Congress, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and House Select Committee to Investigate Covert Arms Transactions with Iran, *Report on the Iran-Contra Affair*, S.Rept. 100-216 and H.Rept. 100- 433, 100th Cong., 1st sess. (Washington: GPO, 1987).

[37] 9/11 Commission, *Report,* p. 420.

[38] See especially House Subcommittees on Efficiency and on National Security, *CIA Refusal*, 2001.

[39] The oversight roles of the support agencies are spelled out in CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser, et al.

[40] The Intelligence Community Audit Act, H.R. 978 and S. 82, 110th Cong. Congressional hearings and press coverage include U.S. Congress, Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Government-wide Intelligence Community Reform*, hearings, 110th Cong., 2nd sess., Feb. 29, 2009, available at [http://hsgac.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=301d0683-d270-41a2-b024-9736f89e0df2]; Chris Strom, "Panel witnesses press

for GAO audits of intelligence agencies," *Government Executive*, available at [http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0208/ 022908cdpm2.htm], February 29, 2008; and Paul Kane, "GAO Seeks Review of Spy Agencies," *Washington Post*, Mar. 7, 2008, p. A15.

[41] Statutory citations for such restrictions include Central Intelligence Agency Act of 1949, 63 Stat. 213; General Accounting Office Act of 1980, 94 Stat. 311; 31 U.S.C. 716(d); and 31 U.S.C. 716(b) and 3524(c).

[42] GAO is limited in its independent authority to audit and investigate the CIA, because of provisions in public law and congressional rules as well as tradition and precedents. The CIA, however, is the only intelligence component which makes such an across-the-board claim. See U.S. General Accounting Office, *Central Intelligence Agency: Observations on GAO Access to Information on CIA Programs and Activities*, statement by Henry J. Hinton, GAO-01-975T (Washington: GAO, 2001); *Information Sharing*, GAO-06-385, (Washington: GAO, 2006), pp. 6-7;and DOD *Personnel Security Clearances*, Letter to Honorable George V. Voinovich, Chairman, Senate Subcommittee on Oversight of Government Management, June 14, 2006, p. 1. See also U.S. House Government Reform Subcommittees on Government Efficiency and on National Security, *Is the CIA's Refusal to Cooperate with Congressional Inquiries a Threat to Effective Oversight of the Federal Government*, hearings, 107th Cong., 1st sess (Washington: GPO, 2001); Frederick M. Kaiser, "GAO Versus the CIA: Uphill Battles Against an Overpowering Force," *International Journal of Intelligence and Counterintelligence*, vol. 15 (2002), pp. 330-389; and CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

[43] See House Government Reform Subcommittees on Government Efficiency and National Security, *CIA's Refusal to Cooperate*, pp. 1-8. The subcommittee chairmen emphasized that the CIA had initially agreed to participate in a GAO survey of computer security programs but later declined. The Agency also attempted, unsuccessfully as it turned out, to have other IC entities follow suit. Finally, the CIA declined to participate in any of the subcommittees' hearings or meetings, even if held in executive or secret session.

[44] Department of Defense Instruction 7650.02, November 20, 2006.

[45] Elaboration of GAO's support for such new authority and the DNI's (and the previous DCI's) opposition appears in, letter from David M. Walker, Comptroller General, to Hon. John D. Rockefeller, Chairman, and Hon. Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, March 1, 2007; and letter from J. M. McConnell, Director of National Intelligence, to Hon. John D. Rockefeller, Chairman, and Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, Mar. 7, 2007. See M.Z. Hemingway, "GAO wants more muscle," *Federal Times*, March 26, 2007, p. 1; and "GAO Seeks Greater Role in Oversight of Intelligence," *Secrecy News*, Oct. 3, 2007, available at [http://www.fas.org]. For the competing views of the disputes over independent GAO access, which date to the earliest days of the CIA, see U.S. Central Intelligence Agency, *DCI Affirmation of Policy for Dealing with the General Accounting Office (GAO)*, Memorandum for the Director of Central Intelligence, from Stanley L. Moskowitz, Director of Congressional Affairs, 7 July 1994; U.S. General Accounting Office, *Central Intelligence Agency: Observations on GAO Access to Information on CIA Programs and Activities*, statement of Henry J. Hinton, GAO-01-975T (2001); letters from the Comptroller General to the Director of National Intelligence (DNI), April 27, 2006, and to the Chairman and Ranking Minority Member of the Senate Committee on Homeland Security and Governmental Affairs, May 15, 2006, disagreeing with the DNI's position that the "review of intelligence activities is beyond the GAO's purview," as stated in *Information Sharing*, GAO-06-385 (2006), pp. 6 and 71.

[46] H.R. 978 and S. 82, 110th Congress.

[47] P.L. 103-62, 107 Stat. 285.

[48] 5 U.S.C. Appendix. For an overview and other sources, see CRS Report 98-379, *Statutory Offices of Inspector General: Past and Present*, by Frederick M. Kaiser.

[49] In the 110th Congress, several legislative initiatives are designed to enhance the independence of and coordination among inspectors general. This would occur through additional protections for the IGs and a new coordinative council, which would include the statutory IGs in the intelligence community (IC), among others operating under the IG Act and other laws. Prominent bills are H.R. 928, which passed the House, and S. 2324, a modified version, which has been approved by the Senate. Some of their provisions, however, have been opposed by the Bush Administration, which has raised the prospect of a veto. For coverage, see CRS Report RL34176, *Statutory Inspectors General: Legislative Developments and Legal Issues*, by Vanessa K. Burrows and Frederick M. Kaiser.

[50] Notwithstanding its overarching jurisdiction, the IC inspector general would not replace the existing counterparts in various departments and agencies. The proposal, however, did not reach fruition, as the FY 2008 Intelligence Authorization Act (H.R. 2082, 110th Cong.) was vetoed by President Bush and his veto sustained. *Congressional Record*, vol. 154, March 11, 2008, pp. H1503-H1514. A similar recommendation has been included in the proposed FY2009 Intelligence Authorization Act (H.R. 5959, 110th Cong.), also meeting objections from the Bush Administration. See U.S. Office of Management and Budget, "Statement of Administration Policy: H.R. 5959 — Intelligence Authorization Act for FY 2009," July 6, 2008.

[51] The FY 2009 Intelligence Authorization Act (H.R. 5959, 110th Cong.), reiterating sections of the (vetoed) FY2008 bill, would place four DOD intelligence entities — the National Reconnaissance Office, Defense Intelligence Agency, National Security Agency, and the National Geospatial-Intelligence Agency — under the

Inspector General Act of 1978, as amended (5 U.S.C. Appendix). These agencies would be the equivalent of "designated federal entities," that is, entities whose IGs are appointed by and removed by the agency head. In addition, the Secretary of Defense would be able to prevent or halt an audit or investigation, if the Secretary or DNI determined that such a prohibition would be necessary to protect vital U.S. national security interests. The House and Senate Committees on Armed Services and on Intelligence would have to be notified of such an exercise by the Secretary of Defense.

[52] The DNI, under authority establishing the post and office (P.L. 108-458), has complete discretion to create and construct an OIG in his Office, based on provisions he selects from the Inspector General Act of 1978, as amended. In 2006, the director established an inspector general post in his office. U.S. Office of the Director of National Intelligence, *Report on the Progress of the DNI in Implementing the Intelligence Reform Act of 2004*, May 2006. In the meantime, however, the House and Senate Intelligence Committees have raised questions about the IG's independence, capabilities, jurisdiction, and reporting to Congress. U.S. Congress, House Permanent Select Committee on Intelligence, *Intelligence Authorization Act for 2007*, H.Rept. 109-411, 109th Cong., 2nd sess.

[53] See CRS Report RL32617, *A Perspective on Congress's Oversight Function*, by Walter J. Oleszek.

[54] Illustrations of such restrictions can be found in an interview with Representative Jane Harman, a former member of the House Intelligence Committee: "House Committee to Probe Ruin of CIA Tapes," *Morning Edition*, National Public Radio, January 6, 2008.

[55] 9/11 Commission, *Report*, p. 24.

[56] Ibid., pp. 420-421.

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Chapter 2

INTELLIGENCE ISSUES FOR CONGRESS

Richard A. Best, Jr.

SUMMARY

To address the challenges facing the U.S. Intelligence Community in the 21st century, congressional and executive branch initiatives have sought to improve coordination among the different agencies and to encourage better analysis. In December 2004, the Intelligence Reform and Terrorism Prevention Act (P.L. 108- 458) was signed, providing for a Director of National Intelligence (DNI) with substantial authorities to manage the national intelligence effort. The legislation also established a separate Director of the Central Intelligence Agency.

Making cooperation effective presents substantial leadership and managerial challenges. The needs of intelligence "consumers" — ranging from the White House to cabinet agencies to military commanders — must all be met, using the same systems and personnel. Intelligence collection systems are expensive and some critics suggest there have been elements of waste and unneeded duplication of effort while some intelligence "targets" have been neglected.

The DNI has substantial statutory authorities to address these issues, but the organizational relationships will remain complex, especially for Defense Department agencies. Members of Congress will be seeking to observe the extent to which effective coordination is accomplished. FY2008 intelligence authorization legislation (H.R. 2082/S. 2996) addresses some of these concerns.

International terrorism, a major threat facing the United States in the 21st century, presents a difficult analytical challenge. Techniques for acquiring and analyzing information on small groups of plotters differ significantly from those used to evaluate the military capabilities of other countries. U.S. intelligence efforts are complicated by unfilled requirements for foreign language expertise. Whether all terrorist surveillance efforts have been consistent with the Foreign Intelligence Surveillance Act of 1978 (FISA) has been a matter of controversy. Changes to FISA were enacted in legislation (H.R. 6304) signed by the President on July 10, 2008.

Intelligence on Iraqi weapons of mass destruction was inaccurate and Members have criticized the performance of the Intelligence Community in regard to current conditions in Iraq and other situations. Improved analysis, while difficult to mandate, remains a key goal. Better human intelligence, it is argued, is also essential.

Intelligence support to military operations continues to be a major responsibility of intelligence agencies. The use of precision guided munitions depends on accurate, real-time targeting data; integrating intelligence data into military operations will require changes in organizational relationships as well as acquiring necessary technologies.

Counterterrorism requires the close coordination of intelligence and law enforcement agencies, but there remain many institutional and procedural issues that complicate cooperation between the two sets of agencies. This report will be updated as new information becomes available.

MOST RECENT DEVELOPMENTS

On June 20 the House passed H.R. 6304, the FISA Amendments Act of 2008, which amends the Foreign Intelligence Surveillance Act of 1974 to provide statutory authorities and procedures for certain surveillance efforts and retroactive immunity for telecommunications firms that provided information to the government after 9/11 based on requests from the Executive Branch. The Senate passed the legislation on July 9 and the bill was signed by the President on July 10th.

On May 8, S.2996, the Senate's version of the FY2009 Intelligence Authorization Act, was reported, but floor action has not yet occurred. The bill contains several provisions strongly opposed by the Administration, including some related to limiting interrogation of prisoners by intelligence officials to procedures included in the Army Field Manual on Human Intelligence Collection.

On May 21, the House Intelligence Committee reported H.R. 5959, its version of FY2009 authorization legislation. The House version forbids the use of contractors to conduct interrogations of CIA prisoners (unless there is a written waiver from the DNI), but the Committee rejected a provision similar to that included in the Senate version limiting interrogation techniques to those included in the Army Field Manual. Other provisions in the House bill add funding for human intelligence (humint) efforts and improving foreign language capabilities. The bill would establish an Inspector General for the entire Intelligence Community. The accompanying report (H.Rept. 110-665) calls for security clearance reform including encouraging the employment of first and second generation Americans who have critical language skills; it also requires that all members of the committee be provided more extensive information on intelligence activities, including covert actions. Although the details of authorizations are contained in the classified annex, the Committee voted to eliminate all earmarks from the bill.

BACKGROUND AND ANALYSIS

The attacks on the World Trade Center and the Pentagon on September 11, 2001, dramatically demonstrated the intelligence threats facing the United States in the new century. In response, Congress has approved significantly larger intelligence budgets and, in December 2004, passed the most extensive reorganization of the Intelligence Community since the National Security Act of 1947. The Intelligence Reform and Terrorism Prevention Act of 2004 (hereafter: the "Intelligence Reform Act") (P.L. 108-458) created a Director of National Intelligence (separate from the Director of the Central Intelligence Agency) who will head the Intelligence Community, serve as the principal intelligence adviser to the President, and oversee and direct the acquisition of major collections systems. As long urged by some outside observers, one individual will now be able to concentrate on the Intelligence Community as a whole and possess statutory authorities to establish priorities for budgets, for directing collection by the whole range of technical systems and human agents, and for the preparation of community-wide analytical products.

P.L. 108-458 was designed to address the findings of the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 Commission, that there has been inadequate coordination of the national intelligence effort and that the Intelligence Community, as then-organized, could not serve as an agile information gathering network in the struggle against international terrorists. The Commission released its report in late July 2004 and Congress debated its recommendations through the following months. A key issue was the extent of the authorities of the DNI, especially with regard to budgeting for technical collection systems managed by Defense Department agencies. In the end, many of the recommendations of the 9/11 Commission regarding intelligence organization were adopted after a compromise provision was included that called for implementing the act "in a manner that respects and does not abrogate" the statutory authorities of department heads.

On April 21, 2005, the Senate confirmed the nominations of John D. Negroponte, who had served as Ambassador to Iraq, as DNI and Lt. General Michael V. Hayden, then Director of the National Security Agency, as Deputy DNI. (In May 2006 Hayden became Director of the CIA.) Members of Congress will seek to ensure that the changes effected by P.L. 108-458 improve capabilities against terrorist attacks and other threats to the national security. The legislation is complex and many questions remain concerning implementation; much will depend upon relationships established between the DNI, the separate intelligence agencies, and the Secretary of Defense. On February 7, 2007, retired Navy Vice Admiral J. Michael McConnell was confirmed by the Senate as Negroponte's successor as DNI.

Intelligence Community

The Intelligence Community (defined at 50 U.S.C. 401a(4)) consists of the following:

Central Intelligence Agency (CIA)
Bureau of Intelligence and Research, Department of State (INR)
Defense Intelligence Agency (DIA)
National Security Agency (NSA)

National Reconnaissance Office (NRO)
National Geospatial-Intelligence Agency (NGA)
Federal Bureau of Investigation (FBI)
Army Intelligence
Navy Intelligence
Air Force Intelligence
Marine Corps Intelligence
Department of Homeland Security (DHS)
Coast Guard (CG)
Treasury Department
Energy Department
Drug Enforcement Agency (DEA)

Except for the CIA, intelligence offices or agencies are components of cabinet departments with other roles and missions. The intelligence offices/agencies, however, participate in Intelligence Community activities and serve to support the other efforts of their departments.

The CIA remains the keystone of the Intelligence Community. It has all-source analytical capabilities that cover the whole world outside U.S. borders. It produces a range of studies that cover virtually any topic of interest to national security policymakers. The CIA also collects intelligence with human sources and, on occasion, undertakes covert actions at the direction of the President. (A covert action is an activity or activities of the U.S. Government to influence political, economic, or military conditions abroad, where it is intended that the U.S. role will not be apparent or acknowledged publicly.)

Three major intelligence agencies in DOD — the National Security Agency (NSA), the National Reconnaissance Office (NRO), and the National Geospatial- Intelligence Agency (NGA) — absorb the larger part of the national intelligence budget. NSA is responsible for signals intelligence and has collection sites throughout the world. The NRO develops and operates reconnaissance satellites. The NGA prepares the geospatial data — ranging from maps and charts to sophisticated computerized databases — necessary for targeting in an era dependent upon precision guided weapons. In addition to these three agencies, the Defense Intelligence Agency (DIA) is responsible for defense attachés and for providing DOD with a variety of intelligence products. Although the Intelligence Reform Act provides extensive budgetary and management authorities over these agencies to the DNI, it does not revoke the responsibilities of the Secretary of Defense for these agencies. There will be a need for close cooperation, but also an opportunity for disagreements that could greatly complicate the intelligence effort.

The State Department's Bureau of Intelligence and Research (INR) is one of the smaller components of the Intelligence Community but is widely recognized for the high quality of its analysis. INR is strictly an analytical agency; diplomatic reporting from embassies, though highly useful to intelligence analysts, is not considered an intelligence function (nor is it budgeted as one).

The key intelligence functions of the FBI relate to counterterrorism and counterintelligence. The former mission has grown enormously in importance since September 2001, many new analysts have been hired, and the FBI has been reorganized in an attempt to ensure that intelligence functions are not subordinated to traditional law

enforcement efforts. Most importantly, law enforcement information is now expected to be forwarded to other intelligence agencies for use in all-source products.

The intelligence organizations of the four military services concentrate largely on concerns related to their specific missions. Their analytical products, along with those of DIA, supplement the work of CIA analysts and provide greater depth on key technical issues.

The Homeland Security Act (P.L. 107-296) provided DHS responsibilities for fusing law enforcement and intelligence information relating to terrorist threats to the homeland. The Office of Intelligence and Analysis in DHS participates in the interagency counterterrorism efforts and, along with the FBI, has focused on ensuring that state and local law enforcement officials receive information on terrorist threats from national-level intelligence agencies.

The Coast Guard, now part of DHS, deals with information relating to maritime security and homeland defense. The Energy Department analyzes foreign nuclear weapons programs as well as nuclear nonproliferation and energy-security issues. It also has a robust counterintelligence effort. The Treasury Department collects and processes information that may affect U.S. fiscal and monetary policies. Treasury also covers the terrorist financing issue.

The "INTs": Intelligence Disciplines

The Intelligence Community has been built around major agencies responsible for specific intelligence collection systems known as disciplines. Three major intelligence disciplines or "INTs" — signals intelligence (sigint), imagery intelligence (imint), and human intelligence (humint) — provide the most important information for analysts and absorb the bulk of the intelligence budget. *Sigint* collection is the responsibility of NSA at Fort Meade, Maryland. Sigint operations are classified, but there is little doubt that the need for intelligence on a growing variety of nations and groups that are increasingly using sophisticated and rapidly changing encryption systems requires a far different sigint effort than the one prevailing during the Cold War. Since the late 1990s a process of change in NSA's culture and methods of operations has been initiated, a change required by the need to target terrorist groups and affected by the proliferation of communications technologies and inexpensive encryption systems. Observers credit the then-Director of NSA, Lt. Gen. Michael Hayden, who became Director of the CIA in May 2006, with launching a long-overdue reorganization of the Agency, and adapting it to changed conditions. Part of his initiative has involved early retirements for some NSA personnel and greater reliance on outsourcing many functions previously done by career personnel. Some of the initiatives relating to acquisition did not, however, meet their objectives.

A second major intelligence discipline, imagery or *imint*, is also facing profound changes. Imagery is collected in essentially three ways, satellites, manned aircraft, and unmanned aerial vehicles (UAVs). The satellite program that covered the Soviet Union and acquired highly accurate intelligence concerning submarines, missiles, bombers, and other military targets is perhaps the greatest achievement of the U.S. Intelligence Community. Subsequent experience has demonstrated that there now a greater number of collection targets than existed during the Cold War and that more satellites are required, especially those that can be maneuvered to collect information about a variety of targets. At the same time, the availability of high-quality commercial satellite imagery and its widespread use by federal

agencies has raised questions about the extent to which coverage from the private sector can meet the requirements of intelligence agencies. High altitude UAVs such as the Global Hawk may also provide surveillance capabilities that overlap those of satellites.

The National Imagery and Mapping Agency (NIMA) was established in 1996 to manage imagery processing and dissemination previously undertaken by a number of separate agencies. NIMA was renamed the National Geospatial-Intelligence Agency (NGA) by the FY2004 Defense Authorization Act (P.L. 108-136). The goal of NGA is, according to the agency, to use imagery and other geospatial information "to describe, assess, and visually depict physical features and geographically referenced activities on the Earth."

Intelligence from human contacts — *humint* — is the oldest intelligence discipline and the one that is most often written about in the media. The CIA is the primary collector of humint, but the Defense Department also has responsibilities filled by defense attachés at embassies around the world and by other agents working on behalf of theater commanders. Many observers have argued that inadequate humint has been a systemic problem and contributed to the inability to gain prior knowledge of the 9/11 plots. In part, these criticisms reflect the changing nature of the international environment. During the Cold War, targets of U.S. humint collection were government officials and military leaders. Intelligence agency officials working under cover as diplomats could approach potential contacts at receptions or in the context of routine embassy business. Today, however, the need is to seek information from clandestine terrorist groups or narcotics traffickers who do not appear at embassy social gatherings. Humint regarding such sources can be especially important as there may be little evidence of activities or intentions that can be gathered from imagery, and their communications may be carefully limited.

Contacts with individuals or groups who may have knowledge about terrorist plots present many challenges. Placing U.S. intelligence officials in foreign countries under "nonofficial cover" (NOC) in businesses or other private capacities is possible, but it presents significant challenges to U.S. agencies. Administrative mechanisms are vastly more complicated than they are for officials formally attached to an embassy; special arrangements have to be made for pay, allowances, retirement, and healthcare. The responsibilities of operatives under nonofficial cover to the parent intelligence agency have to be reconciled with those to private employers, and there is an unavoidable potential for many conflicts of interest or even corruption. Any involvement with terrorist groups or smugglers has a potential for major embarrassment to the U.S. government and, of course, physical danger to those immediately involved.

Responding to allegations in the early-1990s that CIA agents may have been involved too closely with narcotics smugglers and human rights violators in Central America, the then-Director of Central Intelligence (DCI), John Deutch, established guidelines in 1995 (which remain classified) to govern the recruitment of informants with unsavory backgrounds. Although CIA officials maintain that no proposal for contacts with persons having potentially valuable information was disapproved, there was a widespread belief that the guidelines served to encourage a "risk averse" atmosphere at a time when information on terrorist plans, from whatever source, was urgently sought. The FY2002 Intelligence Authorization Act (P.L. 107-108) directed the DCI to rescind and replace the guidelines, and July 2002 press reports indicated that they had been replaced.

A major constraint on humint collection is the availability of personnel trained in appropriate languages. Cold War efforts required a supply of linguists in a relatively finite set

of foreign languages, but the Intelligence Community now needs experts in a wider range of more obscure languages and dialects. Various approaches have been considered: use of civilian contract personnel, military reservists with language qualifications, and substantial bonuses for agency personnel who maintain their proficiency. The National Security Education Program, established in 1991, provides for scholarships and career training for individuals in or planning to enter careers in agencies dealing with national security issues.[1]

Other "INTs"

A fourth INT, measurement and signatures analysis — *masint* — has received greater emphasis in recent years. A highly technical discipline, masint involves the application of complicated analytical refinements to information collected by sigint and imint sensors. It also includes spectral imaging by which the identities and characteristics of objects can be identified on the basis of their reflection and absorption of light. Masint is undertaken by DIA and other DOD agencies. A key problem has been retaining personnel with expertise in masint systems who are offered more remunerative positions in private industry.

Another category of information, open source information — *osint* (newspapers, periodicals, pamphlets, books, radio, television, and Internet websites) — is increasingly important given requirements for information about many regions and topics (instead of the former concentration on political and military issues affecting a few countries). At the same time, requirements for translation, dissemination, and systematic analysis have increased, given the multitude of different areas and the volume of materials. Many observers believe that intelligence agencies should be more aggressive in using osint; some believe that the availability of osint may even reduce the need for certain collection efforts. The availability of osint also raises questions regarding the need for intelligence agencies to undertake collection, analysis, and dissemination of information that could be directly obtained by user agencies. Section 1052 of the Intelligence Reform Act expressed the sense of Congress that there should be an open source intelligence center to coordinate the collection, analysis, production, and dissemination of open source intelligence to other intelligence agencies. The DNI is to submit a report on the advisability of such a center.

Integrating the "INTs"

The "INTs" have been the pillars of the Intelligence Community's organizational structure, but analysis of threats requires that data from all the INTs be brought together and that analysts have ready access on a timely basis. This has proved in the past to be a substantial challenge because of technical problems associated with transmitting data and the need to maintain the security of information acquired from highly sensitive sources. Some argue that intelligence officials have tended to err on the side of maintaining the security of information even at the cost of not sharing essential data with those having a need to know. Section 1015 of the Intelligence Reform Act mandated the establishment of an Intelligence Sharing Environment (ISE) to facilitate terrorism-related information.

A related problem has been barriers between foreign intelligence and law enforcement information. These barriers derived from the different uses of information collected by the two sets of agencies — foreign intelligence used for policymaking and military operations

and law enforcement information to be used in judicial proceedings in the United States. A large part of the statutory basis for the "wall" between law enforcement and intelligence information was removed with passage of the USA PATRIOT Act of 2001 (P.L. 107-56), which made it possible to share law enforcement information with analysts in intelligence agencies, but longestablished practices have not been completely overcome. The Homeland Security Act (P.L. 107-296) and the subsequent creation of the Terrorist Threat Integration Center (TTIC) established offices charged with combining information from both types of sources. Section 1021 of the Intelligence Reform Act made the new National Counterterrorism Center (NCTC) operating under the DNI specifically responsible for "analyzing and integrating all intelligence possessed or acquired by the United States Government pertaining to terrorism and counterterrorism [except purely domestic terrorism]...."

Intelligence Budget Process

For budgetary purposes, intelligence spending is divided between the National Intelligence Program (NIP; formerly the National Foreign Intelligence Program or NFIP) and the Military Intelligence Program (MIP). The MIP was established in September 2005 and includes all programs from the former Joint Military Intelligence Program, which encompassed DOD-wide intelligence programs and most programs from the former Tactical Intelligence and Related Activities (TIARA) category, which encompassed intelligence programs supporting the operating units of the armed services. The Program Executive for the MIP is the Under Secretary of Defense for Intelligence. Only a small part of the intelligence budget is made public; the bulk of the $40 billion that media reporting associates with overall intelligence spending is "hidden" within the DOD budget. Spending for most intelligence programs is described in classified annexes to intelligence and national defense authorization and appropriations legislation. (Members of Congress have access to these annexes, but must make special arrangements to read them.)

For a number of years some Members have sought to make public total amounts of intelligence and intelligence-related spending; floor amendments for that purpose were defeated in both chambers during the 105th Congress. In response, however, to a lawsuit filed under the Freedom of Information Act, DCI George Tenet stated on October 15, 1997 that the aggregate amount appropriated for intelligence and intelligence-related activities for FY1997 was $26.6 billion. He added that the Administration would continue "to protect from disclosure any and all subsidiary information concerning the intelligence budget." In March 1998, DCI Tenet announced that the FY1998 figure was $26.7 billion. Figures for FY1999 and subsequent years have not been released and the executive branch has thus far prevailed against legal efforts to force release of intelligence spending figures. On May 23, 2000, the House voted 175-225 to defeat an amendment calling for annual release of an unclassified statement on aggregate intelligence spending. During consideration of intelligence reform legislation in 2004, the Senate at one point approved a version of a bill which would require publication of the amount of the NIP; the House version did not include a similar provision and, with the Senate deferring to the House, the Intelligence Reform Act does not require making intelligence spending amounts

public. Provisions requiring public disclosure of the aggregate amount of funds for the NIP are included in the Senate's version of the FY2008 authorization bill (S. 1538). Section 601 of P.L. 110-53, Implementing Recommendations of the 9/11 Commission Act of 2007, requires that the DNI publicly disclose the aggregate amount of funds appropriated for the NIP although after FY2008 the President could waive or postpone the disclosure upon sending a explanation to congressional oversight committees. However, during floor consideration of the H.R. 3222, the FY2008 defense appropriations act, an amendment was adopted that would preclude funds appropriated in the act from being used to make public disclosure of NIP spending levels.

Jurisdiction over intelligence programs is somewhat different in the House and the Senate. The Senate Intelligence Committee has jurisdiction only over the NIP but not the MIP, whereas the House Intelligence Committee has jurisdiction over both sets of programs. The preponderance of intelligence spending is accomplished by intelligence agencies within DOD and thus in both chambers the armed services committees are involved in the oversight process. Other oversight committees are responsible for intelligence agencies that are part of departments other than DOD.

Most appropriations for intelligence activities are included in national defense appropriations acts, including funds for the CIA, DIA, NSA, the NRO, and NGA. Other appropriations measures include funds for the intelligence offices of the State Department, the FBI, and DHS. In the past, defense appropriations subcommittees have funded the intelligence activities of CIA and the DOD agencies (although funds for CIA have been included in defense appropriations acts, these monies are transferred directly). The Senate voted in October 2004 to establish an Appropriations Subcommittee on Intelligence, but this has not occurred and the House has not taken similar action. On January 9, 2007, the House approved H.Res. 35 which establishes a select panel within the appropriations committee that includes three members of the intelligence committee to review intelligence activities to support the work of the appropriations committee.

Intelligence budgeting issues were at the center of the debate on intelligence reform legislation in 2004. On one hand, there was determination to make the new DNI responsible for developing and determining the annual National Intelligence Program budget (which is separate from the MIP budgets that are prepared by the Office of the Secretary of Defense). The goal was to ensure a unity of effort that arguably has not previously existed and that may have complicated efforts to monitor terrorist activities. On the other hand, the intelligence efforts within the National Intelligence Program include those of major components of the Defense Department, including NSA, the NRO, and NGA, that are closely related to other military activities. Some Members thus argued that even the National Intelligence Program should not be considered apart from the Defense budget. After considerable debate, the final version of P.L. 108-458 provides broad budgetary authorities to the DNI, but in Section 1018 requires the President to issue guidelines to ensure that the DNI exercises the authorities provided by the statute "in a manner that respects and does not abrogate the statutory responsibilities of the heads of" of the Office of Management and Budget and Cabinet departments. Even when guidelines are drafted, observers expect that implementing the complex and seemingly overlapping budgetary provisions of the Intelligence Reform Act will depend on effective working relationships between the Office of the DNI, DOD, and the President.

The 9/11 Investigations and the Congressional Response

In the aftermath of September 11, 2001, there was extensive public discussion of whether the attacks on the Pentagon and World Trade Center represented an "intelligence failure." In response, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence undertook a joint investigation of the September 11 attacks. (Earlier in July 17, 2002, the House Intelligence Committee Subcommittee on Terrorism and Homeland Security had undertaken an investigation of ways to improve counterterrorism capabilities in the light of the September 2001 attacks.) Public hearings by the resulting "Joint Inquiry" began on September 18, 2002, beginning with testimony from representatives of families of those who died in the attacks. Former policymakers and senior CIA and FBI officials also testified. Eleanor Hill, the Inquiry Staff Director summarized the Inquiry's findings: " ... the Intelligence Community did have general indications of a possible terrorist attack against the United States or U.S. interests overseas in the spring and summer of 2001 and promulgated strategic warnings. However, it does not appear that the Intelligence Community had information prior to September 11 that identified precisely where, when and how the attacks were to be carried out."

The two intelligence committees published the findings and conclusions of the Joint Inquiry on December 11, 2002.[2] The committees found that the Intelligence Community had received, beginning in 1998 and continuing into the summer of 2001, "a modest, but relatively steady, stream of intelligence reporting that indicated the possibility of terrorist attacks within the United States." Further findings dealt with specific terrorists about whom some information had come to the attention of U.S. officials prior to September 11 and with reports about possible employment of civilian airliners to crash into major buildings. The Inquiry also made systemic findings highlighting the Intelligence Community's lack of preparedness to deal with the challenges of global terrorism, inefficiencies in budgetary planning, the lack of adequate numbers of linguists, a lack of human sources, and an unwillingness to share information among agencies.

Separately, the two intelligence committees submitted recommendations for strengthening intelligence capabilities. They urged the creation of a Cabinet-level position of Director of National Intelligence (DNI) separate from the position of director of the CIA. The DNI would have greater budgetary and managerial authority over intelligence agencies in the Defense Department than possessed by the DCI. The committees also expressed great concern with the reorientation of the FBI to counterterrorism and suggested consideration of the creation of a new domestic surveillance agency similar to Britain's MI5.

The Joint Inquiry was focused directly on the performance of intelligence agencies, but there was widespread support among Members for a more extensive review of the roles of other agencies. Provisions for establishing an independent commission on the 2001 terrorist attacks were included in the FY2003 Intelligence Authorization Act (P.L. 107-306). Former New Jersey Governor Thomas H. Kean was named to serve as chairman, with former Representative Lee H. Hamilton serving as vice chairman. Widely publicized hearings were held in spring 2004 with Administration and outside witnesses providing different perspectives on the role of intelligence agencies prior to the September 11, 2001, attacks. The Commission's Report was published in July 2004.

Although the 9/11 Commission surveyed the roles of a number of Federal and local agencies, many of its principal recommendations concerned the perceived lack of authorities

of the DCI. The Commission recommended establishing a National Intelligence Director (NID) to manage the National Intelligence Program and oversee the agencies that contribute to it. The NID would annually submit a national intelligence program budget and, when necessary, forward the names of nominees to be heads of major intelligence agencies to the President. Lead responsibility for conducting and executing paramilitary operations would be assigned to DOD and not CIA. The Commission also recommended that Congress pass a separate annual appropriations act for intelligence that would be made public. The NID would execute the expenditure of appropriated funds and make transfers of funds or personnel as appropriate. Proposing a significant change in congressional practice, the Commission recommended a single intelligence committee in each house of Congress, combining authorizing and appropriating authorities.

On August 27, 2004, President Bush addressed key recommendations of the 9/11 Commission in signing several executive orders to reform intelligence. In addition to establishing a National Counterterrorism Center, the orders provided new authorities for the DCI until legislation was enacted to create a National Intelligence Director. In addition, several legislative proposals were introduced to establish a National Intelligence Director, separate from a CIA Director.[3] The Senate passed S. 2845 on October 16, 2004; the House had passed H.R. 10 on October 8, 2004. Efforts by the resulting conference committee to reach agreed-upon text focused on the issue of the authorities of the proposed Director of National Intelligence in regard to the budgets and operations of the major intelligence agencies in DOD, especially NSA, NRO, and NGA.[4] Conferees finally reached agreement in early December, and the conference report on S. 2845 (H.Rept. 108-796) was approved by the House on December 7 and by the Senate on December 8. The President signed the legislation on December 17, 2004, and it became P.L. 108-458.

The Intelligence Reform Act is wide-ranging (as noted below) and its implementation will undoubtedly receive close oversight during the 110th Congress. Some observers have suggested that modifications to the legislation may be needed; others recommend that any difficulties be addressed by executive orders or memoranda of understandings (MOUs).

Oversight Issues

The 9/11 Commission concluded that congressional oversight of intelligence activities was "dysfunctional." A number of measures were undertaken to address issues raised by the Commission, including the establishment of oversight subcommittees on both committees.[5] Proposals to establish one committee with both appropriations and authorization responsibilities proved unacceptable, but H.Res. 35, passed on January 9, 2007, established a panel within the appropriations committee with additional staff to review intelligence activities. Senate rules require that the Intelligence Committee include Members also serving on the Appropriations Committee thus providing for a measure of coordination; although S.Res. 445 in the 108th Congress envisioned an appropriations subcommittee on intelligence, no such entity has been established.

The involvement of the Intelligence Community in homeland security efforts that involve domestic law enforcement agencies has affected congressional oversight. In the past the two intelligence committees and the appropriations committees were almost the only points of contact between intelligence agencies and the Congress. In the 109th Congress the Homeland

Security Committees also undertook oversight of some aspects of intelligence activities. Disagreements have arisen over the extent to which the Government Accountability Office (GAO) has oversight over intelligence aspects of government-wide information sharing efforts[6].

Ongoing Congressional Concerns

Collection Capabilities

Intelligence agencies collect vast quantities of information on a daily, even an hourly basis. The ability to locate fixed installations and moving targets has become an integral component of U.S. military capabilities. On almost any subject, the Intelligence Community can provide a wealth of knowledge within short time frames. Inevitably, there are "mysteries" that remain unknowable — the effects of unforeseeable developments and the intentions of foreign leaders. The emergence of the international terrorist threat has posed major challenges to intelligence agencies largely designed to gather information about nation states and their armed forces. Sophisticated terrorist groups in some cases relay information only via agents in order to avoid having their communications intercepted. Human collection has been widely perceived as inadequate, especially in regard to terrorism; the Intelligence Reform Act stated the Sense of Congress that, while humint officers have performed admirably and honorably, there must be an increased emphasis on and greater resources applied to enhancing the depth and breadth of human intelligence capabilities. In October 2005 the National Clandestine Service was established at CIA to undertake humint operations by CIA and coordinate humint efforts by other intelligence agencies.

There are also congressional concerns regarding major technical systems — especially reconnaissance satellites. These programs have substantial budgetary implications. Whereas the Intelligence Community was a major technological innovator during the Cold War, today both intelligence agencies and their potential targets make extensive use of commercial technologies, including sophisticated encryption systems. Filtering out "chaff" from the ocean of data that can be collected remains, however, a major challenge.

Analytical Quality

The ultimate goal of intelligence is accurate analysis. Analysis is not, however, an exact science and there have been, and undoubtedly will continue to be, failures by analysts to prepare accurate and timely assessments and estimates. The performance of the Intelligence Community's analytical offices during the past decade is a matter of debate; some argue that overall the quality of analysis has been high while others point to the failure to provide advance warning of the 9/11 attacks and a flawed estimate of Iraqi weapons of mass destruction as reflecting systemic problems. Congressional intelligence committees have for some time noted weaknesses in analysis and lack of language skills, and a predominant focus on current intelligence at the expense of strategic analysis.

Analytical shortcomings are not readily addressed by legislation, but Congress has increased funding for analytical offices since 9/11 and the Intelligence Reform Act of 2004

contains a number of provisions designed to improve analysis — an institutionalized mechanism for alternate or "red team" analyses to be undertaken (section 1017), the designation of an individual or entity to ensure that intelligence products are timely, objective, and independent of political considerations (section 1019), and the designation of an official in the office of the DNI to whom analysts can turn for counsel, arbitration on "real or perceived problems of analytical tradecraft or politicization, biased reporting, or lack of objectivity" (section 1020).

These efforts will, however, be affected by the long lead-times needed to prepare and train analysts, especially in such fields as counterterrorism and counterproliferation. Improving analysis depends, among other things, upon the talents of analysts brought into government service, encouraging their contributions and calculated risk-takings, and a willingness to tolerate the tentative nature of analytical judgments. These factors are sometimes difficult to achieve in government organizations. Another significant impediment to comprehensive analysis has been a shortage of trained linguists especially in languages of current interest. As noted above, the National Security Education Program and related efforts are designed to meet this need, but most observers believe the need for linguists will remain a pressing concern for some years.

An enduring concern is the existence of "stovepipes." Agencies that obtain highly sensitive information are reluctant to share it throughout the Intelligence Community out of a determination to protect their sources. In addition, information not available to analysts with relevant responsibilities is many times wasted. In recent years there have been calls for greater sharing in order to improve the quality of analysis, but it is expected that dealing with this complex dilemma will require continuing attention by intelligence managers.

The Intelligence Community and Iraq

The Intelligence Community has been widely criticized for its performance in regard to Iraq. The Baath regime in Bagdad undeniably presented major challenges; it was almost impossible to penetrate the inner reaches of Saddam Hussein's government. U.S. intelligence agencies supported the efforts of U.N. inspectors charged with determining Iraqi compliance with U.N. resolutions requiring Iraq to end any programs for the acquisition or deployment of weapons of mass destruction, but such efforts were frustrated by the Iraqi government.

At Congress's request, a National Intelligence Estimate (NIE) dealing with Iraqi weapons of mass destruction (WMD) was prepared in September 2002, shortly before crucial votes on the Iraqi situation. The NIE has been widely criticized for inaccurately claiming the existence of actual WMDs and exaggerating the extent of Iraqi WMD programs. The Senate Intelligence Committee concluded that the NIE's major key judgments "either overstated, or were not supported by, the underlying intelligence reporting." The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction severely criticized analysts who misinterpreted the limited intelligence about Iraqi WMDs that was available and failed to alert policymakers to the uncertainties in both evidence and analysis.

Other observers note, however, that the Intelligence Community based its conclusions in significant part on Iraq's previous use of WMD, its ongoing WMD research programs, and its unwillingness to document the destruction of WMD stocks in accordance with U.N. resolutions. These factors, which have never been disputed, served as background to

Administration decisions. Some observers argue, however, that Administration officials misused intelligence in an effort to build support for a military option.[7]

On February 11, 2004, President Bush by Executive Order 13328 created a Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. The Commission, co-chaired by former Senator Charles S. Robb and retired Federal Judge Laurence H. Silverman, was asked to assess the capabilities of the Intelligence Community to collect, analyze, and disseminate intelligence regarding WMD and related 21st Century threats. It addition, the Commission was asked to look specifically at intelligence regarding Iraqi WMD prior to Operation Iraqi Freedom and to compare prewar assessments with the findings of the Iraq Survey Group. The Commission issued its report on March 31, 2005.[8] The report described in detail a number of analytical errors that resulted in faulty pre-war judgments on Iraq's weapons of mass destruction. The Commission recommended that the DNI take steps to forge an integrated Intelligence Community, that intelligence functions within the FBI be combined into a single National Security Service, and urged that the DNI not focus on the preparation of the President's Daily Brief at the expense of the long-term needs of the Intelligence Community.

Despite the inadequate intelligence on Iraqi WMD programs, the success of the military attack on the Iraqi regime launched in March 2003 by the United States, the UK, and other countries was greatly assisted by intelligence. The extensive use of precision-guided munitions that targeted key Iraqi military and command facilities and limited civilian casualties was made possible by the real-time availability of precise locating data. Observers have noted that operational shortcomings in transmitting intelligence data that were frequent during the 1991 Persian Gulf War were not observed in the Iraq campaign of 2003.

As the security situation in Iraq continues to be a matter of grave concern, intelligence collection and analytical capabilities have been severely criticized. In December 2006 the Iraq Study Group concluded that the "Defense Department and the intelligence community have not invested sufficient people and resources to understand the political and military threat to American men and women in the armed forces." The Group further maintained that intelligence agencies "are not doing enough to map the insurgency, dissect it, and understand it on a national and provincial level. The analytic community's knowledge of the organization, leadership, financing, and operations of militias, as well as their relationship to government security forces, also falls far short of what policy makers need to know."[9]

International Terrorism

Although intelligence agencies were focused on international terrorism from at least the mid-1980s, the events of September 11, 2001 made counterterrorism a primary mission of the Intelligence Community. In response to a widespread perception that barriers that restricted the flow of information between the CIA and the FBI, Congress passed the USA PATRIOT Act (P.L. 107-56) which removed barriers on sharing foreign intelligence and law enforcement information (including grand jury information). The PATRIOT Act was designed to facilitate an all-source intelligence effort against terrorist groups that work both inside and outside U.S. borders. Nevertheless, problems of coordination and institutional rivalries persist. Moreover, some provisions in the USA PATRIOT Act relating to the sharing of law enforcement and foreign intelligence information were to have expired in early 2006,

but new legislation (P.L. 109-177 and P.L. 109-178) was enacted on March 9, 2006, that extended expiring provisions with modifications.[10]

Legislation was also enacted to create a Department of Homeland Security that would contain an analytical office responsible for integrating information from foreign intelligence and law enforcement sources. In addition, the Administration announced the establishment of the Terrorist Threat Integration Center (TTIC) in January 2003 under the DCI. In accordance with EO13354 of August 27, 2004 and the Intelligence Reform Act, TTIC has been transferred to the National Counterterrorism Center (NCTC).

As an intelligence mission, counterterrorism has several unique characteristics. Although it usually requires input from all the various intelligence disciplines, most observers believe that it is especially dependent upon humint. Technical systems are good at providing information about numbers of airplanes, ships, and tanks but the most important information on small groups of terrorist plotters often is provided by humint sources. Furthermore, the type of humint required for counterterrorism depends on contacts with sources far removed from embassy gatherings and requires expertise in languages that are possessed by few in this country. This is a distinct difference from humint collection during the Cold War when Soviet diplomats and military officers were often the principal targets.[11]

Intelligence Support to Military Forces

In 1997, the House intelligence committee noted that "intelligence is now incorporated into the very fiber of tactical military operational activities, whether forces are being utilized to conduct humanitarian missions or are engaged in full-scale combat." The Persian Gulf War demonstrated the importance of intelligence from both tactical and national systems, including satellites that had been previously directed almost entirely at Soviet facilities. There were, nonetheless, numerous technical difficulties, especially in transmitting data in usable formats and in a timely manner. Many of these issues have since been addressed with congressional support and in Operation Iraqi Freedom intelligence was an integral part of the operational campaign.

Issues in the 110th Congress

Observers expect that oversight of the implementation of the Intelligence Reform Act will extend into the 110th Congress. Both chambers will address authorization and appropriations legislation in accordance with procedures established in the Intelligence Reform Act, undoubtedly taking into consideration the diverse interpretations of different Members regarding the provisions. Congress is also likely to monitor the evolving relationship between the DNI and the CIA Director especially in regard to humint collection and covert operations as well to CIA's analytical efforts. The role of the Defense Department and the Under Secretary of Defense for Intelligence are also likely to be a congressional concern.

Quality of Analysis

Evaluations of the Intelligence Community's performance in regard to Iraqi WMD undertaken by congressional committees and by the Robb/Silverman Commission are likely

to affect the influence of ongoing assessments of Iranian and North Korean and potentially other nuclear programs. Intelligence on WMD requires the collecting of data with highly sophisticated technical systems and by human agents in areas where U.S. access is limited and continuing analysis of complex and subtle indicators. As WMD proliferation will remain a major policy concern, the quality of supporting intelligence is likely to be a focal point of congressional interest in the Intelligence Community.

Implementation of the Intelligence Reform Act (P.L. 108-458).

The legislation is expected to continue to have a major influence on the Intelligence Community. The DNI will have authority to task intelligence collection and analysis and manage national intelligence centers including the National Counterterrorism Center, which encompasses TTIC, and the National Counter Proliferation Center (and potentially additional centers). The DNI will have enhanced budgetary and acquisition authorities over the entire national intelligence effort, although the exact contours of the relationship with other government organizations, especially the Defense Department, will be addressed in accordance with presidential guidelines.

The act has a number of provisions designed to ensure that intelligence analysis is not politicized or biased and to protect civil liberties at a time when additional counterterrorism measures are being undertaken. Intelligence agencies in the DOD will remain in their existing chain of command and continue to be responsible for providing support to combat commands.

The expansion of intelligence efforts, especially concentrated in counterterrorism, has resulted in a severe shortage of trained analysts, especially those with excellent foreign language talents. The problem is already acute in some agencies and the likelihood of significant retirements in coming years will complicate efforts to improve intelligence capabilities.

ISR Programs

Although major intelligence, surveillance, and reconnaissance programs are classified and discussed in the classified annexes of intelligence authorization and defense appropriations acts, they include a substantial portion of the overall intelligence budget. Satellites and NSA's sigint efforts are likely to continue to receive close scrutiny from Congress throughout the 110th Congress given their technological complexity and high costs.[12]

Terrorist Surveillance Program/NSA Electronic Surveillance/FISA.

In December 2005 media accounts of electronic surveillance by NSA authorized outside the parameters of the Foreign Intelligence Surveillance Act (FISA) led to extensive criticism of the Administration. Although the technical details of the effort remain classified, the Administration maintains that communications, which involve a party reasonably considered to be a member of Al Qaeda, or affiliated with Al Qaeda, and one party in the U.S., may be monitored on the basis of the President's constitutional authorities and the provisions of the Joint Resolution providing for Authority for the Use of Force (P.L. 107-40) of September 18,

2001. The need for speed and agility requires, the Administration further argues, an approach not envisioned by the drafters of FISA. Others counter that FISA should have governed such electronic surveillance. In early March 2006 agreement was reached with the leadership of the two intelligence committees to establish procedures for enhanced legislative oversight of the NSA effort, and legislative initiatives are under consideration that would either modify FISA or establish new statutory authorities for electronic surveillance.

Differing views of Members on the NSA effort were reflected in the House Intelligence Committee's 2006 report on FY2007 intelligence authorization legislation (H.Rept. 109-411).[13] In light of decisions issued by the Foreign Intelligence Surveillance Court (FISC) on January 10, 2007, the Administration advised the Chairman and Ranking Member of the Senate Judiciary Committee that any electronic surveillance that had previously occurred as part of the Terrorist Surveillance Program (TSP) would thereafter be conducted subject to the approval of the FISC. Further, the Administration indicated that it would not re-authorize the TSP after the expiration of the then-current authorization. On May 1, 2007, the Senate Intelligence Committee held an open hearing on the Administration's proposal to revise FISA to take account of changes in communications technologies since the 1970s, with Members expressing differing views on the desirability of the legislation.[14]

According to media reports, a judge on the FISC at some point in 2007 ruled that a FISC order was required for surveillance of communications between foreign persons abroad if the communications passed through the United States. On August 2, 2007, the DNI issued a statement on FISA modernization in which he contended that the Intelligence Community "should not be required to obtain court orders to effectively collect foreign intelligence from foreign targets located overseas." Although details of the effort remain classified, there appears to have been wide agreement among Members that FISA needed to be amended to permit surveillance without a court order of such foreign to foreign communications regardless of whether they were routed through the United States.

The Protect America Act (P.L. 110-55), signed on August 5, 2007, after extensive congressional debate excluded from the definition of "electronic surveillance" under FISA, surveillance directed at a person reasonably believed to be located outside the United States. In addition, under certain circumstances, FISA, as amended by this legislation, permitted the DNI and the Attorney General, for periods up to one year, to authorize acquisition of foreign intelligence information "concerning persons reasonably believed to be located outside of the United States," apparently including U.S. persons, and to direct a communications provider, custodian, or other person with access to the communication immediately to provide information, facilities, and assistance to accomplish the acquisition. Those receiving such directives had the right to contest them in court. The DNI and the Attorney General were required to certify, in part, that this acquisition did not constitute electronic surveillance; and the Attorney General was required to submit the procedures by which this determination is made to the FISC for review as to whether the Government determination was clearly erroneous. On a semiannual basis, the Attorney General must report to congressional oversight committees on instances of noncompliance with directives and numbers of certifications and directives issued during the reporting period. P.L. 110-55 expired on February 1, 2008 and efforts to extend it further failed in the House when H.R. 5349 was rejected on February 13.[15] Acquisitions authorized while the PAA was in force may continue until the expiration of the period for which they were authorized.

The Protect America Act was strongly criticized by some Members; on November 15, 2007, H.R. 3773, the RESTORE Act (the Responsible Electronic Surveillance that is Overseen, Reviewed, and Effective Act of 2007) was passed by the House to clarify that a court order is not required for the acquisition of the contents of communications between two persons neither of whom is known to be a U.S. person, and both of whom are reasonably believed to be located outside the United States, regardless of whether the communications passed through the United States or if the surveillance device was in the United States. If, in the course of such an acquisition, the communications of a U.S. person are incidentally intercepted, stringent minimization procedures would apply. Court orders would, however, be required if the communications of a non-U.S. person reasonably believed to be located outside the United States were targeted where the other parties to the target's communications are unknown and thus might include U.S. persons or persons located physically in the U.S. Some Members argue that this provision would unnecessarily tie the hands of intelligence agencies and jeopardize the counterterrorism effort. The RESTORE Act would also provide for increased judicial oversight and would require quarterly implementation and compliance audits by the Inspector General of the Justice Department, and add related congressional reporting requirements.

The Senate Intelligence Committee reported its own version of a FISA amendment on October 26. The Senate bill (S. 2248), as amended, contains provisions authorizing the Attorney General and the DNI jointly to authorize targeting of persons, other than U.S. persons, reasonably believed to be outside the U.S. to acquire foreign intelligence information for periods up to one year. Under the Senate bill, FISC approval would be required for targeting a U.S. person reasonably believed to be located outside the U.S. to acquire foreign intelligence information, if the acquisition constitutes electronic surveillance under FISA, or the acquisition of stored electronic communications or stored electronic data that requires an order under FISA, and the acquisition is conducted in the U.S. The Senate bill also would have provided some retroactive immunity to telecommunications companies from civil suits in federal and states courts related to assistance that they have provided to the government in connection with intelligence activities between September 11, 2001 and January 17, 2007.

A central issue has been the role of the Judicial Branch, and the FISC in particular, in approving and/or overseeing surveillance that does not target but may involve individuals who are U.S. persons. Some argue that only the independent judiciary can ensure that intelligence efforts do not become improperly or illegally directed towards Americans. FISA currently permits electronic surveillance to gather foreign intelligence information pursuant to a FISC order of U.S. persons where there is probable cause to believe they are foreign powers or agents of foreign powers if other statutory criteria are met. Some argue, however, that changes in technologies since FISA was enacted in 1978 have made case-by-case judicial review of each international communication link that might involve a U.S. person impractical and risky to national security. Details of this issue are complex and, in many cases, classified. The Senate approved S. 2248 on February 12 (and incorporated it into H.R. 3773).

On March 14 the House approved an amendment to the version of H.R. 3773 that had been approved by the Senate. The House amendment would require judicial review by the FISC of procedures for targeting a non-U.S. person located outside of the U.S. even if the person was not reasonably believed to be communicating with a U.S. person or a person

in the U.S. The House amendment would require either a prior FISC order approving the applicable certification, targeting procedures, and minimization procedures or a determination that an emergency situation exists in which case a certification would have to be filed with the FISC within seven days. The Administration argues that this requirement adds unprecedented requirements for targeting communications of non-U.S. persons that could result in delaying collection efforts and the loss of some intelligence forever.

If the target of an acquisition were a U.S. person reasonably believed to be outside the U.S., then, except in emergencies, the House-passed amendment would require a FISC order approving an application for an acquisition for a period up to 90 days. The acquisition could be renewed for additional 90 day periods upon submission of renewal applications. If the Attorney General authorized an emergency acquisition of such a U.S. person's communications, the Attorney General would have to submit an application for a court order within seven days of that authorization.

The House version of H.R. 3773 would also not grant retroactive immunity to telecommunications companies but would allow them to present evidence in their defense to a court. In addition, the House bill would establish a commission on warrantless electronic surveillance activities conducted between September 11, 2001 and January 17, 2007.

The House version of H.R. 3773 did not come to a vote in the Senate, and after considerable discussions, Representative Reyes introduced a new bill, H.R. 6304, on June 19 which strengthened the role of the FISC in approving procedures for intelligence surveillance and provided telecommunications companies an opportunity to demonstrate to the courts that they had acted in response to a request for support from the Executive Branch. H.R. 6304 was passed by the House on June 20, 2008 and by the Senate on July 9, 2008; it was signed by the President on July 10.[16]

Role of the CIA

Intelligence reform legislation enacted in 2004 may have a significant effect on the work of the CIA. The CIA Director does not have the Community-wide responsibilities that historically absorbed the attention of the DCI, nor is he responsible for daily morning briefings in the White House. In his role as National Humint Manager, the CIA Director oversees the National Clandestine Service's efforts humint collection by the CIA and coordinates humint efforts by other agencies. The CIA also retains primary responsibilities for all-source analysis on a vast array of international issues that are of concern to the U.S. Government. Some observers suggest that the CIA has lost stature as a result of the Intelligence Reform Act that placed the DNI between the head of the CIA and the President. Other observers argue, however, that without the burden of interagency coordination, the CIA Director will be better positioned to emphasize analytical and humint activities. Congress has expressed concern about both humint and the conduct of analysis on repeated occasions and may choose to oversee the CIA Director's efforts more closely.

Role of the FBI

In the wake of the September 2001 attacks, the FBI was strongly criticized for failing to focus on the terrorist threat, for failing to collect and strategically analyze intelligence, and for failing to share intelligence with other intelligence agencies (as well as among various FBI components). Subsequently, FBI Director Robert S. Mueller III introduced a number of reforms to create a better and more professional intelligence effort in an agency that has always emphasized law enforcement. Congress has expressed concern about the overall effectiveness of these reforms and with the FBI's widely criticized information technology acquisition efforts.[17]

The Role of the Under Secretary of Defense for Intelligence

The position of Under Secretary of Defense for Intelligence (USD(I)) was established by the Defense Authorization Act for FY2003 (P.L. 107-314, sec. 901). The statute and DOD directives gave the incumbent signification authorities for the direction and control of intelligence agencies within DOD especially in regard to systems acquisition. There are reports that DOD special forces have also been involved in human intelligence collection efforts that are not effectively coordinated with CIA. Some media commentators have pointed to potential conflicts between the office of the USD(I) and the DNI's office, but there is little official information available publicly. The first USD(I), Stephen Cambone, resigned at the end of 2006; his successor is retired Air Force Lt. General James Clapper who previously served as director of both NGA and DIA. In May 2007 the USD(I) was also designated Director of Defense Intelligence and will also serve on the DNI's executive committee.

Paramilitary Operations and Defense Humint

In the Afghan campaign and in Iraq the CIA conducted paramilitary operations separate from or alongside Special Forces from the Defense Department. Some observers, and the 9/11 Commission, have recommended that DOD assume responsibility for all such efforts to avoid duplication of effort. In addition, there had been media reports that CIA and DOD efforts in Afghanistan were not well coordinated. DCI Goss testified in February 2005, however, that a joint review by CIA and DOD had reaffirmed the need for separate efforts. Observers note that CIA can hire paramilitary operators (in many instances retired military personnel) for specific missions of a limited duration; in addition, some missions may be more appropriate for nonuniformed personnel.[18]

Some observers have expressed concern that expanded efforts by DOD intelligence personnel to collect humint overseas may interfere with ongoing efforts of CIA humint collectors.[19] Intelligence officials have maintained in congressional testimony that there is no unnecessary duplication of effort and that careful coordination is undertaken during the planning and implementing of such operations.[20] The determination to ensure that such coordination is effective was further reflected in the designation of the DCIA as head of the National Clandestine Service.

Regional Concerns

Despite the urgency of the counterterrorism mission, the Intelligence Community is responsible for supporting traditional national security concerns, including developments in China, North Korea, Iran, and South America. In February 2006 testimony before the Senate Intelligence Committee, DNI Negroponte provided a summary of the Intelligence Community's assessments of threats, challenges, and opportunities throughout the world. A similar review was provided by DNI Negroponte on January 11, 2007.

CIA and Allegations of Prisoner Abuse

Media accounts of abuse of prisoners in Iraq by CIA officials have led to calls for a congressional investigation. Some have also raised broader concerns about the role of intelligence agencies in holding and transporting prisoners.[21] The conference version of the FY2008 Intelligence Authorization bill (sec. 327) included provisions requiring all executive branch agencies, including the CIA, to use only interrogation techniques authorized by the Army Field Manual. Opposition to this provision was a primary reason cited in the President's message vetoing this legislation on March 8, 2008.

109th Congress Legislation

H.R. 2475 (Hoekstra)

Intelligence Authorization Act for FY2006; introduced May 19, 2005; reported June 2, 2005 (H.Rept. 109-101); passed House June 21, 2005.

H.R. 5020 (Hoekstra)

Intelligence Authorization Act for FY2007; introduced March 28, 2006; reported April 6, 2006 (H.Rept. 109-411); passed House April 26, 2006.

S. 1803 (Roberts)

Intelligence Authorization Act for FY2006; introduced and reported by the Select Committee on Intelligence, September 29, 2005 (S.Rept. 109-142); reported by the Armed Services Committee, October 27, 2005 (S.Rept. 109-173).

S. 3237 (Roberts)

Intelligence Authorization Act for FY2007; introduced and reported by the Select Committee on Intelligence, May 25, 2006 (S.Rept. 109-259); reported by the Armed Services Committee, June 21, 2006 (S.Rept. 109-265).

110th Congress Legislation

S. 372 (Rockefeller)

Intelligence Authorization Act for 2007. Introduced and reported by the Select Committee on Intelligence, January 24, 2007 (S.Rept. 110-2). Debated April 16-17, 2007.

S. 1538 (Rockefeller)

Intelligence Authorization Act for 2008. Introduced and reported by Select Committee on Intelligence, May 31, 2007 (S.Rept. 110-75). Reported by Armed Services Committee, June 26, 2007 (S.Rept. 110-92). Floor consideration, October 3, 2007; incorporated into H.R. 2082 as an amendment.

H.R. 1196 (Reyes)

Intelligence Authorization Act for FY2007. Introduced and referred to the Permanent Select Committee on Intelligence, February 27, 2007.

H.R. 2082 (Reyes)

Intelligence Authorization Act for FY2008. Introduced and referred to the Permanent Select Committee on Intelligence, May 1, 2007 (H.Rept. 110-131). Reported, May 2, 2007; debated May 10-11, 2007; approved May 11, 2007. Conference report (H.Rept. 110-478) filed December 6. House approved conference report, December 13, 2007; Senate approved conference report, February 13, 2008. Returned (vetoed) by the President, March 8, 2008.

H.R. 5959 (Reyes)

Intelligence Authorization Act for FY2009. Introduced and referred to Permanent Select Committee on Intelligence, May 5, 2008. Reported (amended), May 21, 2008.

S. 2996 (Rockefeller)

Intelligence Authorization Act for FY2009. Original measure reported, May 8, 2008.

FOR ADDITIONAL READING

U.S. Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, March 31, 2005.

U.S. Congress. Committee of Conference Intelligence Authorization Act for Fiscal Year 2005: Conference Report. December 7, 2004. 108th Congress, 2nd session (H.Rept. 108-798).

Intelligence Reform and Terrorism Prevention Act of 2004. December 7, 2004. 108th Congress, 2nd session. (H.Rept. 108-796).

U.S. Congress. House of Representatives. Permanent Select Committee on Intelligence. Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*. December 2002. 107th Congress, 2nd session (H.Rept. 107- 792). [Also, S.Rept. 107-351].

Intelligence Authorization Act for Fiscal Year 2005. June 21, 2004. 108th Congress, 2nd session (H.Rept. 108-558).

Intelligence Authorization Act for Fiscal Year 2006. June 2, 2005. 109th Congress, 1st session (H.Rept. 109-101).

Intelligence Authorization Act for Fiscal Year 2007. April 6, 2006. 109th Congress, 2nd session (H.Rept. 109-411).

Intelligence Authorization Act for Fiscal Year 2008. May 7, 2007. 110th Congress, 1st session (H.Rept. 110-131).

Intelligence Authorization Act for Fiscal Year 2008. Conference Report. December 6, 2007, 110th Congress, 1st session (H.Rept. 110-478).

Subcommittee on Terrorism and Homeland Security. *Counterterrorism Intelligence Capabilities and Performance Prior to 9-11*. July 2002.

U.S. Congress. Senate. Select Committee on Intelligence. *Report of the Select Committee on Intelligence on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq*. July 9, 2004. 108th Congress, 2d session. (S.Rept. 108-301).

Intelligence Authorization Act for Fiscal Year 2006. September 29, 2005. 109th Congress, 1st session. (S.Rept. 109-142).

To authorize Appropriations for Fiscal Year 2005 for Intelligence and Intelligence-Related Activities of the United States Government, the Intelligence Community Management Account, and the Central Intelligence Agency Retirement and Disability System. May 5, 2004. 108th Congress, 2nd session (S.Rept. 108-258).

Intelligence Authorization Act for Fiscal Year 2007. January 24, 2007. 110th Congress, 1st session. (S.Rept. 110-2).

Intelligence Authorization Act for Fiscal Year 2008. May 31, 2007. 110th Congress, 1st session. (S.Rept. 110-75).

U.S. Department of Justice, Commission for Review of FBI Security Programs, *A Review of FBI Security Programs*, March 2002.

U.S. National Commission on Terrorist Attacks Upon the United States. *The 9/11 Commission Report*, July 2004.

END NOTES

[1] See CRS Report RL32557, *Requirements for Linguists in Government Agencies*, by Jeffrey J. Kuenzi.

[2] The full report was released some months later as H.Rept. 107-792/S.Rept. 107-351.

[3] See CRS Report RL32600, *Comparison of 9/11 Commission Recommended Intelligence Reforms, Roberts Draft Bill, H.R. 4104, S. 190, S. 1520, S. 6, H.R. 4584, Current Law*, and CRS Report RL32601, *Comparison of 9/11 Commission Recommended Intelligence Reforms, S. 2845, S. 2774, H.R. 5024, Administration Proposal, H.R. 10, Current Law*, both by Alfred Cumming.

[4] See CRS Report RL32506, *The Proposed Authorities of a National Intelligence Director: Issues for Congress and Side-by-Side Comparison of S. 2845, H.R. 10, and Current Law*, by Alfred Cumming, and CRS Report RL32515, *Intelligence Community Reorganization: Potential Effects on DOD Intelligence Agencies*, by Richard A. Best, Jr.

[5] See CRS Report RL33742, 9/11 *Commission Recommendations,* by Richard F. Grimmett.

[6] See Government Accountability Office, *Information Sharing: the Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information*, GAO-06-385, March 2006, p. 30.

[7] For additional background, see CRS Report RS21696, *U.S. Intelligence and Policymaking: The Iraq Experience*, by Richard A. Best Jr.

[8] The report may be found at [http://www.wmd.gov/report/index.html].

[9] U.S., Iraq Study Group, Report (Washington: Vintage Books, 2006), p. 94.

[10] For further information, see CRS Report RS22412, *USA PATRIOT Improvement and Authorization Act of 2005: A Sketch*, by Brian T. Yeh and Charles Doyle.

[11] See CRS Report RL31292, *Intelligence to Counter Terrorism: Issues for Congress*, by Richard A. Best, Jr. Foreign language issues are covered in CRS Report RL32557, *Requirement for Linguists in Government Agencies*, by Jeffrey J. Kuenzi.

[12]For further information, see CRS Report RL32508, *Intelligence, Surveillance, and Reconnaissance (ISR) Programs: Issues for Congress*, by Richard A. Best Jr.

[13] See also CRS Report RL33637, *Electronic Surveillance Modernization Act, as passed by the House of Representatives*, and CRS Report RL33669, *Terrorist Surveillance Act of 2006: S. 3931 and Title II of S. 3929, the Terrorist Tracking, Identification, and Prosecution Act of 2006*, both by Elizabeth B. Bazan.

[14] See CRS Report RL34279, *The Foreign Intelligence Surveillance Act: A Brief Overview of Selected Issues* by Elizabeth B. Bazan.

[15] For further background see CRS Report RL34143, P.L. 110-55, *the Protect America Act of 2007: Modifications of the Foreign Intelligence Surveillance Act* by Elizabeth B. Bazan.

[16] See CRS Report RL34566. The *Foreign Intelligence Surveillance Act: A Sketch of Selected Issues* by Elizabeth B. Bazan.

[17] For further information, see CRS Report RL33033, *Intelligence Reform Implementation at the Federal Bureau of Investigation: Issues and Options for Congress*, by Alfred Cumming and Todd Masse.

[18] See CRS Report RS22017, *Special Operations Forces (SOF) and CIA Paramilitary Operations: Issues for Congress*, by Richard A. Best, Jr. and Andrew Feickert; also CRS Report RL33715, *Covert Action: Legislative Background and Possible Policy Questions*, by Alfred Cumming.

[19] See Barton Gellman, "Secret Unit Expands Rumsfeld's Domain," *Washington Post*, January 23, 2005, p. A1.

[20] See the testimony of General Bryan Brown, Commander, Special Operations Command, to the Senate Committee on Armed Services, Subcommittee on Emerging Threats and Capabilities, April 22, 2005.

[21] See CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Convention*, and CRS Report RL33643, *Undisclosed U.S. Detention Sites Overseas: Background and Legal Issues*, both by Jennifer K. Elsea.

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Chapter 3

INTELLIGENCE SPENDING: PUBLIC DISCLOSURE ISSUES

Richard A. Best, Jr. and Elizabeth B. Bazan

SUMMARY

Although the United States Intelligence Community encompasses large Federal agencies — the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office, the National Geospatial-Intelligence Agency (NGA), and the National Security Agency (NSA) — among others — neither Congress nor the executive branch has regularly made public the total extent of intelligence spending. Rather, intelligence programs and personnel are largely contained, but not identified, within the capacious budget of the Department of Defense (DOD). This practice has long been criticized by proponents of open government and many argue that the end of the Cold War has long since removed any justification for secret budgets. In 2004, the 9/11 Commission recommended that "the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret."

The Constitution mandates regular statements and accounts of expenditures, but the courts have regarded the Congress as having the power to define the meaning of the clause. From the creation of the modern U.S. Intelligence Community in the late 1940s, Congress and the executive branch shared a determination to keep intelligence spending secret. Proponents of this practice have argued that disclosures of major changes in intelligence spending from one year to the next would provide hostile parties with information on new program or cutbacks that could be exploited to U.S. disadvantage. Secondly, they believe that it would be practically impossible to limit disclosure to total figures and that explanations of what is included or excluded would lead to damaging revelations.

On the other hand, some Members dispute these arguments, stressing the positive effects of open government and the distortions of budget information that occur when the budgets of large agencies are classified. Legislation has been twice enacted expressing the "sense of the Congress" that total intelligence spending figures should be made public, but on several separate occasions both the House and the Senate have voted against making such

information public. The Clinton Administration released total appropriations figures for intelligence and intelligence-related activities for fiscal years 1997 and 1998, but subsequently such numbers have not been made public. Legal efforts to force release of intelligence spending figures have been unsuccessful.

Central to consideration of the issue is the composition of the "intelligence budget." Intelligence authorization bills have included not just the "National Intelligence Program" — the budgets for CIA, DIA, NSA *et al*., but also a wide variety of other intelligence and intelligence-related efforts conducted by the Defense Department. Shifts of tactical programs into or out of the total intelligence budgets have hitherto been important only to budget analysts; disclosing total intelligence budgets could make such transfers matters of concern to a far larger audience. Legislation reported by the Senate Intelligence Committee in January 2007 (S. 372) would require that funding for the National Intelligence Program be made public but it does not address other intelligence activities. Earlier versions of this Report were entitled *Intelligence Spending: Should Total Amounts Be Made Public*? This report will be updated as circumstances change.

INTRODUCTION

Since the creation of the modern U.S. intelligence community after World War II, neither Congress nor the executive branch has made public the total extent of intelligence spending except for two fiscal years in the 1990s. Rather, intelligence programs and personnel have largely been contained, but not identified, within the capacious expanse of the budget of the Department of Defense (DOD). This practice has long been criticized by proponents of open government. The intelligence reform effort of the mid-1970s that led to greater involvement of Congress in the oversight of the Intelligence Community also generated a number of proposals to make public the amounts spent on intelligence activities. Many observers subsequently argued that the end of the Cold War further reduced the need to keep secret the aggregate amount of intelligence spending. According to this view, with the dissolution of the Soviet Union, there are few foreign countries that can take advantage of information about trends in U.S. intelligence spending to develop effective countermeasures. Terrorist organizations, it is argued, lack the capability of exploiting total intelligence spending data.

In recent years, proposals for making public overall totals of intelligence spending have come under renewed consideration. In 1991 and 1992 legislation was enacted that stated the "sense of the Congress" that "the aggregate amount requested and authorized for, and spent on, intelligence and intelligence-related activities should be disclosed to the public in an appropriate manner" Nevertheless, both the House and the Senate voted in subsequent years not to require a release of intelligence spending data. During the Clinton Administration, Director of Central Intelligence (DCI) George Tenet twice took the initiative to release total figures for appropriations for intelligence and intelligence-related activities. Despite the release of data for fiscal years 1997 and 1998, however, no subsequent appropriations levels have been made public.

The issue has not, however, died. The 9/11 Commission, in its fmal report, recommended that "the overall amounts [or the "top line"] of money being appropriated for national intelligence and to its component agencies should no longer be kept secret. Congress should

pass a separate appropriations act for intelligence, defending the broad allocation of how these tens of billions of dollars have been assigned among the varieties of intelligence work."[1] A number of proposals for Intelligence reform legislation in 2004 included provisions for making the budget public, but the legislation ultimately enacted as the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) [hereafter referred to as the Intelligence Reform Act] did not include provisions for making budget numbers public. More recently, the FY2007 Intelligence Authorization legislation (S. 372) reported in the Senate in January 2007 would require publication of budget totals for national, but not tactical, intelligence programs.

This report describes the constituent parts of the intelligence budget, past practice in handling intelligence authorizations and appropriations, the arguments that have been advanced for and against making intelligence spending totals public, a legal analysis of these issues, and a review of the implications of post-Cold War developments on the question. It also describes past congressional interest in keeping intelligence spending totals secret.

WHAT CONSTITUTES THE INTELLIGENCE BUDGET?

The meaning of the term "intelligence budget" is not easily described. Although some may assume it is equivalent to the budget of the Central Intelligence Agency, in actuality it encompasses a wide variety of agencies and functions in various parts of the Federal Government that are involved in intelligence collection, analysis, and dissemination. At the same time, some important information collection efforts (such as reporting by U.S. embassies to the State Department) are not considered as intelligence activities and their funding is not included in the intelligence budget. A further complication, to be addressed below, is the separate category of intelligence- related activities undertaken in DOD that are included in overall intelligence spending categories. For some purposes, it is sufficient to describe intelligence and intelligence-related activities as those authorized by annual intelligence authorization acts.

In the context of annual budget reviews, both the executive branch and Congress have sought a comprehensive overview of all intelligence collection systems and activities. Thus, there emerged the concept of an intelligence *community*, not a monolithic organization but a grouping of governmental entities ranging in size from the CIA and NSA down to the small intelligence offices of the Treasury and Energy Departments. Except for the CIA, this community consists of components that are integral parts of agencies that are not themselves part of the Intelligence Community and their budgets are subject to separate authorization processes. Thus, for instance, the State Department's Bureau of Intelligence and Research is both part of the Intelligence Community and an organizational component of the Department of State. Its budget is considered as part of the overall intelligence budget and as a component of the State Department budget. Similar situations apply, on a much larger and expensive scale, in the Defense Department. Since these intelligence components are closely tied to their parent departments and share facilities and administrative structure with them, it is not always possible to desegregate intelligence and non-intelligence costs with precision.

For the purposes of this discussion, the U.S. "intelligence budget" is considered to consist of those activities authorized by the annual intelligence authorization acts, viz. the

intelligence and intelligence-related activities of the following elements of the United States government:

- the Central Intelligence Agency (CIA);
- the National Security Agency (NSA);
- the Defense Intelligence Agency (DIA);
- the National Geospatial-Intelligence Agency (NGA) (formerly the National Imagery and Mapping Agency (NIMA));
- the National Reconnaissance Office (NRO);
- the intelligence elements of the Army, Navy, Air Force, and the Marine Corps
- the State Department's Bureau of Intelligence and Research (INR);
- the Federal Bureau of Investigation (FBI);
- the Department of Homeland Security (DHS);
- the Coast Guard;
- the Department of the Treasury;
- the Department of Energy;
- the Drug Enforcement Administration (DEA).

The parameters of the intelligence budget are, to some extent, arbitrary. Lines between intelligence and other types of information-gathering efforts can be fine. As noted earlier, reporting by the State Department's Foreign Service Officers is an invaluable adjunct to intelligence collection, but is not considered an intelligence activity. Similarly, some reconnaissance and surveillance activities, mostly conducted in DOD, are very closely akin to intelligence, but for administrative or historical reasons have never been considered as being intelligence or intelligence- related activities *per se*.

The intelligence budget as authorized by Congress is now divided into two parts, the National Intelligence Program (NM) and the Military Intelligence Program (MIP). NIP programs (formerly categorized as the National Foreign Intelligence Program (NFIP)) are those undertaken in support of national-level decision making and are conducted by the CIA, DIA, NSA, the NRO, NGA, and other Washington-area agencies. MIP programs are those undertaken by DOD agencies in support of defense policymaking and of military commanders throughout the world. Until September, 2005, there were two sets of programs within DOD — the Joint Military Intelligence Program (JMIP) and Tactical Intelligence and Related Activities (TIARA). JMIP programs, established as a separate category in 1994, supported DOD-wide activities. TIARA programs were defined as "a diverse array of reconnaissance and target acquisition programs which are a functional part of the basic military force structure and provide direct support to military operations."[2] In recent years the overlap among intelligence and intelligence-related activities has grown — satellite photography, for instance, can now be made immediately available to tactical commanders and intelligence acquired at the tactical level is frequently transmitted to national-level agencies. As a result, JMIP and TIARA were combined by the Defense Department into the MIP in September 2005.

Within the MIP are programs that formerly constituted the JMIP that support DOD-wide intelligence efforts as well as programs directly supporting military operations that were formerly categorized as TIARA. The relationship of intelligence-related programs to regular

intelligence programs is a complex one that is not likely to be understood by many public observers. In 1994, then-DCI R. James Woolsey described them as a "loose amalgamation of activities that may vary from year to year, depending on how the various military services decide what constitutes tactical intelligence."[3] Intelligence-related programs, which may constitute somewhere around a third of total intelligence spending, are integral parts of defense programs; in many cases they are also supported by non-intelligence personnel and facilities. (The administrative expenses, for instance, of a military base that has intelligence-related missions as well as non-intelligence functions would probably not be included in intelligence accounts.) The role of intelligence-related programs is sometimes misinterpreted in public discussions of the multi-billion dollar intelligence effort.

With the passage of the Intelligence Reform Act in 2004, the Director of National Intelligence (DNI) has extensive statutory authorities for developing and determining the NIP and for presenting it to the President for approval.[4] The President in turn forwards the NIP to Congress as part of the annual budget submission in January or February of each year. The Office of the DNI (ODNI) serves as the DNI's staff for annual budget preparation and submission. The DNI participates in the development of the MIP by the Secretary of Defense. The Under Secretary of Defense for Intelligence (USD(I)) has the responsibility to "oversee all Defense intelligence budgetary matters to ensure compliance with the budget policies issues by the DNI for the NIP."[5] The USD(I) also serves as Program Executive for the MIP and supervises coordination during the programming, budgeting, and execution cycles. Thus, in the development of both the NIP and the MIP essential roles are played by the Office of the DNI and the office of the USD(I). The two offices have overlapping responsibilities and close coordination is required.

Past Budgetary Practice

Budgeting for secret intelligence efforts has long presented difficult challenges to the Congress. Realizing the need for some direction over the intelligence effort that had been disbanded in the immediate aftermath of World War II, President Truman established, in a directive of January 22, 1946, a coordinative element for intelligence activities, the Central Intelligence Group (CIG), headed by a Director of Central Intelligence, and consisting of representatives from the State, War, and Navy Departments. This was not the creation of a new agency, but a coordinative group; personnel and facilities were to be provided "within the limits of available appropriations."[6] This arrangement was questioned, however, because of concern that specific authorization by Congress would be legally required to make funds available to any agency in existence more than a year. Thus, it might have been illegal for the CIG to expend funds after January 22, 1947.[7]

Shortly after taking office in June, 1946, the second DCI, General Hoyt S. Vandenberg, arranged for the creation of a "working fund" consisting of allotments from the Departments of State, War, and the Navy, under the supervision of the Comptroller General, to cover the costs of the relatively small CIG.[8] It cannot be readily determined if funds were transferred from all three departments; the larger budgets of the War and Navy Departments may have made them more likely contributors than the State Department.[9]

Vandenberg, realizing the administrative weakness of this situation, began an effort to obtain congressional approval of an independent intelligence agency with its own budget. The

National Security Act of 1947, which created the unified National Defense Establishment, included provisions for a Central Intelligence Agency, headed by a Director of Central Intelligence. It also authorized the transfer of "personnel, property, and records" of the CIG to the new CIA; it did not, however, provide additional statutory language regarding the administration of the CIA. With the creation of the CIA by the National Security Act of 1947, arrangements were made for the continuation of previous funding mechanisms; "[t]he Agency was to conform as nearly as possible to normal procedures until further legislation by Congress should make exceptions fitting the special needs of the Agency."[10]

It was recognized that follow-on enabling legislation would be required. After some delays, Congress passed the Central Intelligence Act of 1949 (P.L. 81-110) to provide a firmer statutory base for the CIA and to establish procedures for regular appropriations. This legislation, reported by the two armed services committees, provided authority for the CIA "to transfer to and receive from other Government agencies such sums as may be approved by the Bureau of the Budget [predecessor of today's Office of Management and Budget]...." The 1949 Act also provided that "sums transferred to the [CIA]... may be expended for the purposes and under the authority of this Act without regard to limitations of appropriations from which transferred...."

Representative Carl Vinson, speaking on the floor of the House shortly after passage of the 1949 Act, stated that the legislation contained:

> the authority to transfer and receive from other Government agencies such sums as may be approved by the Bureau of the Budget for the performance of any of the agency functions. This is how the Central Intelligence Agency gets its money. It has been going on since the agency was created, and this simply legalizes that important function which is the only means by which the amount of money required to operate an efficient intelligence service can be concealed.[11]

In practice, the CIA Act of 1949 provides funding for CIA through the defense authorization and appropriation process.[12] Funding for other intelligence activities undertaken by DOD agencies was logically included in defense bills.

For many years, authorizations and appropriations for CIA were handled by a relatively small number of Members and staff of the two appropriations committees with consultation with members of the two armed services committees. According to available sources, senior Members of the Appropriations Committees insisted on maintaining the secrecy of the contents of the CIA's budget requests and congressional actions in response.[13] In 1956, subcommittees were created in the Armed Services and Appropriations Committees of each House to oversee the CIA. Many assessments of the practice of congressional oversight of intelligence activities during the Truman, Eisenhower, Kennedy, and Johnson Administrations have concluded that the congressional role was in large measure supportive and perfunctory. This view has, however, come under serious challenge and there is considerable evidence that Congress took close interest in intelligence spending, especially in regard to major surveillance systems and the construction of headquarters buildings.[14] The small handful of Members responsible for intelligence oversight had a close working relationship with the CIA. For a number of years, beginning in the Eisenhower Administration, Senator Richard Russell served both as chairman of the Armed Services

Committee and of the Subcommittee on Defense Appropriations and had an especially important influence on intelligence spending.[15]

During these Cold War years, intelligence budgets grew considerably in significant part because of efforts to determine the extent of Soviet nuclear capabilities through overhead surveillance by manned aircraft such as the U-2s and reconnaissance satellites, and through a worldwide signals intelligence effort. NSA and DIA emerged as major intelligence agencies with large budgets; other agencies were created to launch satellites and interpret overhead photography. These capabilities, which contributed directly to the design of strategic weapons systems and to the negotiation of strategic arms control agreements with the Soviet Union, cost many billions of dollars. These programs were initiated, funded by Congress, and administered in secrecy and involved a number of intelligence agencies and components of DOD. President Lyndon Johnson said on March 16, 1967:

> I wouldn't want to be quoted on this but we've spent 35 or 40 billion dollars on the space program. And if nothing else had come out of it except the knowledge we've gained from space photography, it would be worth 10 times what the whole program has cost. Because tonight we know how many missiles the enemy has and, it turned out, our guesses were way off. We were doing things we didn't need to do. We were building things we didn't need to build. We were harboring fears we didn't need to harbor. Because of satellites, I *know* how many missiles the enemy has.[16]

During the Ford Administration, E.O. 11905 of February 18, 1975, consolidated the budget for all intelligence agencies and provided for a comprehensive review of the National Foreign Intelligence Program by the DCI and senior DOD and NSC officials.[17] Subsequent executive orders (most recently E.O. 12333 of December 4, 1981) and the Intelligence Authorization Act for FY1993 (P.L. 102496)[18] clarified and strengthened the DCI' s role. The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) gave the newly established position of Director of National Intelligence (DNI) authority to coordinate intelligence activities across the government and to manage the NIP. The DNI has specific responsibilities for developing and determining the annual consolidated NIP budget. The DNI also participates in the development of the MIP which is the responsibility of the Secretary of Defense.

A key factor encouraging consolidated review of the intelligence budget has been increasingly detailed oversight by Congress. Efforts in the 1950s and 1960s to establish intelligence committees or to involve a larger number of Members in intelligence oversight were rebuffed, with oversight remaining in the hands of a small number of senior members. This situation was altered in the aftermath of the Vietnam War. In reaction to a series of revelations about allegedly illegal and improper activities by intelligence agencies in 1975, Congress created two (temporary) select committees to investigate the CIA and other intelligence agencies.[19] The Church and Pike Committees investigated a wide range of intelligence issues and conducted well-publicized hearings. Although budgetary issues were not at the heart of the investigations, there emerged a consensus that congressional oversight of intelligence agencies needed to be strengthened and formalized and permanent intelligence committees established. There was also widespread sentiment expressed that more information regarding intelligence agencies and activities should be made public.[20]

Following the work of the Church and Pike Committees, Congress moved to revamp oversight of intelligence agencies. The Senate Select Committee on Intelligence (SSCI) was established in 1976, the House Permanent Select Committee on Intelligence (HPSCI) in 1977. Each of these committees was granted oversight of the CIA as well as other intelligence agencies and charged to prevent the types of abuses that the Church and Pike Committees had criticized. In conjunction with their oversight duties, HPSCI and SSCI were responsible for authorizing funds for intelligence activities undertaken by the CIA and other agencies throughout the government. There is, however, a crucial difference between the charters of the two committees. Although HPSCI has oversight of NIP and shares (with the Armed Services Committee) oversight of the MIP, the SSCI has oversight only over the NIP. In the Senate, oversight of the MIP is conducted by the Armed Services Committee (with informal consultation with the intelligence committee).[21] Both SSCI and the Senate Armed Services Committee are represented in conferences on intelligence authorization bills; the final bill, as reported by the conference committee, authorizes both intelligence activities and intelligence-related activities.

The two intelligence committees are not the sole organs of congressional oversight. The armed services committees often issue sequential reports on intelligence authorization bills. Annual defense authorization acts include the large national intelligence agencies in DOD as well as the intelligence efforts of the four services. Intelligence activities of agencies outside of CIA and DOD are authorized in other legislation although some departments have standing authorizations rather than annual authorization acts.

Authorization

As is the case with other congressional committees, intelligence oversight has entailed reviewing annual budget proposals for the Intelligence Community submitted by the administration, conducting hearings, preparing an annual authorization bill, and managing it for the respective chamber. The two committees publish reports to accompany the annual intelligence authorization bills, with dollar amounts for various intelligence agencies and activities included in classified annexes.[22] The classified annexes are available to all Members, but only within Intelligence Committee offices and sanctions exist for any unauthorized release of classified data.

The intelligence committees, however, do not have exclusive jurisdiction over expenditures for intelligence programs. National defense authorization acts also contain authorizing legislation for intelligence activities funded within their purview. There are various parts of defense authorization bills that are classified; some cover what are known as special access or "black" programs.[23] These include not only some intelligence programs but also procurement of new weapons systems such as stealth aircraft. Members can obtain information about classified parts of defense authorization bills from the Armed Services Committees.

Other authorization bills cover some intelligence activities providing a form of shared oversight. Budgets for INR, DEA and the FBI are funded through the appropriation bills that cover the Departments of Commerce, Justice, and State and similar procedures are used for Treasury and Energy Department intelligence entities in the Treasury, Postal Service, and General Government and Energy and Water Development appropriations bills. All of these

combined, however, represent a small percentage of total intelligence spending—for instance, the FY2007 budget request for INR totaled only $51 million and other agencies are considerably smaller.

There has been some controversy regarding the nature of authorizing legislation required. Section 504(a) of the National Security Act provides that appropriated funds maybe obligated or expended for an intelligence or intelligence-related activity only if ... those funds were specifically authorized by the Congress for use for such activities... .” The nature of specific authorization had not, however, been defined. On November 30, 1990, President George H.W. Bush refused to sign (“pocket vetoed”) the FY1991 Intelligence Authorization bill when it was presented to him (after the 101st Congress had adjourned) and for over eight months intelligence activities were continued without an intelligence authorization act.[24] Although some believed that authorizations contained within the National Defense Authorization Act for FY1991 (P.L. 101-510) were sufficiently specific to meet the requirements of the statute, the House Intelligence Committee subsequently stated that, “It is the view of the congressional intelligence committees that only an intelligence authorization bill provides the degree of specificity necessary to comply with the meaning and intent of Section 504(a).”[25] In 1993, language was included in the House report accompanying the FY1994 Defense Authorization Act that the Armed Services Committee “does not intend that the inclusion of ... authorization [ofNFlP programs] be considered a specific authorization, as required by section [504] of the National Security Act of 1947....”[26] (This statement indicated that, whereas NFlP programs were not specifically authorized in defense authorization bills, TIARA programs were.) In addition, section 309 of the FY1994 Intelligence Authorization Act for FY1994 (P.L. 103-178) amended the National Security Act of 1947 to make it explicit in law that the general authorization included in the 1947 legislation[27] does not satisfy the requirement for specific authorization of intelligence and intelligence- related activities.

In some years when appropriations have been passed prior to final action on authorization bills, the appropriations acts have included a provision similar to section 8092 of the FY2006 Defense Appropriations Act (P.L. 109-148):

> Funds appropriated by this Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 414) during fiscal year 2006 until the enactment of the Intelligence Authorization Act for fiscal year 2006.

No FY2006 intelligence authorization bill was passed and, as a result, this brief clause in the appropriations bill served as the requisite authorization during FY2006. The FY2007 defense appropriations bill was passed prior to floor consideration of a FY2007 intelligence authorization bill and a similar clause was included in the defense appropriations bill (P.L. 109-289, section 8083). (No intelligence authorization legislation was passed in the 109th Congress, but an intelligence authorization bill for FY2007 (S. 372) was reported in the Senate in January 2007.) Although these provisions meet the statutory requirement for a “specific authorization,” significantly less congressional guidance is provided for intelligence programs.

Appropriations

As is the case with all government activities, the appropriations committees have a central role in intelligence programs. Even during the Cold War period when congressional oversight of intelligence activities received little public attention, annual appropriations were required and extensive hearing were held. In recent years, appropriations committees have had an increasingly significant influence on the conduct of intelligence activities. In 1998 a supplemental appropriation act (P.L. 105-277) added substantial funds for intelligence efforts not included in the annual authorization bill, and in the post-9/11 period the practice of relying on supplemental appropriations for funding the regular operations of intelligence agencies has limited the extent of congressional guidance in regard to the intelligence budget.

The reliance on supplemental appropriations has been widely criticized; the House Intelligence Committee in 2003 noted that while supplemental appropriations had reflected crisis in the aftermath of terrorist attacks, "The repeated reliance on supplemental appropriations has an erosive negative effect on planning, and impedes long-term, strategic planning. The Committee hopes that the IC has finally reached a plateau of resources and capabilities on which long-term strategic planning can now begin."[28]

In addition to use of supplemental appropriations to fund intelligence activities, as noted above the required "specific authorization" of intelligence programs required by the section 504 of the National Security Act has in FY2006 been supplied by one paragraph (section 8092) of the FY2006 defense appropriations act (P.L. 109—148). The reliance on appropriations measures to authorize intelligence programs may change the contours of intelligence oversight in Congress by emphasizing the role of the two appropriations committees.

The defense subcommittees of the two appropriations committees review intelligence budget requests and approve funding levels for intelligence agencies that are part of DOD or whose budgets are contained (but not publicly identified) in defense appropriations acts, that is, CIA as well as NSA, DIA, the NRO, and NGA. There is a difference between appropriations for the CIA and the ODNI which, although included in defense appropriations acts, are transferred by the Office of Management and Budget (OMB) directly to the DNI and the CIA Director without the involvement of DOD. The Secretary of Defense is, however, heavily involved in the budgets and activities of intelligence agencies in DOD. The CIA and the defense agencies account for the vast bulk of all intelligence spending. Much smaller amounts are funded in appropriations measures for other departments that contain elements of the Intelligence Community.

The role of the appropriations committees can be significant. For instance, in 1992, the Defense Appropriation Act for FY1993 (P.L. 102-396) reportedly reduced intelligence spending to a level significantly lower than authorized by the Intelligence Authorization Act (P.L. 102-496).[29] In 1990-1991, the Senate Appropriations Committee and the SSCI worked closely together to sponsor a facilities consolidation plan for some CIA activities without the active involvement of the HPSCI. Substantial changes have been made to intelligence programs by appropriations measures and in FY2006 no intelligence authorization act exists and thus agencies rely solely on appropriations legislation.

THE QUESTION OF DISCLOSURE

Since the creation of the modern Intelligence Community in the aftermath of World War II, intelligence budgets have not been made public.[30] At the conclusion of hostilities in August 1945, intelligence activities were transferred from the Office of Strategic Services (OSS) to the Army, Navy, and State Departments, which assumed responsibility for their funding. Meeting the expenses of the CIG, created in 1946, required the establishment of a "working fund," as noted above, which received allocations from the three departments. This pattern was continued when the CIA was established the following year (although there may have been relatively few, if any, transfers from the State Department). The transfer of appropriated funds was done secretly, reportedly at the insistence of Members of Congress.[31]

There are several parts of the intelligence budget that are made public. The costs of the Intelligence Community Management Account (CMA) are specified in annual intelligence authorization acts as are the costs of the CIA Retirement and Disability System (CIARDS). The CMA includes staff support to the DNI role and the CIARDS covers retirement costs of CIA personnel not eligible for participation in the government-wide retirement system. For FY2005, $310.4 million was authorized for 310 full-time CMA personnel and $239 4 million was authorized for CIARDS. In addition, the budget for the State Department's Bureau of Intelligence and Research is made public and some, but not all, tactical intelligence programs are identified in unclassified DOD budget submissions. Careful scrutiny of officially-published data on intelligence expenditures would not, however, provide a valid sense of the size and content of the intelligence budget.

The Church and Pike committees both called for public disclosure of the total amounts of each annual intelligence budget.[32] The then DCI, George H.W. Bush, and President Ford both appealed to the Senate not to proceed with disclosure and the question was referred to the newly created SSCI. After conducting hearings,[33] SSCI recommended (by a one vote margin) in May 1977 (S.Res. 207, 95th Congress) that aggregate amounts appropriated for national foreign intelligence activities for FY1978 be disclosed.[34] The full Senate did not, however, act on this recommendation.

HPSCI, established by House Rule XLVIII after the termination of the Pike Committee, made an extensive study of the disclosure question. After conducting hearings in 1978[35] (and despite the willingness of then DCI Stansfield Turner to accept disclosure of "a single inclusive budget figure") the House Committee concluded unanimously that it could find "no persuasive reason why disclosure of any or all amounts of the funds authorized for the intelligence and intelligence-related activities of the government would be in the public interest."[36] With the failure of either chamber to take action, the disclosure question receded into the background as efforts (ultimately unsuccessful) were underway during the Carter Administration to draft a legislative charter for the entire Intelligence Community. The Reagan Administration showed markedly less interest in such questions as it launched a major expansion of intelligence activities. The issue would return during the Clinton Administration after the end of the Cold War and again in the recommendations of the 9/11 Commission as noted below.

It should be understood that with the establishment of the two intelligence committees in the 1970s, Members have been able to review budget figures contained in the classified

annexes accompanying reports intelligence authorization bills, although rules of both chambers prevent the divulging of classified information.

Policy Arguments, Pro and Con

Since the 1970s, arguments for and against the public disclosure of intelligence spending levels have turned on essentially the same issues, *viz.* the constitutional issue regarding the requirement for full reports of government expenditures (discussed below) and the broader question of the value of open political discourse, the dangers of revealing useful information to actual or potential enemies, and the difficulty of providing and debating aggregate numbers without being drawn into providing details.[37]

Advocates of disclosure argue that greater public discussion of intelligence spending made possible by the disclosure of spending levels would ultimately lead to a stronger intelligence effort. They maintain that no organization, even one with superior management and personnel, is immune to waste and inefficiency and that wider appreciation of the costs and benefits of intelligence could contribute in the long run toward improvements in the organization and functioning of intelligence.[38] Senator William Proxmire put the case as follows:

> ... people not only have a right to know, but you are going to have a much more efficient government when they do know. We only make improvements when we get criticized, and you can only criticize when you know what you are talking about, when you have some information.
>
> If you know that there is a certain amount being spent on intelligence, then you are in a much stronger position to criticize what you are getting for that expenditure.[39]

Also, in terms of efficiency, publication of an aggregate figure for intelligence spending would result in a cleaner, more accurate defense budget. As presently handled, the defense budget includes significant unspecified national intelligence expenditures (e.g., the greater part of the CIA budget) that in many cases are not actually part of defense spending *per se*. Such expenditures make the defense budget and various components of it seem larger than is the case. Identification of those intelligence expenditures that are extraneous to defense could give the public a more accurate perception of defense costs.[40]

Those holding this position argue, in addition, that publication of limited intelligence spending totals would provide no useful information to a present or future adversary. Even during the height of the Cold War, Soviet authorities, they maintain, undoubtedly had a reasonably accurate knowledge of the extent of the U.S. intelligence budget and, in any event, were more concerned with the nature of our activities rather than the size of expenditures. Noting the demise of the Soviet Union, Representative Dan Glickman, then the Chairman of the House Intelligence Committee, stated in 1994 that "Unless a justification on national security grounds exists, keeping the budget totals secret serves only one purpose, and that is to prevent the American taxpayer from knowing how much money is spent on intelligence."[41]

Opposition to public release has been based on the conviction that intelligence by its very nature stands apart from other activities of the government and the publication of general

budgetary information, potentially exploitable by an adversary attempting to discern U.S. intelligence capabilities and operations, could compromise the nation's intelligence capabilities. This concept perceives intelligence to be an exceptional activity that cannot be handled according to normal procedures of an open society. This is particularly true of those operations that involve the collection of intelligence information. Sophisticated reconnaissance devices, electronic technology, and human resources operating at significant risk are particularly vulnerable to human error or hostile penetration; consequently, they require extraordinary protective measures. In 1983, HPSCI described the unique vulnerabilities of intelligence systems as follows:

> Intelligence activities and capabilities are inherently fragile. Unlike weapons systems, which can be countered only by the development of even more sophisticated systems developed over a long period, intelligence systems are subject to immediate compromise. Often they can be countered or frustrated rapidly simply on the basis of knowledge of their existence. Thus budget disclosure might well mean more to this country's adversaries than to any of its citizens. Further, this information could then be used to frustrate United States intelligence missions.[42]

At the end of the Cold War along with the downsizing of the defense budget it was argued that intelligence spending should be significantly reduced. Some advocates of reduction anticipated that publication of spending totals would lead to a perception by the public that such levels of intelligence spending were unjustified and could be lowered. This potential for public opposition to existing levels of spending was also recognized by many who defended intelligence spending levels and probably reinforced their opposition to making the budget public.

Although such perspectives may have been widely shared in the early 1990s, later in the decade the emergence of international terrorism and other transnational threats lead to concerns that intelligence spending should not be further reduced. The 9/11 attacks altered the climate regarding intelligence spending; even though there was widespread criticism of the performance of intelligence agencies, there was a pervasive determination to spend whatever was necessary on intelligence as part of the global war on terrorism. In recent years the argument for making intelligence spending levels public has not in general been a proxy argument for reducing intelligence spending inasmuch as few would argue that less intelligence is needed given the realistic potential for more Al Qaeda attacks.

Other opponents of disclosure have argued that making public a few numbers indicating total spending levels (whether budget requests, authorizations, or appropriations) will be meaningless to the public debate. Explanations will be immediately required to show that these figures are divided among several functions, threats, and agencies, cover national and tactical programs, may or may not include administrative and logistical support, etc. Pressures will in a politically adversarial context mount to publish these sub-totals as well as an aggregated figure. It is further argued that these explanations would likely result in a degree of transparency for U.S. intelligence activities that would allow adversaries to take effective countermeasures.

There is also a contrary argument that intelligence spending, even within the NIP, is in large measure related to defense programs and could be usefully expressed as a percentage of overall defense spending. Admiral Bobby Ray Inman, who served as Deputy Director of

Central Intelligence in the early Reagan Administration, testified in 1991 that, "I am certainly prepared to make unclassified the total amount, and defend to the public why 10% of our total defense efforts spent for both national and tactical intelligence is not a bad goal at all. Just as I don't think that 11 or 12% of the budget for research and development is a bad goal at all for the country."[43]

Some opponents of greater disclosure point out that large fluctuations in intelligence spending might also reveal major new programs under development (the example of the U-2s and satellites is sometimes mentioned). Premature exposure of such new capabilities could severely limit their ability to acquire valuable information before adversaries become aware of U.S. capabilities. On the other hand, according to a 1991 Senate report, DCI Stansfield Turner "testified in 1977 that there had been no 'conspicuous bumps' in the intelligence budget for the preceding decade. The [Senate] Select Committee's experience is similarly that no secrets would have been lost by publishing the annual aggregate budget total since then."[44] Unconvinced defense analysts insist that revealing the fact of significant changes in U.S. intelligence budgets from year to year will alert unfriendly governments or groups to new efforts against them (or to a slackened effort by the U.S. that can be exploited).

Public discussion of the question of making intelligence budgets public has usually turned on the question of the constitutionality or the propriety of keeping intelligence spending figures classified. Beyond these issues, however, lies the less-discus sed issue of the nature of intelligence and intelligence-related spending. The existence of the NIP and the MIP has been publicly acknowledged in many Executive and Legislative Branch publications. However, the respective roles of the separate programs are not well known outside of a relatively narrow circle of intelligence specialists. The role of tactical programs in particular is rarely considered in the context of discussions of making intelligence spending levels public. Observers express concern that characterizing some projects related to information support for targeting as a tactical intelligence program could be characterized in some cases as arbitrary inasmuch as similar projects may be included in other parts of the Defense budget. Reportedly, inclusion of some projects in the MIP program is not consistent from year to year and thus could lead to confusion in tracking intelligence spending.

Some consideration has been given to making public only the budget for the NIP which contains funding for the CIA, the National Reconnaissance Office (NRO), the National Geospatial-Intelligence Agency (formerly the National Imagery and Mapping Agency (NIMA)), and the National Security Agency (NSA).

When making total NIP spending public, some observers would consolidate responsibility for authorizing NIP in the two intelligence committees, leaving the armed services to deal with the MIP. It is likely that jurisdiction of the Armed Services committees will continue inasmuch as the NIP includes the budgets of major defense agencies that report to the Secretary of Defense and to which are assigned many thousands of military personnel. Some argue that the close ties between the NRO, NGA, and NSA and other Defense agencies also require that their budgets be prepared in the same Department.

In 2002 the position of Under Secretary of Defense for Intelligence (USD(I)) was established by section 901 of the FY2003 National Defense Authorization Act (P.L. 107-314). The incumbent of this position, currently Stephen Cambone, is charged with overseeing the budgets of DOD's intelligence agencies, including the portions that fall within the NIP and those are contained in the MIP. The USD(I) is the key point of contact between DOD and the

Office of the DNI and the two offices collaborate in the preparation of annual budget submissions to Congress along with those of other intelligence agencies.

CONSTITUTIONAL QUESTIONS RELATED TO DISCLOSURE OF AGGREGATE INTELLIGENCE BUDGET FIGURE

An issue that arises in considering whether or not to disclose an aggregate intelligence budget figure is whether the Statement and Account Clause of the United States Constitution requires such disclosure. The pertinent constitutional language is contained in Article I, Section 9, Clause 7, which states:

> No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; *and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time*. [Emphasis added.]

A brief examination of the history of this language and of the scant case law interpreting the Statement and Account Clause may be of assistance in placing the disclosure issue in context.

History of the Constitutional Language

During the Constitutional Convention in Philadelphia, the first language on the subject of statements and accounts was offered on September 14, 1787, by George Mason. The debate on the matter, as reflected in Madison's "Notes of Debates," was as follows:

> Col. Mason moved a clause requiring "that an Account of the public expenditures should be annually published" Mr. Gerry 2ded. the motion
>
> Mr Govr. Morris urged that this wd. be impossible in many cases.
>
> Mr. King remarked, that the term expenditures went to every minute shilling. This would be impracticable. Congs. might indeed make a monthly publication, but it would be in such general Statements as would afford no satisfactory information.
>
> Mr. Madison proposed to strike out "annually" from the motion & insert "from time to time" which would enjoin the duty of frequent publications and leave enough to the discretion of the Legislature. Require too much and the difficulty will be get a habit of doing nothing. The articles of Confederation require half- yearly publications on this subject — A punctual compliance being often impossible, the practice has ceased altogether
>
> Mr Wilson 2ded. & supported the motion — Many operations of finance cannot be properly published at certain times.

> Mr, Pinckney was in favor of the motion.
>
> Mr. Fitzimmons — It is absolutely impossible to publish expenditures in the full extent of the term.
>
> Mr. Sherman thought "from time to time" the best rule to be given.
>
> "Annual" was struck out — & those words — inserted nem: con:
>
> The motion of Col. Mason so amended was then agreed to nem: con: and added after — "appropriations by law as follows — "And a regular statement and account of the receipts & expenditures of all public money shall be published from time to time."[45]

During the Virginia ratifying convention, the Statement and Account Clause occasioned comment on at least two occasions. On June 12, 1788, James Madison observed:

> The congressional proceedings are to be occasionally published, including *all receipts and expenditures* of public money, of which no part can be used, but in consequence of appropriations made by law. This is a security which we do not enjoy under the existing system. That part which authorizes the government to withhold from the public knowledge what in their judgment may require secrecy, is imitated from the confederation — that very system which the gentleman advocates.[46]

On the 17th of June, 1788,[47] George Mason raised a question as to the "from time to time" language, and the following debate ensued:

> Mr. GEORGE MASON apprehended the loose expression of "publication from time to time" was applicable to any time. It was equally applicable to monthly and septennial periods. It might be extended ever so much. The reason urged in favor of this ambiguous expression was, that there might be some matters which require secrecy. In matters relative to military operations and foreign negotiations, secrecy was necessary sometimes; but he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people, he affirmed, had a right to know the expenditures of their money; but that this expression was so loose, it might be concealed forever from them, and might afford opportunities of misapplying the public money, and sheltering those who did it. He concluded it to be as exceptionable as any clause, in so few words, could be.
>
> Mr. LEE (of Westmoreland) thought such trivial argument as that just used by the honorable gentleman would have no weight with the committee. He conceived the expression to be sufficiently explicit and satisfactory. It must be supposed to mean, in the common acceptation of language, short, convenient periods. It was as well as if it had said one year, or a shorter term. Those who would neglect this provision would disobey the most pointed directions. As the Assembly was to meet next week, he hoped gentlemen would confine themselves to the investigation of the principal parts of the Constitution.

Mr. MASON begged to be permitted to use that mode of arguing to which he had been accustomed. However desirous he was of pleasing that worthy gentleman, his duty would not give way to that pleasure.

Mr. GEORGE NICHOLAS said it was a better direction and security than was in the state government. No appropriation shall be made of the public money but by law. There could not be any misapplication of it. Therefore, he thought, instead of censure it merited applause; being a cautious provision, which few constitutions, or none, had ever adopted.

Mr. CORBIN concurred in the sentiments of Mr. Nicholas on this subject.

Mr. MADISON thought it much better than if it had mentioned any specified period; because, if the accounts of the public receipts and expenditures were to be published at short, stated periods, they would not be so full and connected as would be necessary for a thorough comprehension of them, and detection of any errors. But by giving them an opportunity of publishing them from time to time, as might be found easy and convenient, they would be more full and satisfactory to the public, and would be sufficiently frequent. He thought, after all, that this provision went farther than the constitution of any state in the Union, or perhaps in the world.

Mr. MASON replied, that, in the Confederation, the public proceedings were to be published monthly, which was infinitely better than depending on men's virtue to publish them or not, as they might please. If there was no such provision in the Constitution of Virginia, gentlemen ought to consider the difference between such a full representation, dispersed and mingled with every part of the community, as the state representation was, and such an inadequate representation as this was. One might be safely trusted, but not the other.

Mr. MADISON replied, that the inconveniences which had been experienced from the Confederation, in that respect, had their weight in him in recommending this in preference to it; for that it was impossible, in such short intervals, to adjust the public accounts in any satisfactory manner

Mr. HENRY. Mr Chairman, we have now come to the 9th section, and I consider myself at liberty to take a short view of the whole. I wish to do it very briefly. Give me leave to remark that there is a bill of rights in that government.

There are express restrictions, which re in the shape of a bill of rights; but they bear the name of the 9th section. The design of the negative expressions in this section is to prescribe limits beyond which the powers of Congress shall not go. These are the sole bounds intended by the American government. Whereabouts do we stand with respect to a bill of rights? Examine it, and compare it to the idea manifested by the Virginian bill of rights, or that of the other states. The restraints in this congressional bill of rights are so feeble and few, that it would have been infinitely better to have said nothing about it. The fair implication is, that they can do every thing they are not forbidden to do. What will be the result if Congress, in the course of their legislation, should do a thing not restrained by this 9th section? It will fall as an incidental power to Congress, not being prohibited expressly in the Constitution....

> If the government of Virginia passes a law in contradiction to our bill of rights, it is nugatory. By that paper the national wealth is to be disposed of under the veil of secrecy; for the publication from time to time will amount to nothing, and they may conceal what they may think requires secrecy. How different it is in your own government! Have not the people seen the journals of our legislature every day during every session? Is not the *lobby* full of people every day? Yet gentlemen say that the publication from time to time is a security unknown in our state government! Such a regulation would be nugatory and vain, or at least needless, as the people see the journals of our legislature, and hear their debates, every day. If this be not more secure than what is in that paper, I will give up that I have totally misconceived the principles of the government. You are told that your rights are secured in this new government. They are guarded in no other part but this 9th section. The few restrictions in that section are your only safeguards. They may control your actions, and your very words, without being repugnant to that paper.
>
> The existence of your dearest privileges will depend upon the consent of Congress, for they are not within the restrictions of the 9th section.... [48]

Some attention to this clause was also given in the New York ratifying convention and in the Maryland House of Delegates. The pertinent portion of the New York debates took place on June 27, 1788. During those debates, Mr. Chancellor Livingston, in expounding upon concerns raised with regard to the power to tax, stated in pertinent part:

> ... You will give up to your state legislatures every thing dear and valuable; but you will give no power to Congress, because it may be abused; you will give them no revenue, because the public treasures may be squandered. But do you not see here a capital check? Congress are to publish, from time to time, an account of their receipts and expenditures. These may be compared together; and if the former, year after year, exceed the latter, the corruption will be detected, and the people may use the constitutional mode of redress....
>
> ... I beg the committee to keep in mind, as an important idea, that the accounts of the general government are, "from time to time," to be submitted to the public inspection.
>
> Hon. Mr. SMITH remarked, that "from time to time' might mean from century to century, or any period of twenty or thirty years.
>
> The CHANCELLOR asked if the public were more anxious about any thing under heaven than the expenditure of money. Will not the representatives, said he, consider it essential to their popularity, to gratify their constituents with full and frequent statements of the public accounts? There can be no doubt of it.[49]

On November 29, 1787, the Delegates to the Constitutional Convention were called before the Maryland House of Delegates to explain the Principles, upon which the proposed Constitution was founded.[50] James McHenry, in his explanation of Section 9, stated in part:

> ... When the Public Money is lodged in its Treasury there can be no regulation more consistent with the Spirit of Economy and free Government that it shall only be

> drawn forth under appropriation by Law and this part of the proposed Constitution could meet with no opposition as the People who give their Money ought to know in what manner it is expended.[51]

Thus, the history of this provision sheds some light upon the range of views with regard to anticipated benefits and intended sweep of this language, but does not give great attention to the possibility of secret funding for intelligence activities. Rather, the debate focused principally upon the general need for such a provision, the timing of the statements and accounts, and the practical impact of such a requirement. Nevertheless, there were a few indications that some of the delegates considered the possibility of secrecy attached to some of those statements and accounts. For example, one might compare Mr. Wilson's observations during the Constitutional Convention with those of Mr. Mason at the Virginia ratifying convention. Mr. Wilson noted that some financial operations could not be published at certain times. Mr. Mason recognized that at times necessity might dictate that some secrecy would attach to military operations or foreign negotiations, but rejected the notion that receipts and expenditures of public money should ever be concealed.[52] The most explicit mention of receipts and expenditures shrouded in secrecy is contained in the remarks of Mr. McHenry. He regarded the clause’s requirement of publication from time to time as so broad as to permit the Congress to dispose of the public wealth in secrecy or to conceal what they determine requires secrecy. The history of the clause leaves it uncertain whether or to what extent his views were shared by others.

It appears clear that the concern over how public funds would be spent was the motivating force behind the inclusion of the Statement and Account Clause. The clause seems to impose an affirmative duty to disclose information with regard to public receipts and expenditures. These general outlines do not appear to provide unequivocal guidance as to the scope and frequency of these disclosures, however, and there are some indications that at least delay in releasing some information and possibly secrecy of some information was anticipated, whether with approbation or alarm, by some of those at the Constitutional Convention and the ratifying conventions.

Judicial Interpretation

Further insight may be drawn from an examination of judicial interpretation of the clause in the intelligence budget context. Several cases appear to be of significance in this regard. In 1974, the United States Supreme Court decided *United States v. Richardson*, 418 U.S. 166 (1974). There a federal taxpayer challenged the constitutionality of provisions of the Central Intelligence Agency Act of 1949 concerning public reporting of expenditures on the ground that they violated the Statement and Account Clause. The provisions at issue permitted the CIA to account for its expenditures solely on the certificate of the Director, 50 U.S.C. § 403j(b).

Richardson had made several attempts to obtain detailed information regarding the CIA's expenditures from the Government Printing Office and the Fiscal Service of the Bureau of Accounts of the Treasury Department, but found the information he received unsatisfactory. He questioned the constitutionality of the provision and requested that the Treasury Department seek an opinion from the Attorney General on this question. The Treasury

Department declined to do so, and Richardson then filed suit. The district court dismissed for lack of standing and on the ground that the subject matter raised political questions not amenable to judicial determination. Richardson's request for a three judge court to try the matter was also rejected by the District Court. The Court of Appeals for the Third Circuit, sitting en banc, reversed, and remanded for consideration by a three-judge court.

The Supreme Court granted certiorari and reversed. The issue before the Court was whether the respondent had standing to sue. The Court found that he did not, without reaching the merits of the constitutional question.[53] In so doing, the Court noted:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of the Congress, and ultimately to the political process....[54]

In footnote 11, 418 U.S. at 178, the Court also observed:

> Although we need not reach or decide precisely what is meant by "a regular Statement and Account," it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen. While the available evidence is neither qualitatively nor quantitatively conclusive, historical analysis of the genesis of cl. 7 suggests that it was intended to permit some degree of secrecy of governmental operations. The ultimate weapon of enforcement available to the Congress would, of course, be the "power of the purse." Independent of the statute here challenged by respondent, Congress could grant standing to taxpayers or citizens, or both, limited, of course, by the "cases" and "controversies" provision of Art. III.
>
> Not controlling, but surely not unimportant, are nearly two centuries of acceptance of a reading of cl. 7 as vesting in Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds and to exempt certain secret activities from comprehensive public reporting. See 2 M. Farrand, The Records of the Federal Convention of 1787, pp. 618-619 (1911); 3 *id*., at 326-327; 3 J. Elliot, Debates on the Federal Constitution 462 (1836); D. Miller, Secret Statutes of the United States 10 (1918).

Several lower court decisions are also instructive here. In *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), a Member of Congress sought declaratory and injunctive relief to foreclose the CIA from using the funding and reporting provisions of the 1949 Central Intelligence Act in connection with allegedly illegal activities. The United States Court of Appeals for the District of Columbia Circuit dismissed the suit for lack of standing. Plaintiff did not challenge the constitutional sufficiency of the funding and reporting provisions.[55] In outlining the statutory and constitutional framework to set the case in context, the court noted that the funding and reporting requirements of the CIA Act

> ... represent an exception to the general method for appropriating and reporting the expenditure of federal funds. Article I, section 9, clause 7 of the U.S. Constitution ... is not self-defining and Congress has plenary power to give meaning to the provision. The Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions....
>
> With respect to the reporting of expenditures, the key statutory provision of general application is 31 U.S.C. § 1029 which imposes a duty on the Secretary of the Treasury to provide Congress on an annual basis with "... an accurate, combined statement of the receipts and expenditures ... of all public moneys...." Since Congressional power is plenary with respect to the definition of the appropriations process and reporting requirements, the legislature is free to establish exceptions to this general framework, as has been done with respect to the CIA....[56]

In *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980), a private citizen sought access to CIA documents regarding legal bills and fee arrangements of private attorneys retained by the Agency through the Freedom of Information Act, 5 U.S.C. § 552. The documents were held to be exempt from disclosure under FOIA, exception 3, which addressed documents specifically exempted by statute. Judge Gasch found both that the documents were exempted under the protection from unauthorized disclosure afforded intelligence sources and methods, 50 U.S.C. § 403(d)(3) (1976), and that the information sought was specifically exempted by Section 6 of the Central Intelligence Act, 50 U.S.C. § 403g (1976).[57] The plaintiff argued that application of these statutes under the FOIA exemption was violative of the Statement and Account Clause. The appellate court, relying upon *United States v. Richardson*, *supra*, rejected his argument, holding that he lacked standing to challenge the constitutionality of secret appropriations and expenditures for the CIA. The court found that the nature of the injury alleged by the plaintiff under FOIA was undifferentiated and common to all members of the Public and therefore, like the taxpayer in *Richardson*, the plaintiff had not shown the "'particular concrete injury' required for standing."[58]

In determining the constitutionality and justiciability of statutory secrecy for CIA expenditures, the *Halperin* court reviewed the history of the Statement and Account Clause. As to the debates in the Virginia ratifying convention in June of 1788, the court opined:

> Mason's statement clarifies several points concerning the Framers' intent. First it appears that Madison's comment on governmental discretion to maintain the secrecy of some expenditures, far from being an isolated statement, was representative of his fellow proponents of the "from time to time" provision. Second, as to what items might legitimately require secrecy, the debates contain prominent mention of military operations and foreign negotiations, both areas closely related to the matters over which the CIA today exercises responsibility. Finally, we learn that opponents of the "from time to time" provision, exemplified by Mason, favored secrecy only for the operations and negotiations themselves, not for receipts and expenditures of public money connected with them. But the Statement and Account Clause, as adopted and ratified, incorporates the view not of Mason, but rather of his opponents, who desired discretionary secrecy for the expenditures as well as the related operations....

The court regarded Patrick Henry's concern[59] over the "time to time" language and the potential for expenditures being concealed by Congress as confirmation for the court's interpretation of the Madison-Mason debate. It observed further:

> Viewed as a whole, the debates in the Constitutional Convention and the Virginia ratifying convention convey a very strong impression that the Framers of the Statement and Account Clause intended it to allow discretion to Congress and the President to preserve secrecy for expenditures related to military operations and foreign negotiations. Opponents of the "from time to time" provision, it is clear, spoke of precisely this effect from its enactment. We have no record of any statements from supporters of the Statement and Account Clause indicating an intent to require disclosure of such expenditures.[60]

The *Halperin* court also found confirmation for its conclusion that the Statement and Account Clause did not require disclosure of the expenditures at issue from the historical evidence of government practices with regard to disclosure and secrecy before and after the advent of the Constitution. The Committee of Secret Correspondence of the Continental Congress was created on November 29, 1775, Congress resolving to provide for expenses incurred by the Committee in sending out its "agents".[61] When the Committee received information from Arthur Lee, one of its agents, regarding French plans to send arms and ammunition to the Continental Army, it determined to maintain strict secrecy, even from Congress, because of the nature and importance of this information.[62] The court notes that the Congress appears to have exerted greater direct control over the Committee after the Declaration of Independence.

The camouflaging of the actual recipient and intended use of intelligence funds also appears to have had early usage under George Washington, commander-in-chief of the colonial armies, as reflected in a letter to him from Robert Morris, a member of the Committee of Secret Correspondence, from January 21, 1783. The letter reflects both the provision of a cash account in anticipation of needs which might arise for contingencies and secret service. Drafts drawn from that account appear to have been drawn in favor of member's of Washington's family on account of secret services, seemingly a means of concealing the identity of the actual recipients.[63]

The court also noted a series of statutes creating contingent funds or secret service funds giving the President a means of providing secret funding for foreign intelligence activities.[64] For example, in the Act of July 1, 1790, 1 Stat. 128 (10), the Congress created such a fund, appropriating such monies for "persons to serve the United States in foreign parts." In this act, the President was required to provide a regular statement and account of his expenditures from the fund, but permitted him to not disclose "such expenditures as he may think it advisable not to specify."[65] By the Act of February 9, 1793, 1 Stat. 299, 300 (1793), Congress re-enacted the 1790 statute, but modified its language to allow the President to make secret expenditures without specification by making a certificate or by directing the Secretary of State to make a certificate for the amount.[66] It might be noted that although the specific expenditures from these funds do not appear to have been expected to be disclosed, the statutes did include aggregate numbers for the appropriations for the funds created.[67]

In *Aftergood v. Central Intelligence Agency,* 355 F. Supp. 2d 557 (D.D.C. 2005), the plaintiff sought historical intelligence budget information for the years 1947 through 1970, as

well as subsidiary agency budget totals, from the Central Intelligence Agency (CIA) under FOIA. The CIA responded that the by asserting that the information sought was exempt from disclosure under exemption 3, 5 U.S.C. § 552(b)(3), based upon 50 U.S.C. § 403 -3 (c)(7), which provided that the Director of Central Intelligence shall "protect intelligence sources and methods." Both parties filed for summary judgment.[68] The court granted the CIA's motion and denied Mr. Aftergood's motion. The plaintiff argued, in part, that the Statement and Account Clause required publication of the information he requested. Based upon the "unequivocal[]" holding of the U.S. Court of Appeals for the D.C. Circuit in *Halperin*, which, in turn, relied on *Richardson*, Judge Urbina rejected plaintiff Aftergood's contention and held that "a FOIA plaintiff does not have standing under the Statement and Account [C]lause to challenge the constitutionality of CIA budget secrecy."[69]

Conclusions Regarding Statement and Account Clause

The Statement and Account Clause appears to impose an affirmative duty upon the Congress to periodically make a statement and account of its disposition of the public funds.[70] The questions that arose during the debates upon this clause at the Constitutional Convention and the ratifying conventions went largely to the timing and scope rather than the fact of that obligation. The debates suggest that at least some of the delegates to the Constitutional Convention and the participants in the debates on ratification anticipated that some secrecy might be expected or needed in dealing with military and foreign affairs, and that the language of the clause might be broad enough to permit the Congress to determine what expenditures should be kept secret. Historically, both before and after the Constitution's advent, some provision in practice or statute appears to have been made to keep the substance of some intelligence information or activities closely-held, as well as the nature and recipients of funds for intelligence activities. The early statutes creating funds for contingent expenses or secret service do seem to include aggregate figures as to the money appropriated, but permit circumspection as to the documentation of expenses from the funds so created.

The judicial interpretation of the statement and account clause appears to lay the power to define the sweep of the language in the hands of the Congress. The courts have been consistent in denying standing to those who have sought to challenge the constitutionality of the funding structure of the Central Intelligence Agency Act of 1949 under the Statement and Account Clause to try to access information not disclosed because of the strictures of the 1949 Act. The *Richardson* Court and its progeny have indicated that the Congress possesses plenary authority to give substance to the language of the Clause and to require such reporting of expenditures as it deems in the public interest. The vehicle by which Congress gives substance to the Clause's obligations is by statutory mandate. The courts seem to suggest that secrecy as to some expenditures particularly in the area of foreign or military affairs appears to have been anticipated in the crafting of the clause and reflected in contemporaneous practice.

Since the early years of the nation, Congress has from time to time, by statute, created funds for expenditures for foreign intelligence activities, and has permitted expenditures from those funds to be made by certificate. Many of the statutes do specify aggregate amounts to be appropriated for the contingent or secret funds in question, but do not require detailed reporting on the nature of the expenditures therefrom. The Central Intelligence Agency Act of

1949 permits transfer of funds for intelligence purposes from funds appropriated for other agencies, thereby facilitating concealment of the actual intelligence funding levels.

It appears that there was some uncertainty among the Framers of the Constitution as to the scope of the obligation the clause imposed upon the Congress. From our review of the constitutional language, its history, and the sparse judicial interpretation of its import, it seems that the courts regard the Congress as having the power to define the meaning of the clause. The courts have not had occasion to address the issue on the merits, and, indeed, might refuse to do so on political question grounds if the issue were presented; however, the judicial interpretation of the Statement and Account Clause to date suggests that a court would be unlikely to fmd the disclosure of the aggregate intelligence budget constitutionally compelled.

POST-COLD WAR DEVELOPMENTS

The end of the Cold War had a significant effect on intelligence budgets. Since the country does not face the relentless challenge of an enemy superpower with its own hostile intelligence services, significant reductions in intelligence spending were enacted and criticisms of the continued need for budgetary secrecy were raised anew. Senator Robert Kerrey stated in November 1993: "Openness is the order of the day, and unless a threat as formidable and as lethal as the old Soviet Union comes along, our society and Government will steadily become more open. Our task is to make intelligence more useful to more Americans, not hoard it."[71] Some also maintained that the alleged failures of intelligence agencies to appreciate the essential fragility of the Soviet system or to collect intelligence on the Iraqi nuclear capabilities, warrant a significant overhaul and downsizing of collection and analytical efforts.[72]

Reductions in defense spending across the board affected intelligence spending in two ways. First, it was assumed that a smaller military force structure reduced requirements for intelligence infrastructure; fewer forces would likely require fewer intelligence support personnel. This argument was countered by some who argued that leaner force structures actually required stronger intelligence support to ensure their most effective and efficient use. Secondly, as the bulk of intelligence funding continued to be "hidden" within the DOD budget, reductions in overall defense spending required either proportional reductions in intelligence programs or disproportionate reductions in non-intelligence programs to compensate for maintaining intelligence spending at existing levels. The latter alternative engendered strong resistance among defense planners already hard pressed to maintain other priority programs.[73] In short, as defense spending contracted, it became more difficult to launch new intelligence efforts or even to maintain intelligence programs.

This debate over future requirements for intelligence programs was related to (albeit not identical with) the continuing controversy over the desirability of public disclosure of intelligence spending levels. Some opposed to existing or higher levels of intelligence spending consider that public knowledge of the high costs of intelligence spending would lead to demands that they be drastically reduced.[74] Efforts to reduce funding levels in intelligence authorization bills are complicated by the question of shared oversight. In 1991,

there was concern that reductions in FY 1992 intelligence programs were reallocated to other defense programs rather than being used to reduce the deficit.[75]

With the end of the Cold War, the question of the desirability of making public the extent of the intelligence budget re-emerged in congressional debates and floor votes for the first time since 1975.[76] In the consideration of the FY1992 intelligence authorization bill, the SSCI reported a bill (S. 1539) that would have mandated disclosure of three different versions of the total intelligence and intelligence-related budget figure: the aggregate amount requested by the President; the aggregate amount authorized to be appropriated by the conference committee on the Intelligence Authorization Act; and the aggregate amount actually obligated by the executive branch.[77] (The SSCI eschewed publication of the amount appropriated because it doubted "that such a figure could be tallied ... by the time a conference committee issued its report, due to the large number of line-items in which the intelligence appropriation is found.)"[78] The Senate Armed Services Committee, which received the bill by sequential referral, noted that these requirements represent major departures from past practices of both Congress and the executive branch that have "profound implications for the conduct of United States intelligence activities and the formulation of intelligence policy which have not been considered in detail by all of the committees of jurisdiction". The Armed Services Committee proposed that the effective date of these provisions be postponed until FY1993 to allow for detailed consideration.[79] The HPSCI version of the bill (H.R. 2038) had no provision relating to public disclosure of the intelligence spending. The conference committee "while agreeing with the objective of the Senate provisions" chose to avoid mandating disclosure by law and stated its hope that the "[Intelligence] Committees, working with the President, will, in 1993, be able to make such information available to the American people, whose tax dollars fund these activities, in a manner that does not jeopardize U.S. national security interests."[80] Section 701 of the final version of the legislation as enacted (P.L. 102-183) stated:

> It is the sense of Congress that, beginning in 1993, and in each year thereafter, the aggregate amount requested and authorized for, and spent on, intelligence and intelligence-related activities should be disclosed to the public in an appropriate manner

Opposition by the George H.W. Bush Administration may have exerted an important influence on the dropping of mandatory disclosures. Bush, himself a former DCI who had argued against public disclosure in 1977,[81] stated upon signing the final version, "Because secrecy is indispensable if intelligence activities are to succeed, the funding levels authorized by the Act are classified and should remain so."[82] This was the Administration position, despite the statement by Robert Gates at his confirmation hearing for the DCI position in September 1991 that " ... from my personal perspective — and it's not ultimately my decision, I suppose, but the President's — I don't have any problem with releasing the top line number of the Intelligence Community budget. I think we have to think about some other areas as well. But, as I say, it's controversial."[83]

The following year, the two Intelligence Committees were focused on proposals to reorganize the Intelligence Community and held extensive hearings on the question.[84] The Senate version of the FY1993 intelligence authorization bill (S. 2991) included the same "sense of Congress" provision that had previously appeared in the FY1992 legislation.

Although the House version (H.R. 5095) again did not contain a similar provision, the conference committee included the Senate provision (as Section 303 in the final version) and there was no dissent among conferees who "reiterate [d] their hope that the intelligence committees, working with the President, will, in 1993, be able to make available to the American people, in a manner that does not jeopardize U.S. national security interests, the total amounts of funding for intelligence and intelligence-related activities."[85] In the midst of the election campaign President Bush signed the legislation (P.L. 102-496) on October 24, 1992, without comment.

With the advent of the Clinton Administration in January 1993, some observers believed that the question would be revisited with a different conclusion. Senator Howard Metzenbaum, a member of the SSCI, wrote to the President on February 24, 1993, urging the public disclosure of the intelligence budget. Woolsey, the newly appointed DCI, testified to HPSCI on March 9, 1993, of his concerns regarding making the intelligence budget public:

> There is no electronic or data fence around the United States or around American citizens. Disclosing that [intelligence spending levels] and the ensuing debate publicly means disclosing it to the people overseas who [*sic*] we target our intelligence assets on.
>
> My real sense of skepticism about this derives principally from the fact that coming forth with a single number communicates really nothing until one knows what goes into the number; and, therefore, proposals either to reduce or to increase that number would require a public debate. In such a debate, it is inconceivable to me that we wouldn't release information and details as the public and the Congress debated these issues in public and that would be damaging.[86]

Clinton himself responded to Metzenbaum on March 27 asking for the opportunity to "evaluate both the benefits and legitimate concerns which are associated such public disclosure."[87] The House version of the FY1994 Intelligence Authorization bill (H.R. 2330) contained no provision regarding public disclosure, but for the first time in three years the Senate version (S. 1301) also lacked such a provision. According to Senator Arlen Specter, the provision was not included "on the expectation that there would be a stronger resolution compelling disclosure."[88]

On August 4, 1993, the House, considering H.R. 2330 under an open rule, debated an amendment offered by Representative Barney Frank mandating disclosure of "the aggregate amounts requested and authorized for, and spent on, intelligence and intelligence-related activities" beginning in 1995. The amendment failed on a vote of 169-264. Many of those who voted for the Frank amendment supported other amendments aimed at reducing the size of the intelligence budget and many observers hoped or feared, depending on their point of view, that making the budget public would lead to public demands for spending cuts. This view was not, however, universa1.[89]

In the Senate an amendment to the FY1994 Defense Appropriation bill (H.R. 3116) was introduced on October 18, 1993, by Senator Daniel P. Moynihan to require "a separate, unclassified statement of the aggregate amount of budget outlays for the prior fiscal year for national and tactical intelligence activities. This figure shall include, without limitation, outlays for activities carried out under the Department of Defense budget to collect, analyze, produce, disseminate or support the collection of intelligence." Although Senator Moynihan,

a critic of the Intelligence Community who had also introduced legislation (S. 1682) to transfer the functions of the CIA to the State Department,[90] withdrew the amendment shortly after introducing it, the proposal drew support from Senator Daniel Inouye, then the Chairman of the Appropriations Committee Subcommittee on Defense.[91]

Three weeks later, on November 10, 1993, the Senate debated an amendment to the FY1994 Intelligence Authorization bill offered by Senator Metzenbaum to include essentially the same "sense of Congress" language as included in the two previously enacted intelligence authorization bills. Although the provision had not been controversial in the Senate on the two earlier occasions, in 1993, the incoming Republican vice chairman of the SSCI, Senator John Warner, spoke out against the proposal. After lengthy debate, the Senate first voted not to table the Metzenbaum amendment by a vote of 49-51 and then voted 52-48 to incorporate it into the FY1994 Intelligence Authorization bill (S. 1301). The amendment passed with the support of Senator DeConcini, the new SSCI chairman.[92]

The Committee of Conference on the two intelligence authorization bills subsequently met, but it did not include the provision regarding public disclosure of the intelligence budget in the final version. The conference report stated: "House conferees were of the view that, in light of the House vote [on the Frank amendment], they could not agree to the inclusion in the conference report of the Senate's `sense of the Congress' provisions and therefore voted to insist on the House position."[93] Thus, the FY1994 Intelligence Authorization Act (P.L. 103-178) that was signed by President Clinton on December 3, 1993, did not address the question of public disclosure of the intelligence budget.

Along with the strong opposition to public disclosure by Senator Warner, the vice chairman of the SSCI (unlike his predecessor, Senator Frank Murkowski, who supported disclosure), an important factor was opposition from the Clinton Administration. During the November 10, 1993, debate, Senator Warner inserted into the *Congressional Record* sections of a letter from the Office of Management and Budget, dated October 18, 1993, that stated, "... the Administration opposes any change to S. 1301 [the Senate version of the FY1994 intelligence authorization bill] that would disclose, or require the disclosure of, the aggregate amount of funds authorized for intelligence activities. The current procedure that provides for the authorization of appropriations in a classified annex continues to be appropriate."[94]

The issue did not disappear. The conference committee had indicated that both intelligence committees had agreed to hold hearings on the question of disclosure in early 1994 "in preparation for thoroughly evaluating a provision to require disclosure of the aggregate intelligence budget figure which may be considered during preparation of the Intelligence Authorization Act for Fiscal Year 1995."[95] Shortly after final passage of the FY1994 authorization bill on November 20, 1993, a group of senior congressional leaders, including Speaker of the House Foley, Senate Majority Leader Mitchell, and other present and former leaders of committees having intelligence oversight responsibilities, signed a letter to the President urging a change in Administration policy to permit public disclosure of intelligence spending. The Members stated that, "The level of intelligence spending (although not the details) must be open to the public." Further, "[t]he norms of our democratic system require that the public be informed."[96]

The President, replying in a December 27, 1993 letter to Representative Glickman, noted his opposition to the proposal in 1993 "because I believed that the cost of disclosure outweighed the benefits." He added, however, that he had asked Anthony Lake, the National

Security Adviser, in concert with the DCI and others, to "look carefully at our position in light of your arguments and in consultation with Congress."

By January 1994, both the executive and legislative branches were committed to review the advisability of making intelligence spending levels public. Congressional hearings were scheduled for 1994 and an NSC-level review was underway. At the HP SCI hearings conducted on February 22-23, 1994, DCI Woolsey repeated his opposition to budgetary disclosure. He emphasized the difficulty of conducting a debate on intelligence programs and priorities in public and his concern that it would be impossible to avoid moving from one aggregate number to disaggregated details that would educate "the rulers of North Korea, Iran, Iraq, Libya, terrorist groups, and others about our plans and programs."[97]

The 1994-1995 debate took place in the context of declining budgets and an intelligence community grappling with a world that, in the oft-quoted phrase used by DCI Woolsey in his confirmation hearings, has seen the slaying of the Soviet dragon, but still contained jungles "filled with a bewildering variety of poisonous snakes." Nevertheless, on July 19, 1994, the House voted (in the Committee of the Whole) 194-221-24 to reject an amendment to the intelligence authorization bill (H.R. 4299) proposed by Representative Glickman, Chairman of the Permanent Select Committee on Intelligence, to amend the National Security Act of 1947 to require annual reports of amounts expended and amounts requested for intelligence and intelligence-related activities. The Senate version did not address the question of making intelligence spending levels public.

A similar scenario unfolded in subsequent years. On September 13, 1995 the House voted (in the Committee of the Whole) 154-271-9 to reject an amendment to the intelligence authorization bill (H.R. 1655) proposed by Representative Frank to disclose aggregate amounts requested and authorized for intelligence and intelligence-related activities. Again, the Senate bill had no provision relating to the question.

The Senate did support disclosure in 1996, when it passed its version of the FY1997 intelligence authorization bill (S. 1718) with a provision requiring the President to include with the annual budget submission the aggregate amount appropriated for the current year for intelligence and intelligence-related activities and the amount requested for the next year. On May 22, 1996, however, the House voted (in the Committee of the Whole) 176-248-9 to reject an amendment to the intelligence authorization bill (H.R. 3259) proposed by Representative Conyers to require the President to submit a separate, unclassified statement of the appropriations and proposed appropriations for national and tactical intelligence activities. The subsequent Conference Committee acceded to the House and dropped the provision.

On July 9, 1997 the House voted 192-237-5 (in the Committee of the Whole) to reject an amendment to the FY1998 Intelligence Authorization bill (H.R. 1775) offered by Representatives Conyers that would require the President to submit a separate, unclassified statement of the appropriations and proposed appropriations for the current fiscal year, and the amount of appropriations requested for the fiscal year for which the budget is submitted for national and tactical intelligence activities. The Senate voted shortly thereafter, on June 19, 1997, 43-56-1, to reject an amendment to the FY1998 intelligence authorization bill (S. 858) proposed by Senator Torricelli to require the President to submit annual aggregate figures on amounts requested and amounts appropriated for intelligence and intelligence-related activities.

Despite these congressional votes interest in and pressure for public release of intelligence spending levels persisted. The Commission on the Roles and Capabilities of the U.S. Intelligence Community, known as the Aspin-Brown Commission, established pursuant to the FY1995 Intelligence Authorization Act (P. L. 103-359), recommended in 1996:

> ... that at the beginning of each congressional budget cycle, the President or a designee disclose the total amount of money appropriated for intelligence activities for the current fiscal year (to include NFIP, JMIP, and TIARA) and the total amount being requested for the next fiscal year. Such disclosures could either be made as part of the President's annual budget submission or, separately, in unclassified letters to the congressional intelligence committees. No further disclosures should be authorized.[98]

Responding to the Commission's recommendations, on April 23, 1996 President Clinton authorized Congress to make public the total appropriation for intelligence at the time the appropriations conference report was approved.[99] Such action was not, however, taken by the Legislative Branch.

In October 1997, DCI Tenet announced that President Clinton had authorized him to release the aggregate amount appropriated for intelligence and intelligence- related activities for FY1997 ($26.6 billion). His press release indicated that the decision was based on two important points:

> First, disclosure of future aggregate figures will be considered only after determining whether such disclosures could cause harm to the national security by showing trends over time.
>
> Second, we will continue to protect from disclosure any and all subsidiary information concerning the intelligence budget: whether the information concerns particular intelligence agencies or particular intelligence programs. In other words, the Administration intends to draw a firm line at this top-line, aggregate figure. Beyond this figure, there will be no other disclosures of currently classified budget information because such disclosures could harm national security.[100]

The press release took note of the lawsuit filed earlier under the Freedom of Information Act and indicated that the President had preferred to take action concerning the declassification of the intelligence budget "in concert with the Congress," but "the present circumstances related to this lawsuit do not allow for joint action."[101]

The following March, Tenet announced that the aggregate amount appropriated for intelligence and intelligence-related activities for FY1998 was $26.7 billion. In the announcement Tenet stated that the determination that "this release will not harm national security or otherwise harm intelligence sources and methods."[102]

The release of the figure for FY1998 was, however, the final such release. After litigants had sought to require the release of the amount requested for intelligence (in addition to the amount appropriated which had been made public), Tenet declined to make public the amount appropriated for FY1999.[103] Some observers speculate Tenet may have been reluctant to address the substantial additional intelligence funds that were reportedly incorporated in the

Supplemental Appropriation Act (P.L. 105—277), enacted on October 21, 1998. In any event, no such releases have been made subsequently.

Recommendations by the 9/11 Commission and Subsequent Legislation

The attacks of September 11, 2001, had a profound affect on intelligence issues. No longer was there a concern to reduce intelligence spending; the goal was to determine why there had been no tactical warning of the attacks that shattered thousands of American lives. A series of investigations was launched to fix the blame and to make recommendations for improved intelligence performance There was a clear disposition in the Executive Branch and in Congress to increase intelligence spending significantly in support of the counterterrorism effort. Many of the recommendations for intelligence reorganization lie beyond the scope of this Report, but some addressed issues of intelligence acquisition and budgeting. Ultimately, a new position, the Director of National Intelligence (DNI) was established. The DNI has been given statutory authorities for developing and determining the national intelligence budget and for ensuring the effective execution of the budget for intelligence and intelligence-related activities.[104]

In addition, the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 Commission, recommended that the "overall amounts of money being appropriated for *national intelligence* and to its component agencies should no longer be kept secret."[105] This would be different from the Clinton Administration's practice in FY1997 and FY1998 when the total appropriated amount for all intelligence and intelligence-related activities was released.

The Senate bill introduced in response to the recommendations of the 9/11 Commission (S. 2845) provided that the NFIP would be renamed the National Intelligence Program (NIP) and that the President disclose for each fiscal year the aggregate amount of appropriations requested for the NIP. Furthermore, Congress would be required to make public the aggregate amounts authorized and appropriated for the NIP. (The House bill dealing with intelligence reorganization (H.R. 10) contained no similar provision.) An amendment to remove this provision in the Senate bill was tabled on October 4, 2004 by a vote of 55 to 37.

Ultimately, the legislation that was enacted largely in response to the recommendations of the 9/11 Commission, the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, did not include the Senate's provision to make intelligence spending figures public.

The issue resurfaced in 2006 when the Senate Intelligence Committee reported its version of authorization legislation for FY2007, S. 3237. Section 107 of the bill would require that the President disclose to the public the aggregate amount of appropriations requested annually for the NIP. The bill would further require that Congress make public the aggregate amount authorized and appropriated by Congress on an annual basis which would presumably include funds provided by supplemental appropriations bills. The bill further mandates a study by the DNI of the advisability of making such information public for each of the 16 elements of the Intelligence Community. No similar provision exists in the House version of FY2007 intelligence authorization legislation (H.R. 5020). An

identical provision was included in the FY2007 intelligence authorization bill (S. 372) reported in the Senate in January 2007.

In approaching the provision in S. 3237, Congress will likely weigh a number of factors. Some Members believe that not only the spirit of constitutional provisions but also the interests of democracy have always required that intelligence budgets be identified. Even some of those who believed that Cold War conditions necessitated that intelligence budgets be kept secret now argue that conditions have changed and that current enemies would not be able to make use of information on overall levels of intelligence budgets. This view is opposed by others, especially in the House, who believe that the declassification of the intelligence budget could inevitably lead to the compromise of important information on sources and methods.

There are, in addition, other factors that Members may wish to take into consideration. First, making the NIP public might lead to the need for a separate intelligence appropriations bill. This, in turn, could prevent the possibility of easy trade-offs between intelligence and non-intelligence defense programs, arguably to the detriment of the intelligence effort. Second, is the fact that actions taken in regard to national intelligence efforts in supplemental appropriations bills would have to be reflected in accounts of intelligence spending arguably with more public justification than would be desirable in some circumstances.

In addition, providing information on the NIP but not the MIP could give a false sense of the dimensions of the intelligence effort. Most observers argue that in operational terms, intelligence and intelligence-related activities are mutually supportive, even intertwined, and that considering them separately does not permit an understanding of intelligence capabilities. This could affect both those who want to reduce intelligence spending across the board as well as those who argue that intelligence spending has not kept up with the growth of the threats facing the country. If the intelligence-related activities were to be included, as was the case when FY1997 and 1998 budget levels were made public by DCI Tenet, there would have to be a recognition of the subtle and porous dividing lines between intelligence- related activities and other targeting and information-gathering and processing efforts. It would be possible to play "budget games" to demonstrate greater or lesser levels of commitment to intelligence by moving individual programs into or out of intelligence-related categories.

CONCLUSION

After decades of debate, the issues surrounding the question of public disclosure of the intelligence budget have not changed. There is a question of the degree to which the Constitution requires such budgetary information to be made public. Another question centers on whether limited budgetary data can be made public without leading to detailed revelations of properly classified programs and whether information might be made available to adversaries who will use it against the U.S.

Beyond these questions, there is an issue of how to frame an informed public debate on the extent of intelligence spending. How do you provide a sense of how the complex and disparate U.S. Intelligence Community fits together without revealing the extensive detail that

almost all observers would consider unwise. Even sophisticated outside analysts are unlikely to appreciate some of the finer (and, in some cases, arbitrary) distinctions among military and national programs and the relationship of non-intelligence communications and reconnaissance programs to the overall intelligence effort. Funding for intelligence-related activities presents special difficulties; budgetary totals can fluctuate from year to year solely because certain DOD programs are transferred into or out of intelligence accounts. Making public only the figure for national intelligence programs would simplify the task, but would not give the public an accurate understanding of the extent of the whole intelligence effort.

There will continue to be philosophical and political disagreements concerning how much, if any, information regarding the intelligence budget should be provided. The disagreements may in some cases mask policy objectives. Some argue for as inclusive a number as possible, pointing to the size of the total as the basis for urging its reduction in order to transfer funds to what they consider more important governmental functions or to reduce the federal deficit. Others will seek to show bare-bones intelligence spending and urge more rather than less intelligence spending to cope with the uncertainties of the current international environment.

Ultimately, the fundamental issue is whether adequate resources are being devoted to intelligence given the extent of requirements by policymakers, military commanders, and other government officials. The more immediate issue for Congress is how to ensure that there is enough information available to inform this public debate without placing intelligence sources and methods at risk.

END NOTES

[1] U.S., National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: Government Printing Office, 2004), p. 416.

[2] U.S. Congress, House of Representatives, 103rd Cong., 1st sess., Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 1994*, H.Rept. 103-162, Part 1, Jun. 29, 1993, p. 12.

[3] Office of the Director of Central Intelligence before the Permanent Select Committee on Intelligence, U.S. House of Representatives, "Public Disclosure of the Intelligence Budget," Feb. 22, 1994, p. 10.

[4] Pursuant to 50 U.S.C. 403-1. Many of these functions were previously the responsibility of the DCI.

[5] Department of Defense Directive 5143.01.

[6] Directive on Coordination of Foreign Intelligence Activities, Jan. 22, 1946, *Public Papers ofthe Presidents, Harry S. Truman, 1946*, (Washington: Government Printing Office, 1962), p. 88.

[7] See the discussion in an official CIA history prepared in 1952-1953 and published commercially in 1990, Arthur B. Darling, *The Central Intelligence Agency: An Instrument of Government to 1950* (University Park, PA: Pennsylvania State University Press, 1990), pp. 104-105.

[8] Ibid., pp. 114-115, 166-192.

[9] There was, in addition, opposition in the House Appropriations Committee to the State Department's intelligence effort. See Hanson W. Baldwin, "Intelligence Arm Vital," *New York Times*, April 24, 1946, p. 4, cited in Wesley K. Wark, "Great Investigations:" The Public Debate on Intelligence in the US after 1945," *Defense Analysis,* June 1987, p. 123.

[10] Darling, *Central Intelligence Agency*, p. 189. Darling comments on the use of unvouchered funds, i.e., funds provided to the DCI for unspecified purposes, "They must be kept secret; even the provision for them by Congress should not be known." Ibid. Darling continues: the Comptroller General "was willing that unvouchered funds which the National Security Council approved should be exempt from the normal restrictions upon expenditure. But the Bureau of the Budget held that such approval in advance was more properly the function of the Director of the Budget. To this the Comptroller agreed and the proposal went to Congress. The Senate's committee, however, thought otherwise and exempted the Agency from any control by the Bureau of the Budget over the amount of the expenditures which should be unvouchered." Page 190. This passage reflects the concern that existed in Congress in 1947 for the secrecy of intelligence expenditures.

[11] *Congressional Record*, Mar. 7, 1949, p. 1949.

[12] At one point some funds for CIA were included in the State Department budget, but reductions in the overall State Department budget (resulting from the unpopularity of State among some Members at that time) also resulted in cuts in CIA spending; accordingly one Member suggested in 1951 that CIA spending be included in DOD accounts. See David M. Barrett, *The CIA and Congress: the Untold Story from Truman to Kennedy* (Lawrence, KS: University Press of Kansas, 2005), p. 120.

[13] Barrett, *CIA and Congress*, pp. 118-119, quoting Lyman Kirkpatrick, *The Real CIA* (New York: MacMillan, 1968), pp. 116-117.

[14] See Barrett, *CIA and Congress*, especially pp. 118-124; 215-222.

[15] See Gilbert C. Fite, Richard B. Russell, Jr., *Senator from Georgia* (Chapel Hill, NC: University of North Carolina Press, 1991), especially pp. 368-369.

[16] Quoted in Dwayne A. Day, John M. Logsdon, and Brian Latell, eds., *Eye in the Sky: the Story of the Corona Spy Satellites* (Washington: Smithsonian Institution Press, 1998), p. 1.

[17] By Executive Order 11905 of February 18, 1975.

[18] Section 104(b) of this legislation modified the National Security Act of 1947 to provide that "The Director of Central Intelligence shall provide guidance to elements of the intelligence community for the preparation of their annual budgets and shall approve such budgets before their incorporation in the National Foreign Intelligence Program."

[19] The Senate Select Committee to Study Governmental Operation with Respect to Intelligence Activities, known as the Church Committee, and the House Select Committee on Intelligence, known as the Pike Committee. Two years earlier, the Special Senate Committee to Study Questions Related to Secret and Confidential Documents recommended (S.Res. 466, 93' Congress) that appropriations committees include line items in defense appropriations bills for each of the major intelligence agencies and for the intelligence programs of the armed services. This recommendation was not adopted. See U.S. Congress, Senate, 102nd Cong., 1st sess., Select Committee on Intelligence, *Authorizing Appropriations for Fiscal Year 1992 for the Intelligence Activities of the U.S. Government, the Intelligence Community Staff, the Central Intelligence Agency Retirement and Disability System, and for Other Purposes*, S.Rept. 102-117, Jul. 24, 1991, pp. 9-10.

[20] The Church Committee concluded: "Although there is a question concerning the extent to which the Constitution requires publication of intelligence expenditures information, the Committee finds that the Constitution at least requires public disclosure and public authorization of an annual aggregate figure for United States national intelligence activities." U.S. Congress, 94th Cong., 2nd sess., Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report, Book I, Foreign and Military Intelligence,* S.Rept. 94-755, Apr. 26, 1976, p. 425.

[21] See U.S. Congress, Senate, 104th Cong., 2nd sess., Select Committee on Intelligence, *Authorizing Appropriations forFiscal Year 1997 for the Intelligence Activities of the United States Government and the Central Intelligence Agency Retirement and Disability System*, S.Rept. 104-258, pp. 2-3.

[22] As noted below, a relatively small portion of the authorization, having to do the CIA Retirement and Disability Fund and the Intelligence Community Management Staff Account, is included in the unclassified reports.

[23] Legislative provisions regarding the reporting of budgetary data for special access programs were enacted in the FY1988 Defense Authorization Act (P.L. 100-180).

[24] In a letter of December 4, 1990, the chairmen of the two Intelligence Committees wrote to the President advising him of their view that only authorizations in the annual intelligence authorization bills satisfied the requirement of Section 504(a) of the National Security Act of 1947 (as amended) for a specific authorization for the funding of intelligence or intelligence-related activities. "While recognizing a need for important intelligence activities and programs to proceed in the interim, the chairmen's letter underscored the committees' expectation that intelligence agencies would comply with all of the limitations and conditions on the expenditure of funds which were contained in the vetoed bill." U.S. Congress, 102nd Cong., 1st sess., House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act, Fiscal Year 1991*, H.Rept. 102-37, April 22, 1991, p. 3.

[25] U.S. Congress, House of Representatives, 102d Congress, 2d session, Permanent Select Committee on Intelligence, *Pursuant to Clause 1(d) of Rule XI of the Rules of the House of Representatives*, H.Rept. 102-1082, December 30, 1992, p. 11.

[26] H.Rept. 103-200, p. 464. The Report refers to Section 502 of the National Security Act, but the context makes it clear that a reference to Section 504 was intended.

[27] Sec. 307. There are hereby authorized to be appropriated such sums as may be necessary and appropriate to carry out the provisions and purposes of this Act.

[28] U.S. Congress, 108th Cong., 1st sess., House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2004*, H.Rept. 108-163, June 18, 2003, p. 22. The following year nine members of the House Intelligence Committee in a minority report to the FY2005 intelligence authorization bill argued even more forcefully against funding through supplemental appropriations acts:" Members on both sides of the aisle have roundly criticized this growing practice of funding the Intelligence Community in bits and pieces, rather than for a full fiscal year, the Congress is supposed to do it. Senior intelligence officials have told the Committee that this practice makes it impossible to plan, forcing them to

'rob Peter to pay Paul' until the additional funds arrive—potentially jeopardizing key counterterrorism operations." Minority views of Representatives Harman, Hastings, Reyes, Boswell, Peterson, Cramer, Eshoo, Holt, and Ruppersberger, U.S. Congress, 108th Cong., 2nd sess., House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2005*, H.Rept. 108-558, Jun. 21, 2004, p. 69.

[29] See statements by Representative Combest, *Congressional Record*, Aug. 3, 1993, p. H5678; Representative Pelosi, *Congressional Record*, Aug. 3, 1993, p. H5697. See also George Lardner Jr. and Walter Pincus, "Congress May Seek Review of All Intelligence Spending," *Washington Post*, Jan. 10, 1993, p. A4.

[30] During World War II, spending for the Office of Strategic Services (OSS), the predecessor of the CIA, was openly included in National War Agencies Appropriation Acts.

[31] Walter Pforzheimer, the first Legislative Counsel to the CIG and the CIA, testified in 1992 to the SSCI, that "... from the very beginning [the intelligence budget] has always been secret, and it was not at our initial request, although we supported it. It was the Congress who kept it secret...." U.S. Congress, Senate, 102nd Cong., 2nd sess., Select Committee on Intelligence, *S. 2198 and S. 421 to Reorganize the United States Intelligence Community*, S. Hearings 894, February 20, March 4,12,19, 1992, p. 151.

[32] The Church Committee recommended that the planned congressional "intelligence oversight committee [s] should authorize on an annual basis a 'National Intelligence Budget,' the total amount of which would be made public." The Church Committee further recommended that the intelligence committees "consider whether it is necessary, given the Constitutional requirements and the national security demands, to publish more detailed budgets." U.S. Congress, Senate, 94th Cong., 2nd sess., Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Foreign and Military Intelligence, Book I*, April 26, 1976, p. 470. Similarly, the Pike Committee recommended that "all intelligence related items be included as intelligence expenditures in the President's budget, and that there be disclosure of the total single sum budgeted for each agency involved in intelligence, or if such an item is a part or portion of the budget of another agency or department that it be separately identified as a single item." U.S. Congress, House of Representatives, 94th Cong., 2nd sess., Select Committee on Intelligence, *Recommendations of the Final Report*, H.Rept. 94-833, Feb. 11, 1976, p. 3.

[33] U.S. Congress, Senate, 95th Cong., 1st sess., Select Committee on Intelligence, *Whether Disclosure ofFunds Authorizedfor Intelligence Activities is in the Public Interest*, Hearings, April 27-28, 1977.

[34] U.S. Congress, Senate, 95th Cong., 1st sess., Select Committee on Intelligence, Whether *Disclosure of Funds for the Intelligence Activities of the United States is in the Public Interest*, S.Rept. 95-274, Jun. 16, 1977, p. 9. The appropriated amount, rather than the authorized amount, was to be disclosed because it represented final congressional action embodied in legislation. Ibid., p. 4, 10.

[35] U.S. Congress, House of Representatives, 95th Cong., 2nd sess., Permanent Select Committee on Intelligence, *Disclosure of Funds for Intelligence Activities*, Hearings, January 24-25, 1978.

[36] U.S. Congress, House of Representatives, 95th Cong., 2nd sess., Permanent Select Committee on Intelligence, *Annual Report Pursuant to Section 3 of House Resolution 658, 95th Congress, 1st session* , H.Rept. 95-1795, Oct. 14, 1978, pp. 15-16.

[37] Much of the discussion in this section is taken directly from archived CRS Report 89-465, *Intelligence Budgets: Contents and Releasability*, by Alfred B. Prados.

[38] In making a recommendation in favor of disclosure of aggregate figures appropriated for national intelligence and for its various component agencies, in mid-2004 the 9/11 Commission stated:

> The specifics of the intelligence appropriation would remain classified, as they are today. Opponents of declassification argue that America's enemies could learn about intelligence capabilities by tracking the top-line appropriations figure. Yet the top-line figure by itself provides little insight into U.S. intelligence sources and methods. The U.S. government readily provides copious information about spending on its military forces, including military intelligence. The intelligence community should not be subjected to that much disclosure. But when even aggregate categorical numbers remain hidden, it is hard to judge priorities and foster accountability.
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> *9/11 Commission Report, p. 416*.

[39] U.S. Congress, Senate, 95th Cong., 1st sess., Select Committee on Intelligence, *Whether Disclosure ofFunds Authorized forintelligenceActivities Is in the Public Interest*, Hearings, April 27-28, 1977, p. 41.

[40] See Louis Fisher, "Confidential Spending and Governmental Accountability," *George Washington Law Review*, vol. 47, January 1979.

[41] Opening Statement, Chairman Dan Glickman, February 22, 1994, p. 3.

[42] U.S. Congress, House of Representatives, 98th Congress, 2nd session, Permanent Select Committee on *Intelligence, Intelligence Authorization Act for Fiscal Year 1984, Report to Accompany H.R. 2968*, H.Rept. 98-189, Part I, May 16, 1983, p. 2.

[43] U.S. Congress, Senate, 102nd Cong., 1st sess., Select Committee on Intelligence, *Review of Intelligence Organization*, S. Hearing 102-91, Mar. 21, 1991, p. 24.

[44] U.S. Congress, Senate, 102nd Cong., 1st sess., Select Committee on Intelligence, *Authorizing Appropriations for Fiscal Year 1992 for the Intelligence Activities of the U.S. Government, the Intelligence Community Staff, the*

Central Intelligence Agency Retirement and Disability System, and for Other Purposes, S.Rept. 102-117, Jul. 24, 1991, p. 12. It is not clear if this conclusion included covert actions (officially secret but widely debated) that have been funded in the intelligence budget process.

[45] 2 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 618-19 (1937) (hereinafter Farrand); I W. Benton, 1787 DRAFTING THE U.S. CONSTITUTION 1004-05 (1986). There is some non-substantive variation between these two sources as to use of abbreviations, and occasionally as to punctuation or spelling. The Farrand version is quoted directly above. No corrections of punctuation, spelling or capitalization have been made, so that the quotation would as closely parallel the original as possible. The term nem. con. stands for nemine contradicente, the Latin term meaning "no one contradicting." The Journal of the Convention, published in Boston in 1819, is quite cryptic, shedding no light on the debate on this clause. However, it does indicate, at pp. 377-78, on September 14, 1787: "Add at the end of the sixth clause of the ninth section, first article, 'and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.'" See 2 Farrand at 610 n.2. Farrand also notes that the last paragraph of the quotation included in the text above may have been a later insertion, and if so he opines that it was taken from this notation in the Journal. 2 Farrand at 619 n. 17.

[46] 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 311 (1911), Citing Robertson, DEBATES OF THE CONVENTION OF VIRGINIA, 1788 236 (2d ed. 1805).

[47] Elliot lists this date as the 15th of June 1788, but he lists both the immediately preceding Saturday and Monday as being the 14th of June. In fact, the 14th of June was on a Saturday in 1788, so the correct date for the Tuesday of that week would be the 17th of June, 1788, as reflected in Farrand.

[48] III J. Elliot, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 459-62 (1888) (hereinafter Elliot); see also, 2 Farrand at 326-27 (spelling, capitalization, and punctuation as in the original) (Farrand contains ellipses in place of part of this day's debates, including comments of Mr. Lee, Mr. Mason, Mr. Corbin, Mr. Nicholas, and Mr. Henry).

[49] II Elliot at 345-47.

[50] This document, included in 3 Farrand at 144-150, was among the manuscripts of John Leeds Bozman, and was identified by Mr. Bernard C. Steiner of the Enoch Pratt Free Library, Baltimore, as part of the legislative records of Maryland, in the handwriting of one of the clerks of the legislature. 3 Farrand at 144 n. 2.

[51] 3 Farrand at 149-150.

[52] For a discussion of some historical instances of confidential spending, see Fisher, "Confidential Spending and Governmental Accountability," 47 G.W. L. REV. 347 (1979); *see also*, Halperin v. CIA, 629 F.2d 144, 157-60 (D.C. Cir. 1980).

[53] *But see* Justice Douglas' dissenting opinion, 418 U.S. at 197-202. Justice Douglas reviewed the history of the Statement and Account Clause, concluding that it was inserted into the Constitution to give the public knowledge of the way public funds are spent. He concluded that to permit Congress to determine to withhold a regular statement and account with regard to an agency is to reduce the clause to a nullity. Further, he asserted that if the solution to the failure of the Congress to provide such a statement and account is the electoral process, then the public must have "a basic knowledge of at least the generality of the accounts under every head of government" if the franchise is to be exercised intelligently. *Id.*, at 201. Justice Douglas would have affirmed the Court of Appeals holding that the taxpayer had standing to sue.

[54] 418 U.S. at 179.

[55] 553 F.2d at 194, 196.

[56] 553 F.2d at 194-95, relying in part on United States v. Richardson, *supra*.

[57] 629 F.2d at 146. Section 403g provided an exemption from provisions of any other law requiring disclosure or publication of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA.

[58] 629 F.2d at 152.

[59] As the court relied upon Elliot as its source for Patrick Henry's words, it references a date of June 15th rather than June 17th of 1788. As noted in fn. 3, above, the correct date appears to be June 17th.

[60] 629 F.2d at 156.

[61] 3 JOURNALS OF THE CONTINENTAL CONGRESS 392 (1905), cited at 629 F.2d at 157.

[62] 629 F.2d at 157, citing statement of Committee members Benjamin Franklin and Robert Morris, concurred in by Richard Henry Lee and William Hooper, from II American Archives, Fifth Series, 818-19 (P.Force, ed. 1851).

[63] 629 F.2d at 157-58, citing 6 U.S. Department of State, DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION 428 (F. Wharton, ed. 1889).

[64] 629 F.2d at 158-60.

[65] 1 Stat. at 129.

[66] For a more detailed discussion of the statutes and historical precedents upon which the *Halperin* court relied, see 629 F.2d at 157-60.

[67] While they have not provided additional constitutional analysis, other FOIA cases have also involved plaintiffs who have sought disclosure of the executive budget request for intelligence and intelligence-related activities.

For example, in Aftergood v. Central Intelligence Agency, 1999 U.S. Dist. LEXIS 18135 (D.D.C. 1999) (*Aftergood I*), Steven Aftergood, on behalf of the Federation of American Scientists, sought disclosure of the Administration's total budget request for FY1999 for all intelligence and intelligence-related activities. The CIA denied this request under exemption 1 (on the grounds that the information was properly classified in the interest of national defense or foreign policy under E.O. 12958) and under exemption 3 (on the basis that release of the aggregate figure would tend to reveal intelligence sources and methods which are expressly exempted from disclosure by statute).

In its motion for summary judgment, the CIA relied upon statements by from DCI Tenet, one filed as an unclassified exhibit attached to the motion, and two classified statements filed under seal and ex parte for in camera review by the district court. In order to be satisfy the exemption 1 requirements, an agency must show "that the records at issue logically fall within the exemption, i.e., that an Executive Order authorizes that the particular information sought be kept secret in the interest of national defense or foreign policy" and "that [the agency] followed the proper procedures in classifying the information." Id. at *3-*4. The court found both of these criteria to be satisfied. In so doing, the court rejected the Plaintiff's argument that the DCI's determination differed from the President's and was therefore invalid, based upon a statement three years earlier by a presidential spokesman that, "as a general matter, the President believed "that disclosure of the annual amount appropriated for intelligence purposes will not, in itself, harm intelligence activities." *Id*. at *5-*6. The court acknowledged that the President, should he choose to do so, had the authority to disclose the information sought, but noted that he had not done so, nor had he ever addressed the impact of disclosure of the 1999 aggregate intelligence budget request or the amount appropriated for these purposes in FY1999. Similarly, the court found the fact that the President had permitted release of similar information in other years unpersuasive. In the absence of the President's order to release the information or his withdrawal of the DCI's authority to make classification decisions, where there is no indication that the DCI has acted in bad faith in his refusal to release the information sought, the court found the DCI authorized to make the classification decision at issue and found that his determination was done properly. *Id*. at *6.

In its de novo determination as to whether the information was properly classified, the court applied a deferential standard: "Thus, summary judgment for the government in an Exemption 1 FOIA action should be granted on the basis of agency affidavits if they simply contain 'reasonable specificity' and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Id.* at *8. The court found that DCI Tenet's declarations satisfied this standard:

> ... Essentially, DCI Tenet explains that disclosure of the budget request reasonably could be expected to cause damage to national security in several ways ...: (1) disclosure "reasonably could be expected to provide foreign governments with the United States' own assessment of its intelligence capabilities and weaknesses," Tenet Declaration P 14; (2) disclosure "reasonably could be expected to assist foreign governments in correlating specific spending figures with particular intelligence programs," Tenet Declaration P 16; and (3) official disclosure could be expected to free foreign governments' limited collection and analysis resources for other efforts targeted against the United States, Tenet Declaration, p. 18.

Id. at *9. The court did not require the DCI to demonstrate certainty as to the damage that disclosure of the requested information would cause to national security. "In the area of intelligence sources and methods, the D.C. Circuit has ruled that substantial deference is due to an agency's determination regarding threats to national security interests because this is "necessarily a region for forecasts in which the CIA's informed judgment as to potential future harm should be respected." *Id*. at * 10. The investigative zeal of foreign intelligence agencies was deemed a matter the CIA appropriately could assume.

In concluding that the plaintiff had offered no contrary evidence which undercut the DCI's "highly fact-dependent determination," the *Aftergood* I court found the 1996 nonbinding recommendations of a congressionally-chartered commission of private citizens without classification authority (the Brown Commission) made to the Congress and the President in favor of disclosure did not compel disclosure by the court. In so finding, the court noted that neither Congress nor the President had acted upon those recommendations. The court also noted that the Brown Commission did not consider whether it would recommend disclosure of the 1999 figures under the circumstances which the DCI described in his unclassified declaration. The court found the fact that the DCI had disclosed aggregate intelligence budget figures in other years indicative of his careful, case by case assessment of the impact of each disclosure. "Therefore, the Court must defer to DCI Tenet's decision that release of a third consecutive year, amidst the information already publicly available, provides too much trend information and too great a basis for comparison and analysis for our adversaries." *Id*. at * 10-* 12.

As to the applicability of FOIA exemption 3 to the requested disclosure, the court applied a 2 step analysis, looking at whether the statute relied upon was a statute which fell within the exemption, and whether the withheld material satisfied the criteria of the exemption statute involved. *Id.*, at *12. See *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990). The court, relying upon *Sims*, found it well-settled that the statute relied upon, the 1947 National Security Act's requirement that the DCI "protect intelligence sources and methods from unauthorized disclosure," 50 U. S.C. § 403-3(c)(6) (formerly 403-3(c)(d)), was an exemption 3 statute. *Id.* at * 13. The court, again applying a deferential standard, concluded

that the DCI had demonstrated that the information sought related to intelligence sources and methods. The necessary connection was found in the "special appropriations process used for intelligence activities." See Military Audit Project v. Casey, 656 F.2d 724, 745 (D.C. Cir. 1981). The Aftergood court relied upon the determination by DCI Tenet that release of the total budget request would "tend to reveal secret budgeting mechanisms constituting 'intelligence methods" to hold that the disclosure of the aggregate intelligence budget request was exempt from FOIA disclosure under exemption 3. *Aftergood I, supra*, at *14-*16. *See also, Center forNational Security Studies v. Central Intelligence Agency*, 711 F.2d 409, 410-411 (D.C. Cir. 1983) (holding that the court lacked jurisdiction over an interlocutory appeal of a district court order granting the CIA's summary judgment motion on plaintiff's FOIA request for the CIA's 1979 budget for the National Foreign Intelligence Program, holding that it was exempted under exemption 1).

[68] In reaching its 2005 decision, the court relies on an earlier case involving the same parties, Aftergood v. CIA, 2004 U.S. Dist. LEXIS 27035 at * 1, No. 02-1146, slip op. at 4-5 (D.D.C. Sept. 29, 2004), in which the plaintiff sought disclosure, under FOIA, of the FY2002 aggregate intelligence budget. The court in its 2005 decision states that, in the 2004 decision, it held that 50 U.S.C. § 403-3(c)(7) qualified as a basis for an exemption under exemption 3, and that intelligence budget information "`relate[d] to intelligence methods, namely the allocation, transfer and funding of intelligence programs.' 355 F. Supp. 2d at 562 (this purports to quote 2004 U.S. Dist. LEXIS 27035, *4). However, that phrase does not appear in the cited decision.) In the 2005 case, the court framed the issue before it as whether the requested intelligence budget information related to intelligence sources that the DCI had an obligation to protect. 355 F. Supp. 2d at 562. The court relied upon its 2004 holding to conclude that the intelligence budget information sought related to intelligence sources and methods. In so doing, Judge Urbina also cited the Acting Director of Central Intelligence's declaration that "aggregate intelligence budgets are not identified 'to protect the classified intelligence methods used to transfer to and between intelligence agencies', and that "the methods of clandestinely providing money to the CIA and the Intelligence Community for the purpose of carrying out the classified intelligence activities of the United States are themselves congressionally enabled intelligence methods." *Id*.

[69] 355 F. Supp. 2d at 562-63:

> ... Specifically the court [in Halperin v. CIA, 629 F.2d 144, 152 (D.C. Cir. 1980),] concluded that "the injury alleged by the plaintiff [is] undifferentiated and common to all members of the public" and therefore, the plaintiff "has not shown the particular concrete injury required for standing." Id. (internal quotations omitted).
>
> The plaintiff laments that the Circuit's holding in *Halperin* implies that the CIA never has to report its intelligence expenditures ... What the plaintiff ignores is that fact that within the same opinion, the court explains that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress and ultimately to the political process." *Halperin*, 629 F .2d at 152 (quoting United States v. Richardson, 418 U.S. 166, 179 ... (1974)).

[70] As noted in III J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342, 213-14 (1970), in his discussion of the purpose of Article I, Section 9, Clause 7:

> The object is ... to secure regularity, punctuality, and fidelity, in the disbursements of the public money.... Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purposes, and by what authority.

[71] *Congressional Record*, Nov. 10, 1993, p. 515569.

[72] Senator DeConcini noted that the intelligence community had failed to analyze the condition of the Soviet Union: "Maybe they had too much money. Maybe there was a wrong direction coming from the executive branch. ..." Therefore, "What does Congress do when some agency does something like that? You start cutting away at their budget, and rightfully so. That is what we have done." *Congressional Record*, Nov. 10, 1993, p. 515565.

[73] See Bruce D. Berkowitz and Allan E Goodman, *Strategic Intelligence for American National Security* (Princeton, NJ: Princeton University Press, 1989), p. 142.

[74] Senator Metzenbaum noted on November 10, 1993, "The argument that disclosure of the intelligence budget total would lead to cuts in that budget is . . . interesting. I have to admit that I think it would do just that. I think the American people would object to spending so much on intelligence. If the budget figure is more than the American people want spent on intelligence, then why should we be spending it?" *Congressional Record*, Nov. 10, 1993, p. S 15555. Representative Sanders, on the other hand, argued for reductions in intelligence spending without reference to budgetary data, stating during the House debate on August 3, 1993: "My job is not to go through the intelligence budget. I have not even looked at it. What I am here to tell you is that you have to tell us that your spy satellites are more important than feeding the hungry children, taking care of people sleeping out in the streets, not rebuilding our educational system, not rebuilding our infrastructure." *Congressional Record*, Aug. 3, 1993, p. H5692.

[75] The question was debated on the Senate floor on August 2, 1991, *Congressional Record*, pp. S11971-11977.

[76] On October 1, 1975 the House voted down an amendment to the FY1976 Defense Appropriation bill to require disclosure of funds appropriated to the CIA.

[77] In a floor statement in November 1993, Senator Metzenbaum indicated that he had introduced the provision in the SSCI markup, with the support of both the then-chairman, Senator Boren, and the Republican vice chairman, Senator Murkowski. *Congressional Record*, Nov. 10, 1993, p. 515554.

[78] S.Rept. No. 102-117, p. 14.

[79] U.S. Congress, Senate, 102nd Cong., 1st sess., Select Committee on Intelligence, *Authorizing Appropriations for Fiscal Year 1992 for the Intelligence Activities of the U.S. Government, the Intelligence Community Staff, the Central Intelligence Agency Retirement and Disability System, and for Other Purposes*, S.Rept. 102-172, Oct. 3, 1991, p. 2.

[80] U.S. Congress, House of Representatives, 102nd Cong., 1st sess., *Intelligence Authorization Act for Fiscal Year 1992*, Conference Report, H.Rept. 102-327, Nov. 18, 1991, p. 29. House Republican conferees did not support the disclosure provision, but no exception was taken by any Senate conferee.

[81] Prepared Statement by George Bush, Former Director of Central Intelligence, printed in Senate, Whether Disclosure of Funds Authorized for Intelligence Activities is in the Public Interest, Hearing, pp. 81-82.

[82] U.S. *Public Papers of the Presidents. George Bush, 1991*, II (Washington: Government Printing Office, 1992), p. 1544.

[83] U.S. Congress, Senate, Select Committee on Intelligence, 102nd Cong., 1st sess., *Nomination of Robert M Gates, to be Director of Central Intelligence*, S.Hrg. 102-799, September 16-20, 1991, Vol. 1, p. 509.

[84] See archived CRS Issue Brief IB92053, *Intelligence Reorganization Proposals*, by Richard A. Best Jr.

[85] U.S. Congress, House of Representatives, 102nd Cong., 2nd sess., *Intelligence Authorization Act for Fiscal Year 1993*, Conference Report, H.Rept. 102-963, Oct. 1, 1992, p. 81

[86] U.S. Congress, House of Representatives, 103rd Cong., 1st sess., Permanent Select Committee on Intelligence, *Director Woolsey — Future of the Intelligence Community*, Hearing, Mar. 9, 1993, p. 13; Woolsey repeated his concerns in a MacNeil/Lehrer Newshour interview on Oct. 19, 1993.

[87] Inside the Pentagon, May 6, 1993, p. 15; Senator Metzenbaum provided excerpts from the exchange in the *Congressional Record*, Nov. 10, 1994, p. S15554.

[88] *Congressional Record*, Nov. 10, 1993, pp. S15557-15558.

[89] See, for instance, the remarks of Representative Skaggs, *Congressional Record*, Aug. 4, 1993, p. H5777.

[90] In 1977, however, Senator Moynihan had joined a number of Senators in opposing a move by the SSCI to disclose the intelligence budget. See Minority views of Senators Chafee, Gam, Goldwater, Hathaway, Lugar, Moynihan, Pearson, and Wallop printed in S.Rept. No. 95-274, pp. 13-17.

[91] *Congressional Record*, Oct. 18, 1993, pp. S13805-13808.

[92] *Congressional Record,* Nov. 10, 1993, pp. S15553-15570.

[93] The conference report continued: "Nevertheless, the House conferees did state their willingness to entertain bill language expressing the 'sense of the Senate' (as opposed to the `sense of the Congress' expressing the views of both Houses) in favor of disclosure of the aggregate budget figure, but Senate conferees opposed to disclosure prevented agreement to such modification of the Senate amendment on an evenly divided vote of the Senate conferees. To resolve the impasse, the Senate conferees ultimately agreed to recede to the position of the House." U.S. Congress, House of Representatives, 103rd Cong., 1st sess., *Intelligence Authorization Act for Fiscal Year 1994*, Conference Report, H.Rept. 103-377, Nov. 18, 1993, pp. 29-30.

[94] *Congressional Record*, Nov. 18, 1993, p. 515561.

[95] H.Rept. 103-377, p. 30.

[96] Quoted in Tim Weiner, "Disclosure Urged for Secret Budget," *New York Times*, Nov. 25, 1993, p. A20.

[97] Statement of the Director, Feb. 22, 1994, p. 8.

[98] Commission on the Roles and Capabilities of the United States Intelligence Community, *Preparing for the 21" Century: An Appraisal of U.S. Intelligence,* Mar. 1, 1996, p. 142. It is noteworthy that the Commission included several Members of Congress, including Representatives Goss and Dicks both of whom served on the House Intelligence Committee.

[99] Walter Pincus, "Clinton Approves Disclosure of Intelligence Budget Figure," *Washington Post*, Apr. 24, 1996, p. A19.

[100] Central Intelligence Agency, Press Release No. 13-97, *Statement of the Director of Central Intelligence Regarding the Disclosure of the Aggregate Intelligence Budget for Fiscal Year 1997*, Oct. 15, 1997.

[101] Ibid.

[102] Central Intelligence Agency, Press Release No. 03-98, *Statement by the Director of Central Intelligence Regarding the Disclosure of the Aggregate Intelligence Budget for Fiscal Year 1998*, Mar. 20, 1998.

[103] Vernon Loeb, "CIA Won't Disclose Total Intelligence Appropriation for Fiscal Year," Washington Post, Dec. 25, 1998, p. A10. See the discussion earlier in this Report, pp. 28—31.

[104] 50 U.S.C. 403-1(c)(1)(B); 50 U.S.C. 403-1(c)(4).

[105] 9/11 *Commission*, p. 416.

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Chapter 4

DIRECTOR OF NATIONAL INTELLIGENCE STATUTORY AUTHORITIES: STATUS AND PROPOSALS

Richard A. Best Jr. and Alfred Cumming

SUMMARY

In passing the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) in 2004, Congress approved the most comprehensive reform of the U.S. Intelligence Community since it was created over 50 years ago. Principal among enacted changes was the establishment of a new position of the Director of National Intelligence (DNI) to manage the Intelligence Community (IC).

Some observers have questioned whether the act provides the DNI the authority necessary to effectively implement Congress's 2004 intelligence reforms. Others assert that the DNI's authorities are significantly stronger than those of the former Director of Central Intelligence (DCI), but suggest that the DNI has failed to aggressively assert the authorities he has been provided.

In 2007, DNI Michael McConnell acknowledged his authorities are stronger than those of the DCI and conceded that he had not issued certain guidance to the IC clarifying the new authorities. Nevertheless, he argued effectively managing the IC would require additional authorities on top of the ones Congress agreed to in 2004.

In response to these entreaties, the Senate Intelligence Committee further strengthened the DNI authorities in the FY2008 Intelligence Authorization bill (S. 1538; S.Rept. 110-75), authorizing the DNI to conduct accountability reviews of significant IC failures, address interagency information sharing deficiencies, and approve interagency funding of national intelligence centers.

Similarly, but on a more limited basis, the House Intelligence Committee also strengthened certain DNI authorities in its version of the FY2008 authorization bill. The Committee, however, said it was disappointed that the DNI had not assumed a more directive role in coordinating the IC.

Despite these differences in emphasis, Senate and House intelligence committee conferees agreed to accord the DNI several new authorities (H.Rept. 110-478). President

Bush, however, vetoed the congressional conference report, citing, among other concerns, the limitations the legislation imposed on terrorist interrogations conducted by the Central Intelligence Agency. Although an attempt in the House to override the President's veto failed, the congressional intelligence committees are likely to revisit the issue of strengthening DNI authorities during consideration of the FY2009 intelligence budget.

In examining the DNI's current authorities, it is clear that they are significantly stronger than those that were available to the DCI, but whether they are sufficient to implement intelligence reforms mandated by Congress will continue to depend on several factors. They include the extent to which the authorities themselves are adequate, the DNI's willingness to assert those authorities, and the extent to which the DNI receives presidential and congressional support. This report will be updated as new information becomes available.

BACKGROUND

On April 21, 2005, Ambassador John Negroponte was confirmed as the first Director of National Intelligence (DNI), a position established by the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458; hereafter, the Intelligence Reform Act). There was considerable media speculation at the time as to whether the new DNI would have the authority necessary to effectively manage the Intelligence Community, long viewed by observers as more of a loose confederation of 16 separate intelligence entities than an integrated community On January 22, 2007, Ambassador Negroponte was nominated as Deputy Secretary of State, and retired Admiral J. Michael McConnell was confirmed as his successor on February 7, 2007.

Historically, the Director of Central Intelligence (DCI) had three primary responsibilities that were codified in the National Security Act, as amended. First, the DCI was responsible for providing national intelligence (as opposed to tactical intelligence for military commanders) to the President and other senior officials, and "where appropriate," to Congress. Second, the DCI served as head of the Intelligence Community with authorities to establish priorities for collection and analysis, to develop and present to the President the annual budget for national intelligence programs, and, within tightly prescribed limits, to transfer funds and personnel from one part of the National Foreign Intelligence Program (NFIP), renamed the National Intelligence Program (NIP) under the Intelligence Reform Act, to another. And, third, the DCI served as head of the Central Intelligence Agency (CIA), directing the collection of information by human sources, supervising the wide-ranging analytical efforts of the CIA, and, when directed by the President, undertaking covert actions.

Many outside observers, Members of Congress, and various commissions over the years argued that the DCI position was unworkable. They contended that DCIs, frustrated by the challenges involved in managing the entire Intelligence Community, focused narrowly on the CIA, and that the result was an ill-coordinated intelligence effort that has poorly served the Nation. Some also asserted that DCIs lacked adequate legal authorities to establish priorities and to ensure compliance by intelligence agencies beyond the CIA. In particular, it was suggested that major intelligence agencies in the Department of Defense (DOD) — the National Security Agency (NSA), the National Reconnaissance Office (NRO), and the National-Geospatial Agency (NGA) — have been more responsive to the needs of the military services than to the requirements of national policymakers. And, fmally, some

observers, while conceding that DCI authorities under the National Security Act were limited, nevertheless contended that DCIs failed to fully assert their authorities, particularly when their priorities conflicted with those of the Secretary of Defense, viewed by many as the dominant voice in the Intelligence Community because of the Secretary's control over an estimated eighty-five percent of the intelligence budget.

In July 2004 the 9/11 Commission (the National Commission on Terrorist Attacks Upon the United States) recommended that the DCI position be replaced by a National Intelligence Director to manage the national intelligence program and oversee the agencies that contribute to it. In response, a number of bills were introduced and, after extended deliberations, Congress approved and the President signed on December 17, 2004, the Intelligence Reform Act. It established the new position of DNI along with a separate head of the CIA. Having accepted this principle, however, there were significant differences of opinion about the particular authorities that should be given to the DNI, especially with regard to the preparation and execution of the budgets of the large intelligence agencies in DOD. These differences were addressed by a provision in the act (section 1018) requiring that the President issue guidelines to ensure that the DNI's authorities are exercised in a way that "respects and does not abrogate the statutory responsibilities" of other departments. No such guidelines have been issued. Some maintain that this reflects the fact that in asserting his existing authorities, the DNI has not done so in a way that has caused DOD or other agencies housing intelligence components to call for the issuance of the guidelines.

The Intelligence Reform Act assigns to the DNI two of the three principal responsibilities formerly performed by the DCI. The DNI will provide intelligence to the President, other senior officials, and Congress, and the DNI will head the Intelligence Community But, unlike DCIs, the DNI will not oversee the CIA. Rather, the act establishes the new position of Director of the Central Intelligence Agency (DCIA), who will report to the DNI. The act also restates the major responsibilities of the DCIA, which include (1) collecting intelligence through human sources and by other appropriate means (but with no police, subpoena, or law enforcement powers or internal security functions); (2) correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence; (3) providing overall direction for and coordination of collection by human sources outside the U.S., in coordination with other government departments; (4) performing other functions and duties related to intelligence affecting the national security as the President or DNI may direct [a formulation that, some observers believe, is intended to encompass the planning and carrying out of covert actions]; and (5), under the DNI's direction, coordinating relationships between U.S. intelligence services and those of other countries.

DNI CALLS FOR STRONGER, CLEARER AUTHORITIES

In April 2007, DNI McConnell reportedly told a conference of federal officials that he lacks sufficient authority to lead the 16-agency Intelligence Community because, except for the CIA, he has no direct line management authority over the remaining 15 agencies, since each is part of another Cabinet-level department.[1] The same month, the Administration proposed to Congress a FY2008 Intelligence Authorization Act containing several new DNI authorities.

Also in April, as part of a new initiative to improve integration and collaboration within the Intelligence Community, DNI McConnell announced a "100 Day Plan" that included a proposal to revise "existing statutes, regulations, and directives," as part of an effort to "delineate clearly the roles and responsibilities of the heads of Intelligence Community components, as well as to clarify DNI authority regarding national intelligence agencies."[2]

Despite his call for new authorities, DNI McConnell in an October 10, 2007 follow-up report noted that the Intelligence Reform Act had "significantly clarified and strengthened DNI authorities," but acknowledged that Intelligence Community leadership had "not fully defined those authorities in guidance" to the Intelligence Community"[3] Such an acknowledgment may suggest a recognition by the DNI that he has not have fully asserted his existing authorities.

CONGRESSIONAL INTELLIGENCE COMMITTEES ADOPT DIFFERENT APPROACHES; HOUSE COMMITTEE CRITICIZES DNI

The two congressional intelligence committees appear to have taken somewhat differing approaches to the issue of DNI authorities. In its version of the FY2008 Intelligence Authorization Act,[4] the Senate Intelligence Committee approved several proposals intended to strengthen the DNI authorities, while the House Intelligence Committee in its version adopted a more limited number of new authorities and expressed disappointment that the DNI had not played a more aggressive role in coordinating the Intelligence Community using his existing authorities.

Senate Intelligence Committee Approves New DNI Authorities

The Senate bill[5] would have given the DNI several new authorities, including the authority to:

- conduct accountability reviews of significant failures or deficiencies within the Intelligence Community;[6]
- use National Intelligence Program funds to address deficiencies or needs that arise in intelligence information access or sharing capabilities;[7]
- delegate to certain senior officials the authority to protect intelligence sources and methods from unauthorized disclosure;[8]
- approve interagency financing of national intelligence centers;[9]
- convert competitive service positions and incumbents within the Intelligence Community to excepted positions;[10]
- provide enhanced pay authority for critical position in portions of the Intelligence Community where that authority does not exist[11]
- authorize Intelligence Community elements, under certain circumstances, to adopt compensation, performance management, and scholarship authorities that have been authorized for any other Intelligence Community element;[12] and, the authority to;

- through the DNI's Director of Science and Technology and under the direction of the DNI, establish engineering standards and specifications applicable to each acquisition of a major system by the Intelligence Community [13]

House Intelligence Committee Approves Fewer New DNI Authorities

The House bill[14] would have provided the DNI with a more limited number of new authorities, including the authority to:

- to have federal employees detailed to the Community Management Staff on a non-reimbursable basis, if they serve in such positions for less than a year.[15]
- provide incentive awards to federal employees and military personnel assigned to the DNI's office;[16]

In its report, which accompanied the Intelligence Authorization Bill, the House Intelligence Committee noted its disappointment that DNI "has not assumed a more directive role in coordinating the Intelligence Community"[17] The Committee also expressed its concern that the DNI "has not taken a consistent approach on whether the ODNI [Office of the Director of National Intelligence] will serve as coordinator, or executor, of Intelligence Community functions"[18] and that the DNI "remains unable to set goals and requirements for important skills, including foreign language capability."[19]

Both the Senate and House bills would give the DNI the authority to delegate authority to approve certain travel on common carriers to the head of individual Intelligence Community elements;[20]

Intelligence Conferees Adopt Several New DNI Authorities

Choosing among the DNI authority enhancement provisions contained in the Senate and House versions of FY2008 Intelligence Authorization Bill, conferees agreed to include several enhancements in the final version of the FY2008 Intelligence Act Conference Report, which the President subsequently vetoed, citing concerns that the legislation would impose certain limitations on the CIA's terrorist interrogation program and other provisions.[21] The President did not, however, express objections to provisions in the bill that would have enhanced the authorities of the DNI, and the congressional intelligence committees are likely to revisit the issue of strengthening DNI authorities during consideration of the FY2009 intelligence budget.

The conferees provided the DNI with several new authorities, including the authority to:

- have detailed to the DNI's office U.S. Government personnel on a reimbursable or non-reimbursable basis for periods up to two years.[22] The Senate bill would have allowed such assignments for up to the three years; the House bill would have permitted non-reimbursable details of less than one year.
- provide enhanced pay authority for critical positions in portions of the Intelligence Community (IC) where that authority does not exist.[23]

- delegate authority to approve certain travel on common carriers to the head of individual Intelligence Community elements;[24]
- conduct accountability reviews of significant failures or deficiencies within the Intelligence Community[25] According to conferees, this accountability process is intended to be separate and distinct from any accountability reviews conducted by IC elements or their inspectors general. Conferees also noted that the Senate bill included language stipulating that the DNI may conduct an accountability review if requested by one of the congressional intelligence committees, but that it is not statutorily required to do so.
- delegate to the IC's Chief Information Officer the authority to protect intelligence sources and methods from unauthorized disclosure.[26] The Senate bill would have permitted DNI to extend such authority to any Deputy DNI or to the head of any IC element. Conferees noted that at the request of the Senate Armed Services Committee, the DNI's authority to delegate such authority was limited to personnel within the DNI's office. Conferrees further limited the DNI's delegation authority to apply only to the DNI's Chief Information Officer, whose responsibilities as a presidentially-appointed, Senate-confirmed official involve information matters throughout the IC.
- use National Intelligence Program funds to quickly address deficiencies or needs that arise in intelligence information access or sharing capabilities.[27] Conferees also required that over a four-year period the DNI report annually on the implementation of this authority.
- approve interagency financing of national intelligence centers. This new authority, according to conferees, would provide the DNI the capability to rapidly focus the IC on a emerging threat without being constrained by the budget cycle or general limitations in the appropriations law.[28] Conferees required that over a four-year period the DNI report annually on the exercise of this authority.

Conferrees rejected several other authorities contained in the Senate bill, including authorities to: convert competitive service positions and incumbents within the IC to "excepted" positions; authorize IC elements to adopt compensation, performance management, and scholarship authorities that have been authorized for any other IC element; and to establish, through the DNI's Director of Science and Technology, certain engineering standards and specifications applicable to each acquisition of a major system. Conferees also rejected a House provision that would have authorized the DNI to provide incentive awards to federal employees and military personnel assigned to the DNI's office.

2004 INTELLIGENCE REFORM ACT STRENGTHENS DNI AUTHORITIES

To strengthen the DNI's authority, Congress in 2004 approved the Intelligence Reform Act, providing the DNI additional powers in certain areas, including in those of personnel, tasking, and acquisition. Arguably, most important, the act enhanced the DNI's control over the budgets of the Intelligence Community's 16 agencies. According to one observer, the DCI had "been pressing his nose against the glass looking in," having never possessed the DNI's budget clout.[29] Other observers acknowledge that the act provided the DNI more authority,

but question whether this enhanced authority will be sufficient and whether the DNI will aggressively assert it in any case.

Budget Authority

The Intelligence Reform Act accords the DNI several new and enhanced budget authorities that were unavailable to DCIs. First, it provides that at the DNI's exclusive direction, the Director of the Office of Management and Budget (OMB) shall "apportion," or direct, the flow of congressionally appropriated funds from the Treasury Department to each of the cabinet level agencies containing Intelligence Community elements.[30] This change is designed to strengthen the DNI's control over Intelligence Community spending. If, for example, an agency fails to comply with certain of the DNI's spending priorities, the DNI can withhold that agency's funding. DCIs had no such authority.

Second, the DNI is authorized to "allot" or "allocate" appropriations directly at the sub-cabinet agency and department level, providing the DNI additional control over spending.[31] If a departmental comptroller refuses to act in accordance with a DNI spending directive, the law requires that the DNI notify Congress of such refusal.[32] DCIs had no such authority or reporting obligation.

Third, the DNI is authorized to "develop and determine" the National Intelligence Program (NIP) budget.[33] By contrast, DCIs were authorized to "*facilitate* [emphasis added] the development" of the Intelligence Community's annual budget.

Fourth, the DNI is authorized to "ensure the effective execution of the budget," and to monitor its implementation and execution.[34] Except in the case of the CIA, DCIs had no such authority.

Fifth, the DNI is authorized to provide budget guidance to those elements of the Intelligence Community not falling within the NIP.[35] Again, DCIs had no such authority.

Notwithstanding these stronger budget authorities, the DNI's power to influence and shape DOD intelligence spending is generally seen as essentially the same as that enjoyed by DCIs. The Intelligence Reform Act authorizes the DNI to "participate in the development by the Secretary of Defense of the Joint Military Intelligence Program and the Tactical Intelligence and Related Activities Program."[36] The role of DCIs in such activity was also "participatory" in nature.

Transfer and Reprogramming Authority

The DNI, with OMB approval, is authorized to transfer or reprogram NIP funds after affected department heads, or in the case of the CIA, its director, have been "consulted."[37] DCIs, by contrast, were permitted to transfer such funds, but only if the affected parties did not object.

Personnel Transfer Authority

The DNI, with the OMB approval, is authorized to transfer personnel within the Intelligence Community for periods not to exceed two years. Before doing so, however, the DNI is required to jointly develop with department and agency heads procedures to govern

such transfers. DCIs, by contrast, could transfer such personnel only if the affected parties did not object and only for periods up to one year.[38]

Appointment Authority

The Intelligence Reform Act gives the DNI expanded appointment authority and increases the number of positions over which the DNI can exercise such authority.[39] Specifically, the DNI's "concurrence" is required before a department or an agency head having jurisdiction over a certain appointment can appoint an individual to fill such a vacancy, or recommend to the President an individual to be nominated to fill the such a vacancy, as the case may be. Absent DNI concurrence, the DNI, or the department head, may advise the President directly of such nonconcurrence. DCI appointment authorities were more limited, both in terms of the degree of concurrence authority and with regard to the number of positions over which the DCI exercised such authority.

Acquisition Authority

The DNI is authorized to serve as the exclusive milestone decision authority on major acquisitions, except with respect to DOD programs, in which case the DNI shares joint authority with the Secretary of Defense.[40] DCIs had no such statutorily- based authority.

Tasking Authority

The DNI is authorized to "... manage and direct the tasking of, collection, analysis, production, and dissemination of national intelligence...by approving requirements and resolving conflicts."[41] Although DCIs were authorized to exercise certain collection authorities, statutory authorities did not explicitly address analysis, production, and dissemination authorities.

Authority Over National Counterterrorism Center (NCTC)

The Intelligence Reform Act establishes a hybrid structure, one in which the NCTC director reports to the DNI with regard to counterterrorism intelligence analysis and operations, and to the President with regard to the development and coordination of national interagency counterterrorism policy.[42] The act specifically stipulates that the NCTC director reports to the President, rather than to the DNI, with respect to "... planning and progress of joint counterterrorism operations (other than intelligence operations)."[43] While DCIs had unqualified control over the DCI's Counterterrorism Center, the authorities of the DCI's Center's authorities did not extend beyond the Intelligence Community, whereas certain of NCTC's authorities, by contrast, extend across the executive branch.[44]

Some observers suggest that the new and enhanced authorities described above could be interpreted differently by different agencies. They note that section 1018 of the act requires that the President issue guidelines to ensure that the DNI's authorities are implemented in "in a manner that respects and does not abrogate the statutory authorities" of other departments. Although such guidelines have not been promulgated, as was noted earlier, some observers believe that if such guidelines were to be issued, they could serve to weaken the DNI's authorities.

POTENTIAL CONGRESSIONAL CONCERNS

Some commentators have suggested that ambiguities exist within the Intelligence Reform Act that cover complex relationships among disparate agencies with their own statutory authorities. In such a situation, much will undoubtedly depend on how the DNI understands his position, and on the patterns of cooperation and deference that are set in his tenure. Congress may be especially interested in the relationships between the DNI and the Defense Department and the law enforcement community.

Whether the DNI's authorities under the act are sufficient to meet the demands of effective management remains to be seen. What is more clear, however, is that the statute provides the DNI substantially more authority — not only in regard to the budget, but also in the areas of personnel, tasking, and acquisition — than DCIs have had under the National Security Act of 1947, as amended. Just how much *more* overall authority the DNI will actually wield will depend on several factors. Among them: (1) will the DNI aggressively assert the new authorities? (2) will the President and Congress back the DNI if he does? (3) and, will the DNI successfully establish a transparent Intelligence Community budget process that will permit him to make and effectively enforce informed budget decisions?

END NOTES

[1] Shawn Waterman, "State of Security: DNI: Lacking Authority," *United Press International*, April 10, 2007. The following agencies are members of the U.S. Intelligence Community: Central Intelligence Agency, Defense Intelligence Agency, Department of Energy, Department of Homeland Security, Department of State, Department of Treasury, Drug Enforcement Administration, Federal Bureau of Investigation, National Geospatial¬Intelligence Agency, National Reconnaissance Office, National Security Agency, U.S. Air Force, Army, Coast Guard, Marine Corps, and Navy.

[2] See "United States Intelligence Community (IC) 100 Day Plan for Integration and Collaboration," April 11, 2007, p. 11, Office of the Director of National Intelligence, [http://www.dni.gov]. The plan, according to DNI McConnell, is based on the National Intelligence Strategy of the United States of America, which former DNI John Negroponte issued in 2005, and represents the first phase of a DNI-sponsored effort that is intended to demonstrate short-term progress and build momentum for Intelligence Community integration.

[3] See "United States Intelligence Community 500 Day Plan for Integration and Collaboration," October 10, 2007, p. 14, Office of the Director of National Intelligence, [http://www.dni.gov]. The "500 Day Plan" represents the second phase of a DNI-sponsored effort to sustain and accelerate Intelligence Community integration and collaboration.

[4] S. 1538, FY2008 Intelligence Authorization Act, passed in the Senate by a voice vote on October 3, 2007.

[5] S. 1538, FY2008 Intelligence Authorization Act.

[6] Ibid, Sec. 401.

[7] Ibid, Sec. 402.

[8] Ibid, Sec. 403.

[9] Ibid, Sec. 404.

[10] Ibid, Sec. 405.
[11] Ibid.
[12] Ibid.
[13] Ibid, Sec. 407.
[14] H.R. 2082.
[15] Ibid, Sec. 104.
[16] Ibid, Sec. 405.
[17] See H.Rept. 110-131, accompanying H.R. 2082, the FY2008 Intelligence Authorization Act, p. 20.
[18] See H.Rept. 110-131, accompanying H.R. 2082, FY2008 Intelligence Authorization Act, pp. 20-21.
[19] Ibid, p. 21.
[20] S. 1538, Sec. 304 and H.R. 2082, Sec. 306.
[21] See President's Message to the House of Representatives, March 8, 2008. An attempt in the House of Representatives on March 11, 2008, to override the President's veto, failed by a vote of 225-118 (2/3 required to override).
[22] H.Rept. 110-478, Sec. 302. H.Rept. 110-478, the FY2008 Intelligence Authorization Act, accompanied H.R. 2082.
[23] Ibid, Sec. 304.
[24] Ibid, Sec. 305.
[25] Ibid, Sec. 408.
[26] Ibid, Sec. 409.
[27] Ibid, Sec. 410
[28] Ibid, Sec. 411.
[29] Interview with a senior Intelligence Community official.
[30] P.L. 108-458, Sec. 102A(c)(5)(B).
[31] Ibid., Sec. 102A(c)(5)(A).
[32] Ibid., Sec. 102A(c)(7)(B).
[33] Ibid., Sec. 102A(c)(1)(B).
[34] Ibid., Sec. 102A(c)(4).
[35] Ibid., Sec. 102A(c)(3)(B).
[36] Ibid., Sec. 102A(c)(3)(A). The Joint Military Intelligence Program, or JMIP, and the Tactical Intelligence and Related Activities Program, or TIARA, subsequently were consolidated into the National Intelligence Program in September 2005.
[37] Ibid., Sec. 102A(d).
[38] Ibid., Sec. 102A(e).
[39] Ibid., Sec. 1014. These positions include the Director of the National Security Agency; the Director of the National Reconnaissance Office; the Director of the National Geospatial-Intelligence Agency; the Assistant Secretary of State for Intelligence and Research; the Director of the Office of Intelligence of the Department of Energy (DOE), the Director of the Office of Counterintelligence, DOE; the Assistant Secretary for Intelligence Analysis, Department of the Treasury; the Executive Assistant Director (EAD) for Intelligence, the Federal Bureau of Investigation (FBI) or any successor to that position; and, the Assistant Secretary of Homeland Security for Information Analysis. In 2006, DOE consolidated the Office of Intelligence and Office of Counterintelligence into the new Office of Intelligence and Counterintelligence under the control of DOE's Senior Intelligence Officer. In 2005, the FBI consolidated the EAD for Counterterrorism and Counterintelligence and the EAD for Intelligence into a single EAD for National Security.
[40] Ibid., Sec. 102(A)(q). U.S. intelligence and Pentagon officials reportedly are finalizing the first formal agreements governing how the two communities work together on major acquisitions. See John T. Bennett, "U.S. DOD, Intel Agencies Forge Joint Acquisition," *Defense News*, January 14, 2008.
[41] Ibid., Sec. 102A(f)(ii)(I) and (II).
[42] lbid Sec. 1021. Section 1021 of P.L. 108-458 codifies the existence of NCTC, which initially was established under Executive Order (EO) 13358. With regard to the establishment of NCTC, there is a potential conflict between the statute and EO 13358. See CRS Report RL32816, *The National Counterterrorism Center: Implementation Challenges and Issues for Congress*, by Todd M. Masse.
[43] P.L. 108-458, Sec. 1021, amending Title I of the National Security Act of 1947 by adding Sec. 119(c)(3). The March 2005 Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction expressed concerns about NCTC's "hybrid character" (p. 328).
[44] See the *Congressional Record*, December 8, 2004, with regard to Senate consideration of the conference report to accompany S. 2845, the Intelligence Reform and Terrorism Prevention Act of 2004, in which Senator Joseph I. Lieberman is quoted as stating that NCTC's Directorate of Strategic Operational Planning would conduct strategic operational planning for "...the entire Executive branch — ranging from the combatant commands, to the State Department, to the FBI's Counterterrorism Division to the Department of Health and Human Services to the CIA" (p. 11971).

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Chapter 5

COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS

Alfred Cumming

SUMMARY

Published reports have suggested that in the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counter-terrorism intelligence activities as part of what the Bush Administration terms the global war on terror. Some observers have asserted that the Department of Defense (DOD) may be conducting certain kinds of counterterrorism intelligence activities that would statutorily qualify as "covert actions," and thus require a presidential finding and the notification of the congressional intelligence committees.

Defense officials assert that none of DOD's current counter-terrorist intelligence activities constitute covert action as defined under the law, and therefore, do not require a presidential finding and the notification of the intelligence committees. Rather, they contend that DOD conducts only "clandestine activities." Although the term is not defined by statute, these officials characterize such activities as constituting actions that are conducted in secret, but which constitute "passive" intelligence information gathering. By comparison, covert action, they contend, is "active," in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target.

Some of DOD's activities have been variously described publicly as efforts to collect intelligence on terrorists that will aid in planning counter-terrorism missions; to prepare for potential missions to disrupt, capture or kill them; and to help local militaries conduct counter-terrorism missions of their own.

Senior U.S. intelligence community officials have conceded that the line separating Central Intelligence Agency (CIA) and DOD intelligence activities has blurred, making it more difficult to distinguish between the traditional secret intelligence missions carried out by each. They also have acknowledged that the U.S. Intelligence Community confronts a major challenge in clarifying the roles and responsibilities of various intelligence agencies with regard to clandestine activities. Some Pentagon officials have appeared to indicate that DOD's activities should be limited to clandestine or passive activities, pointing out that if

such operations are discovered or are inadvertently revealed, the U.S. government would be able to preserve the option of acknowledging such activity, thus assuring the military personnel who are involved some safeguards that are afforded under the Geneva Conventions. Covert actions, by contrast, constitute activities in which the role of the U.S. government is not intended to be apparent or to be acknowledged publicly. Those who participate in such activities could jeopardize any rights they may have under the Geneva Conventions, according to these officials.

This chapter examines the statutory procedures governing covert action and associated questions to consider. This report will be updated as warranted.

INTRODUCTION

Some observers assert that since 9/11 the Pentagon has begun to conduct certain types of counterterrorism intelligence activities that may meet the statutory definition of a covert action. The Pentagon, while stating that it has attempted to improve the quality of its intelligence program in the wake of 9/11, contends that it does not conduct covert actions.

Congress in 1990 toughened procedures governing intelligence covert actions in the wake of the Iran-Contra affair, after it was discovered that the Reagan Administration had secretly sold arms to Iran, an avowed enemy that had it branded as terrorist, and used the proceeds to fund the Nicaraguan Democratic Resistance, also referred to by some as "Contras." In response, Congress adopted several statutory changes, including enacting several restrictions on the conduct of covert actions and establishing new procedures by which Congress is notified of covert action programs. In an important change, Congress for the first time statutorily defined covert action to mean "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[1]

The 1991 statutory changes remain in effect today. This report examines the legislative background surrounding covert action and poses several related policy questions.

BACKGROUND

In 1974, Congress asserted statutory control over covert actions in response to revelations about covert military operations in Southeast Asia and other intelligence activities. It approved the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961 requiring that no appropriated funds could be expended by the CIA for covert actions unless and until the President found that each such operation was important to national security, and provided the appropriate committees of Congress with a description and scope of each operation in a timely fashion.[2] The phrase "timely fashion" was not defined in statute.

In 1980, Congress endeavored to provide the two new congressional intelligence committees with a more comprehensive statutory framework under which to conduct oversight.[3] As part of this effort, Congress repealed the Hughes-Ryan Amendment and replaced it with a statutory requirement that the executive branch limit its reporting on covert

actions to the two intelligence committees, and established certain procedures for notifying Congress prior to the implementation of such operations. Specifically, the statute stipulates that if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting the vital interests of the United States, the President may limit prior notice to the chairmen and ranking minority members of the intelligence committees, the speaker and minority leader of the House, and the majority and minority leaders of the Senate—a formulation that has become known as the "Gang of Eight." If prior notice is withheld, the President is required to inform the Committees in a "timely fashion" and provide a statement of the reasons for not giving prior notice.[4]

In 1984, in the wake of the mining of Nicaraguan harbors in support of the Nicaraguan Democratic Resistance, the chairman and vice chairman of the Senate Select Committee on Intelligence signed an informal agreement—which became known as the "Casey Accords"—with then-Director of Central Intelligence (DCI) William Casey establishing certain procedures that would govern the reporting of covert actions to Congress. In 1986, the committee's principals and the DCI signed an addendum to the earlier agreement, stipulating that the Committee would receive prior notice if "significant military equipment actually is to be supplied for the first time in an ongoing operation ... even if there is no requirement for separate higher authority or Presidential approval." This agreement reportedly was reached several months after President Reagan signed the January 17, 1986, Iran Finding which authorized the secret transfer of certain missiles to Iran.[5]

Following the Iran-Contra revelations, President Ronald Reagan in 1987 issued National Security Decision Directive 286 prohibiting retroactive findings and requiring that findings be written. The executive branch, without congressional consent, can revise or revoke such National Security Directives.

In 1988, acting on a recommendation made by the Congressional Iran-Contra Committee, the Senate approved bipartisan legislation that would have required that the President notify the congressional intelligence committees within 48 hours of the implementation of a covert action if prior notice had not been provided. The House did not vote on the measure.

Still concerned by the fall-out from the Iran-Contra affair, Congress in 1990 attempted to tighten its oversight of covert action. The Senate Intelligence Committee approved a new set of statutory reporting requirements, citing the ambiguous, confusing and incomplete congressional mandate governing covert actions under the then-current law. After the bill was modified in conference, Congress approved the changes.[6]

President George H.W. Bush pocket-vetoed the 1990 legislation, citing several concerns, including conference report language indicating congressional intent that the intelligence committees be notified "within a few days" when prior notice of a covert action was not provided, and that prior notice could only be withheld in "exigent circumstances."[7] The legislation also contained language stipulating that a U.S. government request of a foreign government or a private citizen to conduct covert action would constitute a covert action.

In 1991, after asserting in new conference language its intent as to the meaning of "timely fashion" and eliminating any reference to third-party covert action requests, Congress approved and the President signed into law the new measures.[8] President Bush noted in his signing statement his satisfaction that the revised provision concerning "timely" notice to Congress of covert actions incorporates without substantive change the requirement found in existing law, and that any reference to third-party requests had been eliminated. Those covert action provisions remain in effect today.[9]

POST 9/11 CONCERNS

Since the 9/11 terrorist attacks, concerns have surfaced with regard to the Pentagon's expanded intelligence counterterrorism efforts. Some lawmakers reportedly have expressed concern that the Pentagon is creating a parallel intelligence capability independent from the CIA or other American authorities, and one that encroaches on the CIA's realm.[10] It has been suggested that the Pentagon has adopted a broad definition of its current authority to conduct "traditional military activities" and "prepare the battlefield."[11] Senior Defense Department officials reportedly have responded that the Pentagon's need for intelligence to support ground troops after 9/11 requires a more extensive Pentagon intelligence operation, and they suggest that any difference in DOD's approach is due more to the amount of intelligence gathering that is necessarily being carried out, rather than to any difference in the activity it is conducting.[12] These same officials, however, also reportedly contend that American troops were now more likely to be working with indigenous forces in countries like Iraq or Afghanistan to combat stateless terrorist organizations and need as much flexibility as possible.[13]

Recent media reports have stated that the U.S. military since 2004 has used broad, secret authority to carry out nearly a dozen previously undisclosed attacks against Al Qaeda and other militants in Syria, Pakistan and elsewhere.[14] According to other media reports, DOD is paying private contractors in Iraq to produce news stories and other media products to "engage and inspire" the local population to support U.S. objectives and the Iraqi government. The products may or not be non-attributable to coalition forces.[15]

Adding even more complexity to DOD and CIA mission differences, CIA Director Michael Hayden reportedly has stated that it has become more difficult to distinguish between traditional secret intelligence missions carried out by the military and those by the CIA and that any problems resulting from overlapping missions will be resolved case-by-case.[16] More recently, General James R. Clapper, Jr., the Pentagon's Under Secretary of Defense for Intelligence, testified before the Senate Armed Services Committee that within the statutory context of the meaning of covert action, "covert activities are normally not conducted ... by uniformed military forces."[17] In written responses to questions posed by the Senate Armed Services Committee in advance of the hearing, General Clapper asserted that it was his understanding that "military forces are not conducting 'covert action,'" but are instead confining their actions to clandestine activities.[18] Although testifying that the term "clandestine activities" is not defined by statute, he characterized such activity as consisting of those actions that are conducted in secret, but which constitute "passive" intelligence information gathering. By contrast, covert action, he suggested, is "active," in that its aim is to elicit change in the political, economic, military, or diplomatic behavior of a target.[19] In comments before the committee, he further noted that clandestine activity can be conducted in support of a covert activity.[20] He also distinguished between a covert action, in which the government's participation is unacknowledged, and a clandestine activity, which although intended to be secret, can be publicly acknowledged if it is discovered or inadvertently revealed.[21] Being able to publicly acknowledge such an activity provides the military personnel who are involved certain protections under the Geneva Conventions, according to General Clapper, who suggested that those who participate in covert actions could jeopardize any rights they may have under the Geneva Conventions. He recommended "that, to the

maximum extent possible, there needs to be a line drawn (between clandestine and covert activities) from an oversight perspective and as well [sic] as a risk perspective."[22]

Some observers suggest that Congress needs to increase its oversight of military activities that some contend may not meet the definition of covert action, and may therefore, be exempt from the degree of congressional oversight accorded to covert actions. Others contend that increased oversight would hamper the military's effectiveness.[23]

CURRENT STATUTE GOVERNING COVERT ACTIONS

The current statute with regard to covert action remains virtually unchanged since it was signed into law in 1991.[24] In essence it codified elements of the "Casey Accords," the President's 1988 national security directive and various legislative initiatives.

The legislation approved that year, according to the conferees,[25] for the first time imposed the following requirements pertaining to covert action:

- A finding must be in writing.
- A finding may not retroactively authorize covert activities which have already occurred.
- The President must determine that the covert action is necessary to support identifiable foreign policy objectives of the United States.
- A finding must specify all government agencies involved and whether any third party will be involved.
- A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media.
- A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.
- Notification to the congressional leaders specified in the bill must be followed by submission of the written finding to the chairmen of the intelligence committees.
- The intelligence committees must be informed of significant changes in covert actions.
- No funds may be spent by any department, agency or entity of the executive branch on a covert action until there has been a signed, written finding.

The term "covert action" was defined for the first time in statute to mean "... an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly...."[26]

In 1991, Congressional conferees said this new definition was intended to clarify understandings of intelligence activities requiring the President's approval, not to relax or go beyond previous understandings. Conferees also signaled their intent that government activities aimed at misleading a potential adversary to the true nature of U.S. military capabilities, intentions or operations, for example, would not be included under the definition. And they stated that covert action does not apply to acknowledged U.S. government activities which are intended to influence public opinion or governmental attitudes in foreign countries. To mislead or to misrepresent the true nature of an acknowledged U.S. activity does not make it a covert action, according to the conferees.[27]

EXCEPTIONS UNDER THE STATUTORY DEFINITION OF COVERT ACTION

In approving a statutory definition of covert action, Congress also statutorily stipulated four categories of activities which would not constitute covert action. They are: (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of U.S. government programs, or administrative activities; (2) traditional diplomatic or military activities or routine support to such activities; (3) traditional law enforcement activities conducted by U.S. government law enforcement agencies or routine support to such activities; (4) activities to provide routine support to the overt activities (other than activities described in the first three categories) of other U.S. government agencies abroad.[28]

This report addresses the second category of activities—traditional military activities and routine support to those activities.

TRADITIONAL MILITARY ACTIVITIES

Conferees stated:

> It is the intent of the conferees that "traditional military activities" include activities by military personnel under the direction and control of a United States military commander (whether or not the U.S. sponsorship of such activities is apparent or later to be acknowledged) preceding and related to hostilities which are either anticipated (meaning approval has been given by the National Command Authorities for the activities and or operational planning for hostilities) to involve U.S. military forces, or where such hostilities involving United States military forces are ongoing, and, where the fact of the U.S. role in the overall operation is apparent or to be acknowledged publicly. In this regard, the conferees intend to draw a line between activities that are and are not under the direction and control of the military commander. Activities that are not under the direction and control of a military commander should not be considered as "traditional military activities."[29]

ROUTINE SUPPORT OF TRADITIONAL MILITARY ACTIVITIES

Conferees further stated that whether or not activities undertaken well in advance of a possible or eventual U.S. military operation constitute "covert action" will depend in most cases upon whether they constitute "routine support" and referenced the report accompanying the Senate bill for an explanation of the term.[30]

The report accompanying the Senate bill[31] states:

> The committee considers as "routine support" unilateral U.S. activities to provide or arrange for logistical or other support for U.S. military forces in the event of a military operation that is to be publicly acknowledged. Examples include caching communications equipment or weapons, the lease or purchase from unwitting

> sources of residential or commercial property to support an aspect of an operation, or obtaining currency or documentation for possible operational uses, if the operation as a whole is to be publicly acknowledged.
>
> The report goes on to state:
>
> The committee would regard as "other-than-routine" support activities undertaken in another country which involve other than unilateral activities. Examples of such activity include clandestine attempts to recruit or train foreign nationals with access to the target country to support U.S. forces in the event of a military operation; clandestine [efforts] to influence foreign nationals of the target country concerned to take certain actions in the event of a U.S. military operation; clandestine efforts to influence and effect [sic] public opinion in the country concerned where U.S. sponsorship of such efforts is concealed; and clandestine efforts to influence foreign officials in third countries to take certain actions without the knowledge or approval of their government in the event of a U.S. military operation.

As the congressional conferees declared in 1991, timing of such activities—whether proximate to a military operation, or well in advance—does not define "other-than-routine" support of military activities. Rather, whether such activities constitute "other-than-routine" support, and thus constitute covert action, will depend, in most cases, on whether such an activity is unilateral in nature, that is, whether U.S. government personnel conduct the activity, or whether they enlist the assistance of foreign nationals.

POSSIBLE POLICY ISSUES FOR THE 111TH CONGRESS

The lines defining mission and authorities with regard to covert action are less than clear. The lack of clarity raises a number of policy questions for the 111th Congress, including the following far from exclusive list.

- How should Congress define its oversight role? Which committees should be involved?
- Can the U.S. military improve the effectiveness of its intelligence operations without at some point enlisting the support of foreign nationals in such a way that such activity could be viewed as "non-routine support" to traditional military activities, that is, a covert action?
- Is it appropriate to view U.S. counterterrorism efforts in the context of a global battlefield and to view the military as having the authority to "prepare" that battlefield, and can "anticipated" military action precede the onset of hostilities by months or years?
- Is it appropriate to view the military as being involved in "a war" against terrorists, and thus its activities as constituting "traditional military activities" as it wages that war?
- By asserting that its activities do not constitute covert actions, is the Pentagon trying to avoid the statutory requirements governing covert action, including a signed presidential finding, congressional notification, and oversight by the congressional intelligence committees? Or, as Pentagon officials suggest, is DOD, in the wake of 9/11, fulfilling a

greater number of intelligence needs associated with combating terrorism that are sanctioned in statute and do not fallunder the statutory definition of covert action?

- Since 1991, when Congress last comprehensively addressed the issue of covert action, has the environment in which the U.S. military operates changed sufficiently to warrant a review of the statute that applies to covert actions?

In his 1991 signing statement, President George H.W. Bush argued that Congress's definition of "covert action" was unnecessary. He went on to state that in determining whether particular military activities constitute covert actions, he would continue to bear in mind the historic missions of the Armed Forces to protect the United States and its interests, influence foreign capabilities and intentions, and conduct activities preparatory to the execution of operations.

AUTHOR CONTACT INFORMATION

Alfred Cumming
Specialist in Intelligence and National Security
acumming@crs.loc.gov, 7-7739

END NOTES

[1] Sec. 503(e) of the National Security Act of 1947 [50 U.S.C. 413b].
[2] P.L. 93-559 (1974). The "appropriate committees of Congress" was interpreted to include the Committees on Armed Services, Foreign Relations (Senate) and Foreign Affairs (House), and Appropriations of each House of Congress, a total of six committees.
[3] The Senate Select Committee on Intelligence was established in 1976. The House Permanent Select Committee on Intelligence was established in 1977.
[4] P.L. 96-450 (1980).
[5] W. Michael Reisman and James E. Baker, *Regulating Covert Action*, 1992, (Yale University Press) pp. 131-132.
[6] S. 2834.
[7] Memorandum of Disapproval issued by President George H.W. Bush, November 30, 1990.
[8] P.L. 102-88. See covert action requirements in Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b].
[9] Although the covert action statute has remained virtually unchanged, Congress has addressed some related concerns. The FY2004 defense authorization law (P.L. 108-136) included a provision requiring the Secretary of Defense to report to Congress on the Special Operations Forces' changing role in counterterrorism, and on the implications of those changes, if any, on the Special Operations command. Also included was a provision requiring that any Special Operations Command-led missions be authorized by the President or the Secretary of Defense. In the 2004 intelligence authorization law, conferees reaffirmed the "functional definition of covert action" and cited the "critical importance to the requirements for covert action approval and notification" contained in the 1991 intelligence authorization law. For a more detailed discussion of these and related issues, see Helen Fessenden, CQ Weekly, "Intelligence: Hill's Oversight Role At Risk, March 27, 2004, p. 734. In the FY2009 Duncan Hunter National Defense Authorization Act, Congress increased, from $25 to $35 million, the amount of annually authorized funds available to the Secretary of Defense, with the concurrence of the relevant Ambassador, "...to provide support to foreign forces, irregular forces, groups, or individuals supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism." Congress also extended the Defense Secretary's authority to spend such funds through fiscal year 2011. Under previously existing law, the Secretary of Defense was required to notify the congressional defense committees "... expeditiously, and in any event in not less than 48 hours, of the use of such authority with respect to that operation." Under the new law, the Secretary is required to notify the committees within 48 hours of the use of such authority. Congress reaffirmed that the Secretary's authority does not constitute the authority to conduct a covert action. See Section 1208, P.L. 110-417.

[10] Eric Schmitt, *New York Times*, "Clash Forseen Between CIA and Pentagon," May 10, 2006, p 1. For a discussion of this and related issues, see Jennifer D. Kibbe, "Covert and Action and the Pentagon," *Intelligence and National Security*, February, 2007.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] See Eric Schmitt and Mark Mazzetti, *New York Times*, "Secret Order Lets U.S. Raid Al Qaeda in Many Countries," November 10, 2008, p. A-1
[15] See Karen DeYoung and Walter Pincus, *Washington Post*, "U.S. to fund Pro-American Publicity in Iraqi Media," October 3, 2008, p. A-1.
[16] Ibid. The Department of Defense makes the following distinction between a clandestine operation and a covert action: a clandestine operation is an operation sponsored or conducted by governmental departments or agencies in such a way as to assure secrecy or concealment. Such an operation differs from a covert action in that emphasis is placed on concealment of the operation rather than on the concealment of the identity of the sponsor. According to DOD, in special operations, an activity may be both covert and clandestine and may focus equally on operational considerations and intelligence-related activities. See "Department of Defense Dictionary of Military and Associated Terms," Joint Publication 1-02, August 8, 2006.
[17] See U.S. Senate Armed Services Committee hearing transcript on Department of Defense March 27, 2007.
[18] See Advanced Questions for Lieutenant General James Clapper USAF (Ret.), Nominee for the Position of Under Secretary of Defense for Intelligence, at http://www.armed-services.senate.gov, Hearings, March 27, 2007, Statement of James R. Clapper, Jr.
[19] See U.S. Senate Armed Services Committee hearing transcript on Department of Defense, March 27, 2007, p. 23.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Helen Fessenden, *CQ Weekly*, "Intelligence: Hill's Oversight Role At Risk," March 27, 2004, p. 734.
[24] Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b].
[25] Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991.
[30] Ibid.
[31] S.Rept. 102-85, S. 1325, 102nd Congress, 1st Session (1991).

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Chapter 6

PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS

Frederick M. Kaiser

SUMMARY

The protection of classified national security and other controlled information is of concern not only to the executive branch — which determines what information is to be safeguarded, for the most part[1] — but also to Congress, which uses the information to fulfill its constitutional responsibilities. It has established mechanisms to safeguard controlled information in its custody, although these arrangements have varied over time between the two chambers and among panels in each. Both chambers, for instance, have created offices of security to consolidate relevant responsibilities, although these were established two decades apart. Other differences exist at the committee level. Proposals for change, some of which are controversial, usually seek to set uniform standards or heighten requirements for access. This report will be updated as conditions require.

CURRENT PRACTICES AND PROCEDURES

Congress relies on a variety of mechanisms and instruments to protect classified information in its custody. These include House and Senate offices responsible for setting and implementing standards for handling classified information; detailed committee rules for controlling access to such information; a secrecy oath for all Members and employees of the House and of some committees; security clearances and nondisclosure agreements for staff; and formal procedures for investigations of suspected security violations. Public law, House and Senate rules, and committee rules, as well as custom and practice, constitute the bases for these requirements.[2]

Chamber Offices of Security and Security Manuals

The chambers have approached their security program differently, although each now has an office of security. The Senate established an Office of Senate Security over two decades ago, in 1987, as the result of a bipartisan effort over two Congresses. It is charged with consolidating information and personnel security.[3] Located in the Office of the Secretary of the Senate, the Security Office sets and implements uniform standards for handling and safeguarding classified and other sensitive information in the Senate's possession. The Security Office's standards, procedures, and requirements — detailed in its *Senate Security Manual*, initially issued in 1988 — "are binding upon all employees of the Senate."[4] These cover committee and Member office staff and officers of the Senate as well as consultants and contract personnel. The regulations extend to a wide range of matters on safeguarding classified information: physical security requirements; procedures for storing materials; mechanisms for protecting communications equipment; security clearances and nondisclosure agreements for all Senate staff needing access; and follow-up investigations of suspected security violations by employees.

The House put its own security office in place, under the jurisdiction of the Sergeant at Arms, in 2005, following approval of the chamber's Committee on House Administration.[5] The new office, similar to the Senate predecessor, is charged with developing an Operations Security Program for the House. Its responsibilities and jurisdiction encompass processing security clearances for staff, handling and storing classified information, managing a counterintelligence program for the House, and coordinating security breach investigations. In the past, the House had relied on individual committee and Member offices to set requirements following chamber and committee rules, guidelines in internal office procedural manuals, and custom.

Security Clearances and Nondisclosure Agreements for Staff

Security clearances and written nondisclosure agreements can be required for congressional staff but have been handled differently by each chamber.[6] The Senate Office of Security mandates such requirements for all Senate employees needing access to classified information.[7] No comparable across-the-board requirements for security clearances or secrecy agreements yet exist for all House employees. But these could be applied by the new office of security, when it becomes fully operational.

Secrecy Oath for Members and Staff

The House and Senate differ with regard to secrecy oaths for Members and staff. Beginning with the 104th Congress, the House adopted a secrecy oath for all Members, officers, and employees of the chamber. Before any such person may have access to classified information, he or she must "solemnly swear (or affirm) that I will not disclose any classified information received in the course of my service with the House of Representatives, except as authorized by the House of Representatives or in accordance with its Rules" (House Rule XXIII, cl. 13, 110th Cong.).

Previously, a similar oath was required for only Members and staff of the House Permanent Select Committee on Intelligence; its requirement had been added in the 102nd Congress as part of the Select Committee's internal rules, following abortive attempts to establish it in public law.[8] It is still in effect for Members and staff: "I do solemnly swear (or affirm) that I will not disclose or cause to be disclosed any classified information in the course of my service on the [Committee], except when authorized to do so by the Committee or the Houses of Representatives" (Committee Rule 14(d), 110th Cong.). Other adoptions have occurred under committee rules. The House Committee on Homeland Security, for instance, requires an oath from each Member, officer, and employee of the committee, or a non-Member seeking access, similar to one developed by the House Intelligence Committee. Each must affirm that "I will not disclose any classified information received in the course of my service on the Committee on Homeland Security, except as authorized by the Committee or the House of Representatives or in accordance with the Rules of such Committee or the Rules of the House" (Committee Rule XIV(E), 110th Cong.). Neither the full Senate nor any Senate panel apparently imposes a similar obligation on its Members or employees.

Investigation of Security Breaches

The Senate Office of Security and the House counterpart are charged with investigating or coordinating investigations of suspected security violations by employees. In addition, investigations by the House and Senate Ethics Committees of suspected breaches of security are authorized by each chamber's rules, directly and indirectly. The Senate Ethics Committee, for instance, has the broad duty to "receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, violations of the Senate Code of Official Conduct, and violations of rules and regulations of the Senate" (S.Res. 338, 88th Cong.). The panel is also directed "to investigate any unauthorized disclosure of intelligence information [from the Senate Intelligence Committee] by a Member, officer or employee of the Senate" (S.Res. 400, 94th Congress). The House, in creating its Permanent Select Committee on Intelligence, issued similar instructions. H.Res. 658 (95th Cong.) ordered the Committee on Standards of Official Conduct to "investigate any unauthorized disclosure of intelligence or intelligence-related information [from the House Intelligence Committee] by a Member, officer, or employee of the House...."

Sharing Information with Non-Committee Members

Procedures controlling access to classified information held by committees exist throughout Congress. These committee and chamber rules set conditions for sharing such information with other panels and Members, determining who is eligible for access to a committee's classified holdings directly, or who can be given relevant information.

The most exacting requirements along all of these lines have been developed by the House Permanent Select Committee on Intelligence; the rules are based on its 1977 establishing authority (H.Res. 658, 95th Cong.) and reinforced by intelligence oversight provisions in public law, such as the 1991 Intelligence Authorization Act (P.L. 102-88; 105 Stat. 441). The panel's controls apply to committee Members sharing classified information

outside the committee itself[9] as well as to non-committee Representatives seeking access to the panel's holdings. In this case, the requester must go through a multi-stage process (Committee Rule 10, 110th Cong.). Thus, it is possible for a nonmember to be denied attendance at its executive sessions or access to its classified holdings. When the House Intelligence Committee releases classified information to another panel or non-member, moreover, the recipient must comply with the same rules and procedures that govern the intelligence committee's control and disclosure requirements. By comparison, rules of the House Armed Services Committee (Committee Rule 20, 110th Cong.) "ensure access to information by any member of the Committee or any other Member, Delegate, or Resident Commissioner of the House of Representatives .... who has requested the opportunity to review such material."

PROPOSALS FOR CHANGE

A variety of proposals, coming from congressional bodies, government commissions, and other groups, have called for changes in the current procedures for handling and safeguarding classified information in the custody of Congress. These plans, some of which might be controversial or costly, focus on setting uniform standards for congressional offices and employees and heightening the access eligibility requirements.

Mandate That Members of Congress Hold Security Clearances to Be Eligible for Access to Classified Information

This would mark a significant departure from the past. Members of Congress (as with the President and Vice President, Justices of the Supreme Court, or other federal court judges) have never been required to hold security clearances. Most of the proposals along this line appeared in the late 1980s. A recent one, however, was introduced in 2006 by Representative Steve Buyer; H.Res. 747 (109th Cong.) would have required a security clearance for Members serving on th House Permanent Select Committee on Intelligence and on the Subcommittee on Defense of the House Appropriations Committee. The resolution does not specify which entity (legislative or executive branch) would conduct the background investigation or which officer (in Congress or in the executive) would adjudicate the clearances.

The broad mandate for such clearances could be applied to four different groups: (1) all Senators and Representatives, thus, in effect, becoming a condition for serving in Congress; (2) only Members seeking access to classified information, including those on panels receiving it; (3) only Members on committees which receive classified information; or (4) only those seeking access to classified information held by panels where they are not members.

Under a security clearance requirement, background investigations might be conducted by an executive branch agency, such as the Office of Personnel Management or Federal Bureau of Investigation; by a legislative branch entity, such as the House or Senate Office of Security, or the Government Accountability Office; or possibly by a private investigative firm under contract. Possible adjudicators — that is, the officials who would judge, based on the

background investigation, whether applicants would be "trustworthy" and, therefore, eligible for access to classified information — could extend to the majority or minority leaders, a special panel in each chamber, a chamber officer, or even an executive branch officer, if Congress so directed.

The main goals behind this proposed change are to tighten and make uniform standards governing eligibility for access for Members. Proponents maintain that it would help safeguard classified information by ensuring access only by Members deemed "trustworthy" and, thereby, limit the possibility of leaks and inadvertent disclosures. In addition, the clearance process itself might make recipients more conscious of and conscientious about the need to safeguard this information as well as the significance attached to it. As a corollary, supporters might argue that mandating a clearance to serve on a panel possessing classified information could increase its members' appreciation of the information's importance and its protection's priority. This, in turn, might help the committee members gain the access to information that the executive is otherwise reluctant to share and improve comity between the branches.

Opponents, by contrast, contend that security clearance requirements would compromise the independence of the legislature if an executive branch agency conducted the background investigation; had access to the information it generated; or adjudicated the clearance. Even if the process was fully under legislative control, concerns might arise over: its fairness, impartiality, objectivity, and correctness (if determined by an inexperienced person); the effects of a negative judgement on a Member, both inside and outside Congress; and the availability of information gathered in the investigation, which may not be accurate or substantiated, to other Members or to another body (such as the chamber's ethics committee or Justice Department), if it is seen as incriminating in matters of ethics or criminality. Opponents might contend, moreover, that adding this new criterion could have an adverse impact on individual Members and the full legislature in other ways. Opponents also maintain that it might impose an unnecessary, unprecedented, and unique (among elected federal officials and court judges) demand on legislators; create two classes of legislators, those with or without a clearance; affect current requirements for non-Member access to holdings of committees whose own members might need clearances; possibly jeopardize participation by Members without clearances in floor or committee proceedings (even secret sessions); and retard the legislative process, while investigations, adjudications, and appeals are conducted.

Direct Senators or Senate Employees to Take or Sign a Secrecy Oath to Be Eligible for Access

This proposal would require a secrecy oath for Senators and staffers, similar to the current requirement for their House counterparts. An earlier attempt to mandate such an oath for all Members and employees of both chambers of Congress seeking access to classified information occurred in 1993; but it was unsuccessful. If approved, it would have prohibited intelligence entities from providing classified information to Members of Congress and their staff, as well as officers and employees of the executive branch, unless the recipients had signed a nondisclosure agreement — pledging that he or she "will not willfully directly or indirectly disclose to any unauthorized person any classified information" — and the oath had been published in the *Congressional Record*.[10]

Direct All Cleared Staff — or Just Those Cleared for the Highest Levels to File Financial Disclosure Statements Annually

This demand might make it easier to detect and investigate possible misconduct instigated for financial reasons. And many staff with clearances may already file financial disclosure statements because of their employment rank or salary level; consequently, few new costs would be added. Nonetheless, objections might arise because the proposal would impose yet another burden on staff and result in additional record-keeping and costs. This requirement's effectiveness in preventing leaks or espionage might also be questioned by opponents.

Require Polygraph Examinations and/or Drug Tests for Staff to Be Eligible for Access to Classified Information

Under such proposals, tests could be imposed as a condition of employment for personnel in offices holding classified information, only on staff seeking access to such information, or for both employment and access.[11] Objections have been expressed to such tests, however, because of their cost and questionable reliability.

END NOTES

[1] Classification of national security information is governed for the most part by executive orders E.O. 12958, issued by President William J. Clinton in 1995, and E.O. 13292, amending it, issued by President George W. Bush in 2003. Related information — such as atomic energy "Restricted Data" (42 U.S.C. 2162-2168) and "intelligence sources and methods" (50 U.S.C. 403(d)(3)) — is specified in statute and subsequent rules issued, respectively, by the Department of Energy and Director of National Intelligence. Other controlled information — such as "sensitive security" and "sensitive but unclassified" information — is determined largely by executive directives. See CRS Report RL33494, *Security Classified and Controlled Information: History, Status, and Emerging Issues*, by Harold C. Relyea; and CRS Report RS21900, *Protection of Classified Information: The Legal Framework*, by Jennifer K. Elsea.

[2] See Herrick S. Fox, "Staffers Find Getting Security Clearances Is Long and Often a Revealing Process," *Roll Call*, October 30, 2000, pp. 24-25; Frederick M. Kaiser, "Congressional Rules and Conflict Resolution: Access to Information in the House Select Committee on Intelligence," *Congress and the Presidency*, vol. 15 (1988), pp. 49-73; U.S. Commission on Protecting and Reducing Government Secrecy, *Secrecy: Report of the Commission* (1997); House Committee on Government Operations, Subcommittee on Legislation and National Security, *Congress and the Administration's Secrecy Pledges,* Hearings, 100th Cong., 2nd sess. (1988); House Permanent Select Committee on Intelligence, *United States Counterintelligence and Security Concerns — 1986,* 100th Cong., 1st sess., H.Rept. 100-5 (1987), pp. 3-4; Joint Committee on the Organization of Congress, *Committee Structure*, Hearings, 103rd Cong., 1st sess. (1993), pp. 64-79, 312-316, 406-417, and 832-841; and Senate Select Committee on Intelligence, *Meeting the Espionage Challenge*, S.Rept. 99-522, 99th Cong., 2nd sess. (1986), pp. 90-95.

[3] *Congressional Record*, vol. 133, July 1, 1987, pp. 18506-18507. The resolution creating the new office (S.Res. 243, 100th Cong.) was introduced and approved on the same day.

[4] U.S. Senate, Office of Senate Security, *Security Manual* (revised, 1998), preface.

[5] The two relevant letters — one requesting an Operations Security Program under the direction of the House Sergeant at Arms and the other granting approval — are, respectively, to the Chairman of the House Committee on House Administration, from the House Sergeant at Arms, February 25, 2003; and to the House Sergeant at Arms, from the Chairman of the House Committee on House Administration, March 28, 2003.

[6] The congressional support agencies — i.e., Congressional Budget Office, Congressional Research Service (as well as the Library of Congress), and Government Accountability Office — have separate personnel security

systems and policies. Nonetheless, each requires security clearances for its staff to gain access to classified information.

[7] Executive Order 12968, "Access to Classified Information," issued by President William Clinton, on August 2, 1995, *Federal Register*, August 7, 1995, vol. 60, pp. 240, 245-250, and 254.

[8] U.S. Congress, Committee of Conference, *Intelligence Authorization Act, Fiscal Year 1992*, 102nd Cong., 1st sess., H.Rept. 102-327 (Washington: GPO, 1991), pp. 35-36.

[9] For a description of the strictures governing communications outside the House Intelligence Committee, see interview with Representative Jane Harman, "House Committee to Probe Ruin of CIA Tapes," *Morning Edition*, National Public Radio, January 16, 2008.

[10] *Congressional Record*, daily ed., vol. 139, August 4, 1993, pp. H5770-H5773; November 18, 1993, p. H10157.

[11] In the 105th Congress, the House approved a rule directing "the Speaker, in consultation with the Minority Leader, shall develop through an appropriate entity of the House a system for drug testing in the House ... (which) may provide for the testing of a Member, Delegate, Resident Commissioner, officer, or employee of the House...."

CHAPTER SOURCES

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