



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

THE DIRECTOR

March 15, 2010

The Honorable Dianne Feinstein
Chairwoman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Madam Chairwoman:

This letter presents the views of the Administration, regarding S.1494 and H.R. 2701, the Intelligence Authorization Acts for Fiscal Year 2010, as passed by the Senate and the House of Representatives. We appreciate the efforts made thus far to help craft this important piece of legislation. Unfortunately, each of these bills and their classified annexes still contain several provisions of serious concern to the Intelligence Community (IC). Three categories of provisions are so serious that the President's senior advisors would recommend that he veto the bill if they are included in a bill presented for his signature: the Congressional notification provisions, GAO provisions, and provisions regarding the amounts authorized for the National Intelligence Program.

In the enclosed remarks, we offer several recommendations to the provisions of most serious concern. Regarding these and other concerns, we also will provide additional details to the conferees, including via classified correspondence. We look forward to working with the conferees to resolve these and all other remaining issues.

Thank you for the opportunity to present these views.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Orszag".

Peter R. Orszag
Director

Enclosure

Identical Letter Sent to The Honorable Silvestre Reyes,
The Honorable Christopher Bond, and The Honorable Peter Hoekstra

**Conference Letter regarding S. 1494 and H.R. 2701,
the Intelligence Authorization Acts for Fiscal Year 2010**

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CONGRESSIONAL NOTIFICATION PROVISIONS (Section 321 of the House bill; Sections 331-334 of the Senate bill):

The Administration strongly objects to these provisions, which would replace the current “Gang of 8” notification procedures on covert activities. There is a long tradition of comity between the branches regarding intelligence matters, and the Administration has emphasized the importance of providing timely and complete congressional notification, and of using “Gang of 8” limitations only to meet extraordinary circumstances affecting the vital interests of the United States. The provisions in the Intelligence Authorization Acts undermine this fundamental compact between the Congress and the President regarding the reporting of sensitive intelligence matters as embodied in Title V of the National Security Act – an arrangement that for decades has balanced congressional oversight responsibilities with the President’s responsibility to protect sensitive national security information.

- The Senate bill imposes unreasonable burdens on the Intelligence Community (IC) by requiring the committees to be notified of *any* change in a covert action and by imposing potential Anti-Deficiency Act liability if there is a subsequent disagreement about whether a committee was “fully and currently” informed of an intelligence activity. In addition, and similar to the House bill, the Senate bill requires that *every* member of the intelligence committees be informed of the “main features” of the intelligence activity that is not fully briefed to all members of the committee. Finally, with respect to the requirement to provide “the legal authority under which [an] intelligence activity is being or was conducted,” we wish to make clear that we would construe the provision only to require that the Executive Branch provide the committee with an explanation of the legal basis for the activity; it would not require disclosure of any privileged information.
- While the House attempted to address some of the IC’s concerns related to Section 321 of its bill, significant concerns remain. For example, the bill requires the President, without regard for the protection from disclosure of sensitive sources and methods, to provide *every* member of the intelligence committees “general information” regarding a “Gang of 8” notification to senior Congressional leadership. “Gang of 8” notifications are made only in the most limited of circumstances and only to meet extraordinary circumstances affecting the vital interests of the United States. This new requirement would undermine the President’s authority and responsibility to protect sensitive national security information. In addition, the House bill establishes detailed criteria for (i) information that must be included in a notification and (ii) what amounts to a “significant undertaking.” In attempting to detail and define this information, the

House has created vague and uncertain requirements. Finally, with respect to the requirement to provide “the legal authority under which [an] intelligence activity is being or was conducted,” we wish to make clear that we would construe the provision only to require that the Executive Branch provide the committee with an explanation of the legal basis for the activity; it would not require disclosure of any privileged information.

GAO PROVISIONS (Section 335 of the House bill; Section 335 of the Senate bill):

We continue to strongly object to the Government Accountability Office (GAO) provisions in both the House and Senate bills, which would amend current law and provide GAO unprecedented authority to conduct intelligence oversight. The IC has a decades-long history of interaction with GAO and has given GAO detailed intelligence assessments, made experts available, and provided classified documents in furtherance of GAO’s activities authorized under current law. However, current law expressly exempts intelligence and counterintelligence activities from GAO review. By allowing GAO to conduct intelligence oversight, these provisions would fundamentally change the statutory framework for oversight of the IC through the intelligence oversight committees and alter the long-standing relationship and information flow between the IC and intelligence committee members and staff. Committee oversight, precisely because it is conducted by the committees through a cadre of knowledgeable and experienced staff, is a valuable contribution to improving the quality of intelligence and the effective, efficient operation of the IC.

Moreover, both bills further undermine this special relationship between the IC and the congressional intelligence committees by permitting any committee of Congress with an arguable claim of jurisdiction over an intelligence program or activity to request a GAO review of that program or activity.

AMOUNTS AUTHORIZED FOR THE NATIONAL INTELLIGENCE PROGRAM (Section 104 of the House bill; Section 104 of the Senate bill):

The FY 2010 Defense Appropriations Act, passed by both houses of Congress and signed by the President, appropriated \$707,912,000 to the Intelligence Community Management Account (ICMA), the unclassified account which partially funds the activities of the Office of the Director of National Intelligence (ODNI). The House-passed version of the FY 2010 Intelligence Authorization bill would reduce the amount authorized for the ICMA to \$643,252,000. Pursuant to the provisions of Section 504 of the National Security Act, appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if those funds were specifically authorized by the Congress for such activities. Consequently, if the Congress adopts the House reductions in the authorized amount, the ODNI will see a reduction of more than \$60 million in the amounts that can be obligated and expended for FY 2010 activities.

At this point, almost halfway through the fiscal year, this reduction will have a serious and disruptive effect on the DNI's ability to fulfill his statutory responsibilities, including directing the implementation of the National Intelligence Program (NIP) and carrying out other missions of the various centers within the ODNI, such as the National Counterterrorism Center and the National Counterproliferation Center.

Any reductions or inconsistencies between the amounts appropriated for intelligence activities and the number of personnel authorized for intelligence activities would have similar seriously disruptive effects throughout the IC. A good example of this potential disruption is found in Section 445 of the Senate bill, which fences appropriations in the classified annex pending receipt of a comprehensive FBI report setting forth a long-term vision of and a strategic plan for the FBI's National Security Branch (NSB). This fencing creates the potential for significant inconsistency between the amount authorized and the amount appropriated in the FY 2010 Consolidated Appropriations bill which, almost halfway through the fiscal year, will have a serious and disruptive effect on the FBI's ability to fulfill its responsibilities. For the IC as a whole, lack of consistency between authorized and appropriated amounts could put critical programs in jeopardy, endanger the completion of ongoing contractual activities, and result in the imposition of hiring freezes at the very moment Congress is directing the IC to take on additional activities such as improving counterterrorism analysis.

Accordingly, we strongly urge the conferees to reconcile the amounts authorized for the NIP in the Intelligence Authorization Acts with the amounts Congress has already appropriated for intelligence activities, taking into account such reprogramming and transfer actions that have been effected since the passage of the NIP Appropriation in the Defense Appropriations bill.

PRESIDENTIALLY-APPOINTED AND SENATE-CONFIRMED POSITIONS
(Section 424 of the House bill; Sections 407, 423, and 432 of the Senate bill):

While we appreciate that the House eliminated provisions in its bill that would have made the General Counsel of the National Security Agency (NSA) and the Inspector General of the NSA Presidentially-appointed and Senate-confirmed (PAS) positions, the House and Senate bills both direct that the Director of the National Reconnaissance Office (NRO) and the Director of the NSA, as well as the newly-created Intelligence Community Inspector General (IC IG), will now be PAS positions. The Senate bill will also make the Director of the National Geospatial Intelligence Agency (NGA) and the Deputy Director of the CIA subject to Presidential appointment and Senate confirmation. Consistent with the recommendations of the National Commission on Terrorist Attacks upon the United States, we believe that if these provisions were to become law, critical national security positions would likely remain unfilled for significant periods of time, which could be disruptive across the IC. It would be particularly unfortunate if confirmation of these officials were delayed as a result of disputes over unrelated matters pending in the Senate.

VIDEOTAPING OF INTERROGATIONS (Section 416 of the House bill):

Although pursuant to EO 13491, the CIA does not operate any long term detention facilities; it is still authorized to detain people on a short term transitory basis. Section 416 requires the establishment of guidelines to ensure that interrogations of detainees and prisoners in Central Intelligence Agency (CIA) custody are recorded on video. We continue to believe that this provision would be problematic for interrogations of captured terrorists who provide information to U.S. intelligence personnel in the field. Conditions as they exist in real-time may not allow for the installation and assembly of video equipment, particularly if hostile forces are active at or near the site of the interrogation. Some interrogations will occur in circumstances in which foreign intelligence services control the environment, and they may refuse to permit recording. Further, interrogations may take place under austere conditions under which recording is not feasible. Under either of these scenarios, the CIA would be unable to interrogate the individual. In addition, requiring the Director of the CIA (D/CIA) to issue unclassified guidelines for video recording of interrogations might provide terrorist organizations information useful for training their personnel to resist interrogations.

This provision has the potential to damage significantly our counterterrorism capabilities and, therefore, our ability to keep the American people safe. It potentially precludes CIA's ability to gain actionable intelligence in a timely manner from a custodial detainee in the event videotaping of the debriefing/interrogation is not feasible or practical. This could result in the loss of important intelligence that could help disrupt planned terrorist operations and save lives.

SECURITY CLEARANCES; REPORTS; OMBUDSMAN; RECIPROCITY (Section 366 of the House bill):

This provision, which provides for educating clearance adjudicators on the effect of combat-related injuries, is unnecessary. This amendment would carve out one small piece of the security clearance adjudication process to require additional training. This amendment fails to recognize that there are a number of factors that must be balanced when assessing whether a clearance should be granted.

ACQUISITIONS-AND MANAGEMENT POLICY-RELATED PROVISIONS (Section 324 of the Senate bill; Section 349 of the House bill):

The Intelligence Community is concerned that the constraints on program execution in Section 324 could jeopardize the development of major systems. In addition, freezing the baseline at Milestone B without allowing for later technology or capability insertion would provide significant disincentives for cost effective, incremental improvements and limit the Intelligence Community's ability to respond to emerging mission needs or to incorporate significant improvements in technology. This would be detrimental to

system effectiveness, especially in the case of the lengthy development phases typical of satellites.

Section 349 prohibits the use of funds to implement the FBI's program that requires reassignment of supervisors after five years. This program promotes upward mobility among the agents, helps ensure that the members of the FBI management gain broad experiences throughout their careers, and ensures that the FBI is able to continue to benefit from the experience of these experienced managers. The FBI further notes that the affected policy was amended in December 2008 to extend the term limit to seven years.

REPROGRAMMING, AUDITS, AND BUDGET PROJECTIONS (Sections 353, 358, and 325 of the Senate bill):

Section 353 purports to further delay the reprogramming of funds for an additional 90 days if one of the intelligence committees requests additional information regarding the reprogramming or transfer. This provision would violate separation of powers principles and the bicameralism and presentment requirements of Article I of the Constitution because it would give a single congressional committee the power to delay intelligence activities. Section 358 requires an independent audit each time a material weakness has been corrected, which could actually delay efforts to achieve auditable financial statements.

Section 325 requires long-term budget projections. The IC supports making realistic long-term budget projections, but the desire to base these projections on certain assumptions locked into statute does not make sense. The IC believes it can meet the committee's oversight needs without such rigid, statutory prescriptions. In addition, Section 325 requires the DNI, before proceeding to Milestone A, Milestone B, or an analogous stage of system development for any major system, to report on how that system will affect the five- and ten-year projections. Much of this information could be pre-decisional and speculative.

INTELLIGENCE COMMUNITY INSPECTOR GENERAL REVIEW OF INTELLIGENCE TO DETERMINE IF FOREIGN CONNECTIONS TO ANTHRAX EXISTS (Section 505 of the House bill):

This provision, which authorizes the IC IG to conduct an investigation to determine if there was a foreign connection to the anthrax attacks of 2001, is duplicative, and the Administration is greatly concerned about the appearance and precedent involved when Congress commissions an agency Inspector General to replicate a criminal investigation. The anthrax investigation was one of the most thorough ever undertaken by the FBI. The case involved more than 10,000 witness interviews, more than 5,000 grand jury subpoenas, and collection of more than 5,000 samples from 60 site locations. The FBI vigorously examined the potential for a foreign connection with the attacks. It

coordinated its investigation with various members of the United States Intelligence Community, as well as with various foreign governments. The investigation was conducted both within the United States as well as overseas. The FBI conducted searches, gathered potential evidence, and conducted interviews, the results of which did not support the existence of a foreign connection with the attacks. On February 19, 2010, the investigation was closed. As a result of these efforts, the FBI is confident that the attacks were planned and committed by Dr. Bruce Ivins, acting alone. The commencement of a fresh investigation would undermine public confidence in the criminal investigation and unfairly cast doubt on its conclusions.

INCORPORATION OF REPORTING REQUIREMENTS (Section 356 of the House bill):

This provision would incorporate the reporting requirements of the classified annex into law. This requirement would raise concerns under the Presentment Clause of Article I of the Constitution to the extent that the annex is not readily accessible to the President at the time the bill is presented to him for signature. Moreover, the IC has consistently opposed similar provisions on the grounds that they are unnecessary and create “secret law.” A new law will be required to modify, extend or delete any reporting requirement in the classified annex. We are concerned this will inevitably lead to a body of stagnant, outdated reporting requirements that would not meet congressional information needs and that would drain the limited resources of the IC. The IC and its oversight committees have successfully worked together over the years to resolve committee concerns without incorporation into law of the classified annex.

PROHIBITION ON USE OF FUNDS TO PROVIDE *MIRANDA* WARNINGS TO CERTAIN PERSONS OUTSIDE OF THE UNITED STATES (Section 504 of the House bill):

We continue to strongly object to Section 504, restricting funding for the provision of *Miranda* warnings abroad, which may impede efforts to prosecute terrorists in Federal court and deny the government an important tool to fight terrorism used by the previous Administration to preserve legal options. Indeed, the practice in the previous Administration had been to provide *Miranda* warnings to persons outside of the United States, recognizing the value of preserving the option to prosecute terrorists in our system of justice. The Nation needs at its disposal every tool in the national security toolbox, including the ability to prosecute and incapacitate terrorists, so that we can thwart terrorist operations and save lives. We note that the Congress recently enacted section 1040 of the FY 2010 National Defense Authorization Act (P.L. 111-84), which prohibits *Miranda* warnings by military or intelligence agencies for foreign nationals captured or detained as enemy combatants. That provision wisely included a carveout to enable the Department of Justice to preserve all legal options, and Congress should not second-guess that decision now.

PROHIBITING THE IMPLEMENTATION OF THE DEFENSE CIVILIAN INTELLIGENCE PERSONNEL SYSTEM (DCIPS) (Section 304 of the House bill):

This provision would direct the Secretary of Defense to terminate the DCIPS pay system twelve (12) months after enactment and to transfer more than 29,000 employees in the Department of Defense's intelligence components to other pay systems. This provision should be consistent with the FY 2010 National Defense Authorization Act, which provides for a pause in the implementation of DCIPS and a study of the system by an independent organization jointly designated by the Secretary of Defense, the Office of Personnel Management, and the DNI. The Act further exempts the National Geospatial Intelligence Agency (NGA), which has operated under a DCIPS pay system for more than 10 years, and no such exemption exists for the NGA in this provision.

FOREIGN INTELLIGENCE AND INFORMATION COMMISSION ACT (Title VI of the Senate bill):

Sections 601-610 of the Senate bill establish a Foreign Intelligence and Information Commission. This commission would be responsible for evaluating current processes and systems for the strategic integration of the Intelligence Community, for providing recommendations to improve such processes, and for offering suggestions to improve the government's inter-agency strategy for intelligence reporting, collection, and analysis. This commission would be duplicative in that the President's Intelligence Advisory Board currently reviews and assesses issues relating to the strategic integration of the IC.

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